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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 94

[Docket No. 05–004–2]

RIN 0579–AB93

Importation of Whole Cuts of Boneless Beef From Japan

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the regulations governing the importation of meat and other edible animal products by allowing, under certain conditions, the importation of whole cuts of boneless beef from Japan. We are taking this action in response to a request from the Government of Japan and after conducting a risk analysis and considering public comments. This action will allow the importation of beef from Japan while continuing to protect against the introduction of bovine spongiform encephalopathy into the United States.

EFFECTIVE DATE: December 12, 2005, 11:30 a.m.

FOR FURTHER INFORMATION CONTACT: Dr. Gary Colgrove, Director, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737–1231; (301) 734–4356.

SUPPLEMENTARY INFORMATION:

Background

The Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA or the Department) regulates the importation of animals and animal products into the United States to guard against the introduction of animal diseases. The regulations in 9 CFR parts 93, 94, 95, and 96 (referred to below as the regulations) govern the importation of certain animals, birds, poultry, meat, other animal products and byproducts, hay, and straw into the United States in order to prevent the introduction of various animal diseases, including bovine spongiform encephalopathy (BSE), a chronic degenerative disease affecting the central nervous system of cattle.

On August 18, 2005, we published in the **Federal Register** (70 FR 48494–48500, Docket No. 05–004–1) a proposed rule to amend the regulations governing the importation of meat and other edible animal products by allowing, under certain conditions, the importation of whole cuts of boneless beef from Japan. In that document, we explained that the proposed rule was developed in response to a request from the Government of Japan and after conducting an analysis of the risk that indicated that whole cuts of boneless beef that are derived from cattle born, raised, and slaughtered in Japan, could be imported into the United States, provided that the following conditions have been met:

- The beef is prepared in an establishment that is eligible to have its products imported into the United States under the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et seq.*) and the regulations in 9 CFR 327.2 and the beef meets all other applicable requirements of the FMIA and regulations thereunder (9 CFR chapter III), including the requirements for removal of specified risk materials (SRMs) and the prohibition on the use of air-injection stunning devices prior to slaughter on cattle from which the beef is derived.
- The beef is derived from cattle that were not subjected to a pithing process at slaughter.
- An authorized veterinary official of the Government of Japan certifies on an original certificate that the above conditions have been met.

In our August 2005 proposed rule we explained that these conditions would continue to protect against the introduction of BSE into the United States.

We solicited comments concerning the proposed rule and supporting risk analysis for 30 days ending September 19, 2005. We received 28 comments by that date. They were from cattlemen's associations, producers, representatives of foreign governments, and private citizens.

A number of commenters supported the rule in general but recommended certain changes to the proposed provisions. Others comments consisted only of recommended changes, objections to the rule in general or to specific provisions, or requests for clarification. In general, the comments we received on the proposed rule can be categorized as follows:

- Comments on the risk analysis;
- Comments on the economic analysis;
- Comments on the environmental analysis;
- Comments on the proposed standards for the importation of whole cuts of boneless beef from Japan; and
- Comments on miscellaneous issues related to the proposed rule.

We discuss these comments by topic below.

Risk Analysis for the Rulemaking

Incubation Period and Distribution of BSE in Cattle

Issue: One commenter stated that the APHIS risk analysis relied on outdated and incomplete scientific evidence to conclude that BSE infectivity is confined only to certain tissues and that infectivity in such tissues does not occur until cattle reach the age of 32 months. The commenter requested that, before APHIS proceeds with this rulemaking, the Agency explain: (1) Why cattle under 30 months of age do not present a risk of BSE, (2) why it is appropriate to base risk management strategies on equivocal science, (3) why additional risk mitigation measures are not needed to address the equivocal nature of the science, and (4) why APHIS is not imposing additional measures to address the potential risk of BSE infectivity in tissues that have not been designated by the USDA's Food Safety and Inspection Service (FSIS) as SRMs.

Response: We consider the BSE research upon which we based the proposed rule and this final rule to be substantial and current, and consider the mitigation measures in this rule to be appropriate based on the research. We discussed the research upon which we based this rulemaking in the risk document we made available with our August 2005 proposed rule. The key points are as follows:

The scope of this rulemaking is limited to whole cuts of boneless beef derived from cattle born, raised, and slaughtered in Japan. BSE infectivity has never been demonstrated in the muscle tissue of cattle experimentally or naturally infected with BSE at any stage of the disease. In tissues that have demonstrated BSE infectivity, pathogenesis studies have illustrated that levels of infectious BSE agent in certain tissues vary with the age of an animal. Infectivity was not detected in most tissues in cattle until at least 32 months post-exposure. The exception to this is the distal ileum (a part of the intestines), where infectivity was confirmed in experimentally infected cattle as early as 6 months post-exposure, and the tonsils, where infectivity was confirmed at 10 months post-exposure. Consistent with requirements established by FSIS and contained in 9 CFR part 310, we proposed to require the removal of tissues that have demonstrated BSE infectivity. (FSIS is the public health agency within USDA responsible for ensuring the food safety of beef.) These tissues (referred to as specified risk materials or SRMs) are the brain, skull, eyes, trigeminal ganglia, spinal cord, vertebral column (excluding the vertebrae of the tail, the transverse process of the thoracic and lumbar vertebrae, and the wings of the sacrum), and dorsal root ganglia of cattle 30 months of age and older, and the tonsils and distal ileum of the small intestine of all cattle. In addition to requiring the removal of SRMs, we proposed mitigation measures to address the potential risk of cross-contamination of the beef with SRMs. These requirements are based on currently available science and are consistent with the international guidelines on BSE established by the World Organization for Animal Health (formerly known as the Office International des Epizooties (OIE)), which is recognized by the World Trade Organization (WTO) as the international organization responsible for the development of standards, guidelines, and recommendations with respect to animal health and zoonoses (diseases that are transmissible from animals to humans).[1] For these reasons, we are not making any changes to the rule based on this comment.

Peripheral Nerves

Issue: Two commenters stated that the underlying assumption of the proposed rule, that whole cuts of boneless beef from Japan will not contain tissues that may carry the BSE agent, is no longer valid because researchers have found peripheral nervous system tissues, including facial and sciatic nerves, that contain BSE infectivity.[2] One of these commenters requested APHIS to explain whether and what additional mitigation measures are needed to reduce the risks that these tissues may be present in Japanese beef. This commenter further requested an additional comment period to obtain public comment regarding the manner by which APHIS intends to treat this new scientific finding.

Response: APHIS is familiar with the results of the study mentioned by the commenters in which mice, genetically engineered to be highly susceptible to BSE and to overexpress the bovine prion protein, were inoculated with tissues from a BSE-infected cow. This study demonstrated low levels of infectivity in the mouse assay in the facial and sciatic nerves of the peripheral nervous system. APHIS has evaluated these findings in the context of the potential occurrence of infectivity in the peripheral nerves of cattle and the corresponding risks of the presence of infectivity in such tissues resulting in cattle or human exposure to the BSE agent. The results from these experiments in genetically engineered mice should be interpreted with caution, as the findings may be influenced by the overexpression of prion proteins and may not accurately predict the natural distribution of BSE infectivity in cattle. Further, the overexpression of prion proteins in transgenic mice may not accurately mimic the natural disease process because the transgenic overexpressing mice have been shown to develop spontaneous lethal neurological disease involving spongiform changes in the brain and muscle degeneration.[3] In addition, the route of administration to the mice was both intraperitoneal and intracerebral, which are two very efficient routes of infection as compared to oral consumption. Given these factors, APHIS has determined that the finding of BSE infectivity in facial and sciatic nerves of the transgenic mice is not directly applicable to cattle naturally infected with BSE. Therefore, we do not consider it necessary to make any adjustments to the risk analysis for this rulemaking or to extend the comment period to solicit additional public comment on this issue.

Blood

Issue: Two commenters expressed concern that there has been a limited amount of research conducted on BSE infectivity in blood. One of these commenters cited a report that discussed, among other things, the detection of infectivity in sheep experimentally infected with BSE via blood transfusions.[4] This commenter also stated that the agent that causes Creutzfeldt-Jakob disease (CJD), a chronic and fatal neurodegenerative disease of humans, was detected in blood, and questioned whether the BSE agent could be detected in blood as well. The other commenter cited a study that detected infectivity in hamsters experimentally infected with scrapie.[5] This commenter requested that APHIS ban the use of blood in cattle feed.

Response: As stated in our risk analysis, the pathogenesis studies of naturally and experimentally infected cattle have not detected BSE infectivity in blood.

The first study mentioned by the commenter above demonstrated transmission of disease from sheep experimentally infected with BSE to another sheep via blood transfusions. We note that there are widely acknowledged differences between the distribution of BSE infectivity in the tissues of cattle and sheep. In addition, there is a significant difference in susceptibility to infection based on the route of transmission. Infection via oral consumption may be 10,000 times less efficient than infection via intravenous injection, such as a blood transfusion.

Both the United Kingdom's Department for Environment, Food and Rural Affairs' Spongiform Encephalopathy Advisory Committee (SEAC) and the European Commission's Scientific Steering Committee (SSC), which are scientific advisory committees, evaluated the findings of transmission of infectivity via blood transfusions in sheep experimentally infected with BSE and concluded that

[1] The OIE guidelines for trade in terrestrial animals (mammals, birds, and bees) are detailed in the Terrestrial Animal Health Code (available on the Internet at *http://www.oie.int*). The guidelines on BSE are contained in Chapter 2.3.13 of the Code and supplemented by Appendix 3.8.4 of the Code.

[2] Bushmann, A., and Gruschup, M.; Highly Bovine Spongiform Encephalopathy-Sensitive Transgenic Mice Confirm the Essential Restriction of Infectivity to the Nervous System in Clinically Diseased Cattle. The Journal of Infectious Diseases, 192: 934–42, September 1, 2005.

[3] Westaway, D., et al.; (1994) Degeneration of Skeletal Muscle, Peripheral Nerves, and the Central Nervous System in Transgenic Mice Overexpressing Wild-type Prion Proteins. Cell 76, 117–129.

[4] Pattison, J., et al.; UK Strategy for Research and Development on Human and Animal Health Aspects of Transmissible Spongiform Encephalopathies, 2005–2008. Available at *http://www.mrc.ac.uk/pdf-about-tse_uk_strategy_june2005.pdf.*

[5] Castilla, J., et al.; Detection of Prions in Blood. Nature Medicine, doi: 10.1038/nm1286, August 28, 2005, at 3.

these findings did not indicate that additional mitigation measures were necessary to protect public health.[6] Therefore, based on currently available information, APHIS considers it unlikely that the experimental observations in sheep reflect a biologically significant event for cattle or affect the safety of whole cuts of boneless beef derived from cattle born, raised, and slaughtered in Japan.

The study on scrapie-infected hamsters noted by the commenter describes a process by which the abnormal prion protein can be amplified and detected using current testing methods, such as a Western blot. In this study, blood from hamsters experimentally infected with a scrapie strain was collected when the animals demonstrated clinical signs of disease. These blood samples were incubated with excess normal prion protein from brain tissue for multiple cycles. If abnormal protein is present in blood, it will convert the normal brain prion to abnormal prion, yielding an increased amount of abnormal prion that can be more easily detected. In this manner, the presence of abnormal prion protein in the initial blood samples, which was present in levels too low to detect using routine test methods, was demonstrated. While this finding has many possibilities related to the development of diagnostic tests, it does not demonstrate BSE infectivity in blood. We also note that the international community largely considers that studies using transmissible spongiform encephalopathies (TSEs) other than BSE in non-bovine animals cannot be directly extrapolated to BSE in cattle because of the significant interactions between the host species and the prion strain involved.

Feed regulations in the United States are under the authority of the Food and Drug Administration (FDA), not APHIS. Therefore, the commenter's request that APHIS ban the use of blood in cattle feed falls outside the scope of this rulemaking. For these reasons, we are not making any changes to the rule based on these comments.

Low Dose Exposure

Issue: One commenter cited new research indicating that infection by the disease agent that causes BSE may be reached through the accumulation of subinfectious doses over time.[7] The commenter expressed concern that this finding undercuts the risk analysis prepared for this rulemaking, which, according to the commenter, discussed evidence that BSE infectivity is caused by the consumption of a single dose of infected tissue and that a low dose exposure has a longer incubation period. This commenter requested APHIS to explain the impact of these findings on its assessment of the risk posed by the importation of boneless beef from Japan.

Response: Our risk analysis does not state, as stated by the commenter, that ''BSE infectivity is caused by the consumption of a single dose of infected tissue.'' Our risk analysis states that ''the incubation period [of the BSE agent] is inversely related to dose (i.e., low dose exposures have a long incubation period before clinical signs of disease become apparent).'' This statement is based on research conducted on BSE and is not meant to make a statement about the number of doses necessary for cattle to become affected by the BSE agent. Further, the findings noted by the commenter would not affect the critical evaluation of risk on which our mitigation measures are based. This rule will allow the importation of whole cuts of boneless beef derived from cattle. Regardless of the infective dose or period of incubation, BSE infectivity has never been demonstrated in the muscle tissue of cattle experimentally or naturally infected with BSE at any stage of the disease. Therefore, we are not making any changes to the rule based on this comment.

Findings Related to Tissue Inflammation

Issue: One commenter requested that APHIS discuss the implications of a recent study[8] indicating that inflammation may act as a modifier of natural and iatrogenic (experimental) prion transmission to other organs and tissues not presently listed as SRMs and whether those findings necessitate the implementation of additional risk mitigation measures to reduce the risk of introducing BSE into the United States from Japan.

Response: APHIS reviewed the study referred to by the commenter. The study authors present results that show that chronic lymphocytic inflammation enabled prion accumulation in certain otherwise prion-free organs. The study authors postulate that chronic inflammatory condition may act to modify natural and iatrogenic prion transmission by expanding tissue distribution of prions. According to the authors, in the inflammatory conditions studied, expression in two specific types of lymphotoxins and a secondary lymphoid organ chemokine in certain tissues was enough to establish ''unexpected'' prion reservoirs. APHIS reviewed the findings from this study, which used transgenic mice, in the context of the potential occurrence in cattle. We do not believe that the study results can be extrapolated to cattle naturally infected with BSE. First, the study used several transgenic and spontaneous mouse models of chronic inflammation that were inoculated with scrapie infectivity rather than BSE infectivity. The pathogenesis and infectivity distribution of the scrapie agent in mice is different from the BSE agent in cattle. Second, the mice in this study were injected with scrapie prions through intraperitoneal and/or intracerebral routes of inoculation, which are much more efficient routes than oral consumption of a disease agent, the natural route for exposure of cattle to the BSE agent. Finally, the study authors themselves did not claim that the mouse models and results obtained in the study represent a model for the pathogenesis of BSE in cattle. They stated that direct evidence from similar studies using the BSE agent in cattle are needed prior to concluding that chronic inflammatory conditions in cattle can alter the distribution of the BSE agent. Therefore, we are making no changes in the rule in response to this comment.

TSE Working Group

Issue: One commenter stated that the proposed rule and supporting risk analysis should be evaluated by APHIS' TSE Working Group. The commenter further requested that APHIS make available to the public a report of the TSE Working Group's evaluation of the risk of BSE arising from the proposed rule along with the Group's recommendations regarding the actions that should be taken in response to these risks.

Response: APHIS has proceeded in a thorough and deliberative manner, in cooperation with FSIS and FDA, to define the steps necessary to protect animal and public health. The APHIS

[6] Spongiform Encephalopathy Advisory Committee, Oct. 19, 2000, Summary of SEAC Committee Meeting 29 September 2000. Available at *http://www.defra.gov.uk/news/seac/seac500.htm.*

European Commission Scientific Steering Committee; The Implications of the Recent Papers on Transmission of BSE by Blood Transfusion in Sheep (Houston et al., 2000; Hunter et al., 2002), Adopted by the SSC at its Meeting of 12–13 September. Available at *http://europa.eu.int/comm/food/fs/sc/ssc/out280_en.pdf.*

[7] Jacquemot, C., et al.; High Incidence of Scrapie Induced by Repeated Injections of Subinfectious Prion Doses. Journal of Virology, July 2005, p. 8904–8908.

[8] Heikenwalder, M., et al.; Chronic Lymphocytic Inflammation Specifies the Organ Tropism of Prions. Science, Vol. 37, February 18, 2005, 1107–1110.

TSE Working Group consists of APHIS employees with expertise in veterinary science, epidemiology, import/export issue management, pathobiology, veterinary biologics, and TSE program management. The group has met in the past to assist and make recommendations to the Deputy Administrator for APHIS' Veterinary Services, as well as other managers, regarding animal health programs. The TSE Working Group is not solely responsible for evaluating information and data regarding BSE/TSE import regulations. That said, members of the TSE Working Group who have special expertise in BSE participated in the development of the risk analysis, either as contributing writers or reviewers of the document. Their input was, therefore, considered by the Agency during development of the proposed rule. Under these circumstances, we do not believe it would be appropriate for the TSE Working Group to take on the role suggested by the commenter.

Harvard-Tuskegee Investigation of BSE Risk in the United States

In April 1998, USDA contracted with the Harvard Center for Risk Analysis (HCRA) at Harvard University and the Center for Computational Epidemiology at Tuskegee University to conduct a comprehensive investigation of BSE risk in the United States. The report,[9] widely referred to as the Harvard Risk Assessment or the Harvard Study, is referred to in this document as the Harvard-Tuskegee Study. It was completed in 2001 and released by the USDA. Following a peer review of the Harvard-Tuskegee Study in 2002, the authors responded to the peer review comments and released a revised risk assessment in 2003.[10]

Issue: One commenter expressed concern about the Harvard-Tuskegee Study. In our risk analysis, we refer to the Harvard-Tuskegee Study in our discussion of the risks associated with plate waste. The commenter disagreed with the study's conclusion that the risk of BSE becoming established in the United States is ''extremely unlikely.'' Specifically, this commenter noted that, with respect to the United States' potential exposure to BSE before the 1989 import ban and 1997 feed ban, the Harvard-Tuskegee Study stated that, ''Exposure to infectivity among U.S. cattle could not have been substantial because in the years prior to the 1997 FDA feed ban, such exposure would have eventually resulted in a substantial number of clinical cases, a prediction that is inconsistent with the fact that BSE has not been identified in the United States to date. There is therefore, a small chance that BSE could have been introduced into the U.S. and remained undetected.'' The commenter stated that the detection of a 12-year-old BSE-positive cow native to the United States in June 2005 proves that the Harvard-Tuskegee Study's assumption was in error, and that the chance that BSE could have been introduced into the United States was not small. The commenter also stated that, until and unless the Secretary revises the Harvard-Tuskegee Study to correct the known, erroneous assumptions underpinning the study, the Harvard-Tuskegee Study is an inappropriate tool for accurately ascertaining the degree of increased risk the United States would be subject to under the proposed rule.

Response: We disagree with this commenter's interpretation of the Harvard-Tuskegee Study's conclusion regarding the risk of BSE establishment in the United States. First, the text extracted from the Harvard-Tuskegee Study and quoted by the commenter states that '' * * * such exposure would have eventually resulted in a substantial number of clinical cases * * *.'' We do not consider one native case of BSE to constitute a substantial number. In addition, the model used by the Harvard-Tuskegee Study did not rely on a zero probability of BSE incidence in the United States. The detection of BSE in a 12-year-old cow does not invalidate the conclusions of the study nor our conclusions about the level of risk posed by the importation of beef from Japan under the proposed conditions. Furthermore, because this rule applies only to whole cuts of boneless beef, and muscle tissue of cattle has never demonstrated BSE infectivity, it is highly unlikely that this meat will introduce BSE into the United States. The Harvard-Tuskegee Study is referenced in the risk analysis only to address this already remote risk.

APHIS considers the assumptions underpinning the study to be valid and based on currently available science. As mentioned above, the USDA commissioned the HCRA and the Center for Computational Epidemiology at Tuskegee University to conduct what we now refer to as the Harvard-Tuskegee Study in 1998. The objective of the Harvard-Tuskegee Study was to analyze and evaluate the measures implemented by the U.S. Government to prevent the spread of BSE in the United States and to reduce the potential exposure of Americans to the BSE agent. The Harvard-Tuskegee Study reviewed available scientific information related to BSE and other TSEs, assessed pathways by which BSE could potentially spread in the United States, and identified measures that could be taken to protect human and animal health in the United States. The Harvard-Tuskegee Study concluded that, if introduced, BSE is extremely unlikely to become established in the United States. The Harvard-Tuskegee Study also concluded that, should BSE enter the United States, only a small amount of potentially infective tissues would likely reach the human food supply and be available for human consumption. The HCRA recently revised its model using updated estimates for some of the model parameters, based on new data about compliance with feed restrictions. The results are even lower estimates of risk than previously predicted.

Risk of BSE in General

Issue: Several commenters expressed concern regarding the risk posed by boneless beef imported into the United States from Japan. One commenter asked why the U.S. Government would propose to allow the importation of boneless beef from Japan if there is any risk that it could introduce BSE into the United States. One commenter stated that APHIS failed to provide a basis for its conclusion that this increased risk is acceptable.

Response: Zero risk is virtually, if not absolutely, impossible to achieve. If we were to make trade dependent on zero risk, foreign, as well as interstate, trade in animals and animal products would cease. Consistent with international trade agreements, such as the WTO's ''Agreement on the Application of Sanitary and Phytosanitary Measures'' (WTO–SPS Agreement) and the North American Free Trade Agreement, APHIS agrees that measures to protect human,

[9] Harvard Center for Risk Analysis, Harvard School of Public Health, and Center for Computational Epidemiology, College of Veterinary Medicine, Tuskegee University; Evaluation of the Potential for Bovine Spongiform Encephalopathy in the United States. Available at *http://www.aphis.usda.gov/lpa/issues/bse/risk_assessment/mainreporttext.pdf, 2001.*

[10] Research Triangle Institute; Review of the Evaluation of the Potential for Bovine Spongiform Encephalopathy in the United States. Accessed online at *http://www.aphis.usda.gov/lpa/issues/bse/BSE_Peer_Review.pdf, 2002.*

Harvard Center for Risk Analysis, Harvard School of Public Health; Evaluation of the Potential for Bovine Spongiform Encephalopathy in the United States: Response to Reviewer Comments Submitted by Research Triangle Institute. Available at *http://www.aphis.usda.gov/lpa/issues/bse/ResponsetoComments.pdf, 2003.*

Harvard Center for Risk Analysis, Harvard School of Public Health, and Center for Computational Epidemiology, College of Veterinary Medicine, Tuskegee University; Evaluation of the Potential for Bovine Spongiform Encephalopathy in the United States. Available at *http://www.aphis.usda.gov/lpa/issues/bse/madcow.pdf, 2003.*

animal, and plant health should be no more trade restrictive than necessary to achieve an appropriate level of protection. Under these agreements, participating nations, including the United States and U.S. trading partners, have agreed to base their measures, such as conditions for importation, on science-based risk assessments and international standards.

As discussed in our risk analysis, BSE infectivity has never been demonstrated in the muscle tissue of cattle experimentally or naturally infected with BSE at any stage of the disease. Therefore, if BSE is present in a country's cattle population, as it is in Japan, the most significant risk mitigation measure for ensuring the safety of whole cuts of boneless beef is the prevention of cross-contamination of the beef with SRMs during stunning and slaughter of cattle. The proposed rule and this final rule include mitigation measures that address such risks and are consistent with the international guidelines on BSE established by the OIE.

U.S. Feed Ban

Issue: One commenter stated that the level of risk posed by beef imported from Japan is unacceptable because the U.S. feed ban could potentially result in the recycling of BSE in the United States. This commenter requested that APHIS define ''small fraction'' and ''highly diluted'' in our statements in the risk analysis about the amount of imported beef that might, hypothetically, be fed to cattle, and the potential concentration of any BSE agent, if present, that might be available. The commenter further questioned whether these terms describe an infectious level below 0.001 gram, which is the amount of infected tissue research has shown to cause BSE infectivity. In addition, the commenter asked how many doses may be expected to enter the animal food chain, if the dose is greater than 0.001 gram.

Response: We disagree that the current feed regulations could result in the recycling of BSE if introduced into the United States by whole cuts of boneless beef from Japan. In our risk analysis, we considered possible direct and indirect pathways by which whole cuts of boneless beef imported from Japan might expose U.S. cattle to BSE if the product contained the BSE agent. We discussed these pathways in the context of barriers that exist to prevent these types of exposures. Our discussion of these barriers was specifically prefaced by the fact that whole cuts of boneless beef are an inherently low risk commodity because BSE infectivity has never been demonstrated in muscle tissue in cattle. In fact, we clearly stated that the primary barriers limiting the likelihood that whole cuts of boneless beef imported from Japan would expose the U.S. cattle population to BSE are the inherently low risk of the product, the mitigation measures included in this rule to prevent contamination, and the fact that the product is unlikely to be fed to cattle. We further stated that although the product is not intended for animal consumption, we evaluated pathways by which some small fraction or amount of the product might inadvertently be fed to cattle.

The amount of boneless beef that would be imported from Japan is relatively small and the amount of material likely to be disposed of is even smaller, given that household and restaurant food waste are rarely, if ever, fed to cattle or rendered. These types of waste become municipal garbage and are disposed of in landfills. Further, because the FDA requires that plate waste be further heat processed before it can be incorporated into ruminant feed, any potential plate waste derived from boneless beef from Japan would most likely be subject to rendering processes that would inactivate significant levels of the BSE agent, thereby further reducing the level of infectivity in the feed. Therefore, our risk analysis concluded that it is extremely unlikely that imported material containing an infectious level of the BSE agent will enter the ruminant feed chain. Because we do not consider these pathways to be epidemiologically significant for exposure of the U.S. cattle population to BSE infectivity in products imported under this rule, we do not believe it is necessary to quantify a level of infectious material that is theoretically possible, but highly unlikely, to be present. For these reasons, we are making no changes to the rule in response to this comment.

With regard to the commenter's request for APHIS to define ''small fraction'' and ''highly diluted,'' in our statements in the risk analysis about the amount of imported beef that might, hypothetically, be fed to cattle, these terms were used to describe a small amount of material and a small amount of material that is not concentrated, respectively.

Issue: One commenter stated that APHIS' reliance upon heat-processed rendering to inactivate BSE infectivity is misplaced because the Harvard-Tuskegee Study makes no definitive finding that the rendering processes used in the United States will inactivate the BSE agent. This commenter stated that, in order to meet its duty to protect the livestock in the United States from the introduction of BSE, the FDA must first modify the U.S. feed ban to prevent the possible recycling of any BSE infectivity imported from Japan. According to the commenter, the U.S. feed ban includes exceptions for the feeding of blood, poultry litter, and plate waste, the feeding of SRMs to farmed animals, and does not require segregated facilities in the manufacturing of animal feed. This commenter stated that these elements of the feed ban must be eliminated before APHIS begins accepting beef or cattle from any country where BSE is known to exist, including Japan.

Response: The model used by the Harvard-Tuskegee Study included assumptions about the types of rendering processes used in the United States, and the amount of material subjected to these processes. There are only a limited number of rendering processes in use, and research has demonstrated that, with one exception, these processes inactivate significant levels of the BSE agent. The one type of rendering system that does not inactivate significant levels of the BSE agent, the low-temperature vacuum system, is not widely used in the United States, if at all. In fact, the Harvard-Tuskegee Study assumed that only 5 percent of cattle carcasses rendered in the United States may be subject to this process. APHIS does not rely solely on this inactivation, however, in the analysis. A series of barriers, of which inactivation at rendering is only one, must each be crossed in sequence for transmission of BSE to occur. In fact, inactivation by rendering would only be relevant if BSE-contaminated beef entered the United States and entered the ruminant feed supply. Our analysis shows that neither event is likely.

With regard to the commenter's statement that the FDA must modify and broaden the U.S. feed ban to prevent the possible recycling of any BSE infectivity imported from Japan, the Harvard-Tuskegee Study demonstrates that with the existing feed ban, even with incomplete compliance, the level of transmission of BSE from infected animals is minimal, if it occurs at all. This rule only allows the importation of whole cuts of boneless beef, a product that presents a very low risk of BSE infectivity. Even if beef were imported with infectivity, all of the sequential barriers to transmission-of which the feed ban is only one-must be crossed in order for transmission to occur. Therefore, we are making no changes to the rule in response to this comment.

Cross-Contamination

Issue: One commenter expressed concern that the current FSIS regulations and policies do not fully address the possibility of cross-contamination between SRMs and edible product in plants that predominately slaughter cattle over 30 months of age. This commenter stated that, although the current policies address the use of separate equipment in cattle under 30 months versus those that are over this age, they do not specifically address the issue of dedicated equipment for the removal and trim of SRMs in plants slaughtering over-30-month-old cattle. The commenter urged the USDA to include more specific requirements in its regulations to prevent cross contamination between SRMs and edible products. The commenter stated that these should include, but not be limited to, requiring the use of separate equipment, such as knives and blades, and utilizing effective TSE disinfection procedures for equipment used to handle SRMs.

Response: The FSIS regulations contained in 9 CFR part 310 require that establishments that slaughter/process cattle develop, implement, and maintain written procedures for the removal, segregation, and disposition of SRMs. These procedures address appropriately potential cross-contamination of edible product with SRMs. FSIS inspectors are responsible for verifying the effectiveness of the establishment's procedures. If FSIS personnel determine that an establishment's procedures are not effective in preventing cross-contamination, the inspectors will take appropriate action.

Issue: One commenter expressed concern that infective tissue could potentially contaminate additional carcasses via the use of saws in carcass splitting. This commenter stated that this risk is too great for consumers and the U.S. cattle industry. Another commenter requested that APHIS explain the risk of introducing BSE into the United States that may result from the potential for boneless beef to be contaminated with BSE-infected tissues during the carcass-splitting process.

Response: As discussed in our risk analysis, cross-contamination events represent potential pathways to contaminate whole cuts of boneless beef. One potential event for such beef is cross-contamination of carcasses with spinal cord during carcass splitting, as the saw cuts the carcass in half.

FSIS has determined that the Japanese meat inspection system is equivalent to that of the United States, and that the slaughter mitigations applied in both systems would work similarly to reduce the potential for contamination of whole cuts of boneless beef. For example, the Japanese establishments, like U.S. establishments, remove the vertebral column as a unit to reduce the likelihood of potentially infective tissues contaminating the beef. The establishments also remove spinal cord dura matter and wash the dressed carcasses after splitting, and inspectors confirm that the carcasses are free of all visually detectable evidence of contamination by spinal cord fragments. Some establishments in Japan carry out suction removal of spinal cords prior to carcass splitting, which further reduces the risk of contamination. Finally, it should be noted that the whole cuts of boneless beef that will be imported into the United States from Japan are trimmed further, which again reduces any potential for contamination.

Issue: One commenter stated that the proposed rule is arbitrary and capricious because APHIS has not quantified the number of infectious doses of BSE-infected material that can be expected to contaminate boneless beef based on the scientifically known occurrence of contamination resulting from carcass splitting. This commenter stated that APHIS provides no basis for its conclusion that the increased risk associated with importing meat from Japan that may be contaminated with high risk tissues is acceptable.

Response: We disagree with the comment. Our proposed rule and the risk analysis are scientifically sound. Many regulatory decisions do not depend on numerical calculations or quantifications. What is important is a careful, comprehensive characterization and evaluation of the risk involved. Such an evaluation has been accomplished by APHIS and is consistent with the methodology used in the risk analysis for this rulemaking. With respect to the commenter's specific concern, *i.e.*, the quantification of infectious doses of BSE-infected material that can be expected to contaminate whole cuts of boneless beef, there currently is no reliable information to support a precise quantification of a human infectious dose. However, there is a wide body of independently verifiable scientific evidence regarding BSE, including how to control and eliminate the disease. This rule requires mitigation measures consistent with that information.

Issue: One commenter expressed concern that the proposal did not address the risk of acceptable methods of stunning (other than air-injection stunning and pithing, which are prohibited under this rule). This commenter cited a report by the European Commission's TSE BSE Ad Hoc Group that noted a theoretical risk that, when a healthy animal that nevertheless has infectivity in the brain is stunned using a penetrative method, there is the possibility that the bolt of the gun could be contaminated and could introduce that infectivity into one or more sequentially stunned animals, if stunned with the same gun.[11] The commenter requested APHIS to specifically address what measures it will put in place to address this risk.

Response: We acknowledge the theoretical possibility that infectivity in the brain of a BSE-infected bovine could potentially be transferred from the head of one animal to the head of another animal through the use of penetrating stunning methods. However, there is currently no evidence that such contamination occurs during the slaughter process. Further, as discussed in the background section of our August 2005 proposed rule, we use the term, ''whole cuts of boneless beef,'' to refer to meat derived from the skeletal muscle of a bovine carcass, excluding all parts of the animal's head and diaphragm. These restrictions ensure that penetrative stunning methods not prohibited under this rule are not a risk factor for whole cuts of boneless beef from Japan.

BSE Incidence in Japan

Issue: One commenter stated that the proposed rule did not take into consideration the present and future BSE incidence rate in Japan. This commenter stated that the rule should require that Japan demonstrate that the incidence of BSE is declining and that no new cases are discovered in animals born after the implementation of the feed ban. The commenter stated that sufficient time has not yet lapsed since Japan implemented its feed ban and other risk mitigation measures to determine whether such measures have effectively arrested the spread of BSE. Another commenter stated that Japanese beef is not safe based on the incidence of BSE in Japan. Finally, one commenter stated that Japan should be proven to be free from BSE for 7 years before the United States should consider importing from Japan.

Response: We concur that at present it is not possible to know with certainty whether any additional animals in Japan are infected with BSE. However, as documented in our risk analysis, we

[11] Scientific Report on Stunning Methods and BSE Risks, TSE BSE Ad Hoc Group, European Commission, December 13, 2001, at 41.

analyzed the likelihood that whole cuts of boneless beef imported from Japan would: (1) Contain infectious levels of the BSE agent; and (2) present a risk of exposing U.S. consumers or cattle to BSE, if the imported beef product was contaminated with BSE. Based on the potential pathways, we then determined appropriate mitigation measures to address the risks associated with whole cuts of boneless beef imported from Japan. BSE infectivity has never been demonstrated in the muscle tissue of cattle infected with BSE at any stage of the disease. Therefore, the most significant risk management strategy for ensuring the safety of whole cuts of boneless beef is the prevention of cross-contamination of the beef with SRMs during stunning and slaughter of the animal. Mitigation measures that prevent contamination of such beef involve procedures for the removal of SRMs and carcass splitting and prohibitions on air-injection stunning and pithing. This rule requires such mitigation measures. While our risk analysis considered the incidence of BSE in Japan in its discussion of the OIE recommendations on BSE, it did not play a central role in our evaluation of the risk posed by whole cuts of boneless beef. Our evaluation was based on the nature of the commodity and the potential pathways for exposure.

Economic Analysis

Issue: One commenter asked what assurances there are in the rule that Wagyu beef will be the only beef exported, since Japan also produces Holstein beef, which appears to be where Japan is experiencing the highest rate of BSE.

Response: This rule allows the importation of whole cuts of boneless beef from all cattle breeds, including Holstein, provided that certain conditions are met. These conditions, which include removal of SRMs and prohibitions on the use of air-injection stunning and pithing, will continue to protect against the introduction of BSE into the United States, regardless of the breed of cattle from which the beef is derived. As a practical matter, the export of Holstein beef to the United States is unlikely, since it is unlikely that Japan will try to compete in the U.S. import market for lower-grade beef from culled dairy cattle against such established suppliers as Australia and New Zealand. We expect only Wagyu beef to be imported under the rule.

Issue: One commenter stated that the impact of the rule on the domestic Wagyu beef industry should be thoroughly analyzed because this rule has the potential to have the most impact on that segment of the beef industry.

Response: Our assessment of the rule's potential impact on U.S. producers of Wagyu beef was as thorough as possible given the available data. In the proposed rule, we stated that we did not have all of the data necessary for a comprehensive analysis, and invited the public to provide information that would enable us to better assess the rule's potential impact, including information on the number of domestic Wagyu producers and their production. None of the comments received from the public in response to the proposed rule included that information.

Issue: One commenter stated that domestic producers will lose economically from this rule because the initial regulatory flexibility analysis noted that consumers may benefit if the price of domestic Wagyu beef goes down due to the resumption of trade in Japanese boneless beef.

Response: The economic impact of the rule on domestic Wagyu producers is unclear. This is because the extent to which Wagyu beef imports from Japan and domestically produced Kobe-style beef compete for the same group of buyers is not known. It is conceivable that demand for, and prices of, domestic Kobe-style beef could decline if consumers switched to Wagyu beef from Japan once that product becomes available in the U.S. market. On the other hand, it is possible that the importation of Wagyu beef from Japan could stimulate additional interest in, and demand for, high-end beef in general, thereby benefitting U.S. producers of Kobe-style beef. That domestic Kobe-style beef will likely sell at a lower average price than Wagyu beef from Japan suggests that the two commodities are not perfect substitutes.

Issue: One commenter expressed concern that the most serious economic impact of the rule has not been addressed, that is, the possibility of an American consumer contracting variant CJD (vCJD), which has been linked via scientific and epidemiological studies to exposure to the BSE agent. The commenter stated that this rule would unfairly reduce demand for beef from American cattle producers because country of origin labeling has not yet been enforced and consumers will not be able to differentiate Japanese beef from American beef.

Response: The possibility of an American consumer contracting vCJD from infected meat imported from Japan is extremely unlikely. FSIS, which assessed the human health risks associated with the rule, concluded that the beef imported under the conditions described in the rule will pose no greater level of risk as products produced for human consumption in the United States. Matters relating to country of origin labeling are beyond the scope of this rule.

Environmental Assessment

Issue: One commenter stated that APHIS should prepare an environmental impact statement (EIS) that shows the effects of a range of potential risks including low risk, moderate risk, and high risk.

Response: APHIS prepared an environmental assessment in order to determine whether or not there could be significant environmental impacts associated with allowing the importation of whole cuts of boneless beef from Japan based upon conditions specified in the rulemaking. The purpose of an environmental assessment is to provide sufficient information and analysis to agency decisionmakers to allow them to determine whether a proposed agency action will have a significant effect on the human environment, including public health and safety. The decisionmaker reviews the environmental assessment and any associated public comments and then makes a determination on whether there will be adverse impacts significantly affecting the human environment. This determination is based on the consequences of associated risks and on safeguards that are designed to prevent those risks from occurring and causing significant adverse impacts on the human environment. If a determination is made that a proposed action would have a significant effect on the human environment, the agency is obligated to prepare an EIS. If a determination is made that the action will not have a significant effect on the human environment, a finding of no significant impact is issued in connection with any final rule and an environmental impact statement is unnecessary. That is the case with this rulemaking.

Issue: The same commenter stated that the proposed rule should be afforded even greater scrutiny from an environmental perspective than APHIS afforded the minimal risk region rule because of the cumulative effects of the two rules.

Response: The minimal-risk region rule (see 70 FR 360–553, Docket No. 03–080–3, January 4, 2005) allows the importation of live bovines less than 30 months of age when imported and when slaughtered, sheep and goats less than 12 months of age when imported and when slaughtered, and certain bovine meat, meat byproducts, and meat food

products, from regions recognized as minimal-risk for BSE, provided that certain conditions are met. The environmental assessment for the minimal-risk region rule and a review of the issues raised by public comment provided the basis for a finding of no significant impact on the quality of the human environment, *i.e.*, public health and safety (see 70 FR 18252–18262, Docket No. 03–080–7, April 8, 2005). The rule for Japanese beef will only allow whole cuts of boneless beef, which have not demonstrated BSE infectivity at any stage of the disease. The conditions contained in this rule for whole cuts of boneless beef, such as the appropriate removal of SRMs from the carcass, address the potential risk for BSE contamination. Thus, it is highly unlikely that the importation of such beef from Japan would result in the introduction of BSE into the United States. Therefore, from an environmental perspective, an environmental assessment is the appropriate level of environmental documentation.

Proposed Regulations

BSE Regulations (General Approach)

Issue: Several commenters expressed concern that APHIS' import policy with regard to BSE and, more specifically, BSE-related restrictions for the importation of whole cuts of boneless beef from Japan, seems to differ from its regionalization approach found in the current BSE regulations and the general policy with regard to recognition of regions for other foreign animal diseases. One commenter stated that, with most diseases, APHIS does not allow importation until adequate surveillance has been done to prove freedom of a region from the disease. However, with regard to BSE, stated the commenter, APHIS allows imports from a region until a case of BSE is identified in that region. The commenter stated that APHIS should define standards for all levels of trade with various countries concerning BSE. The commenter suggested that APHIS conduct or peer review the proper risk evaluations to determine a country's BSE risk category based upon OIE guidance and to classify all countries that have not been evaluated as undetermined risk regions.

Similarly, another commenter expressed concern that APHIS does not have a standard for protecting the United States against the introduction and spread of BSE, and potentially other communicable diseases, because Japan does not meet the criteria for a minimal-risk region. Finally, one commenter stated that no reason was provided in the proposal for APHIS' departure from previous policies to deny the importation of commodities from BSE-affected regions.

Response: With regard to trade from BSE-affected regions, § 94.18(a)(1) lists regions where BSE is known to exist. Paragraph (a)(2) of § 94.18 lists regions that present an undue risk of BSE because their import requirements are less restrictive than those that would be acceptable for import into the United States and/or because the regions have inadequate surveillance for BSE. Additionally, § 94.18(a)(3) lists regions that present a minimal risk of introducing BSE into the United States. APHIS prohibits the importation of live ruminants and certain ruminant products and byproducts both from regions where BSE is known to exist (and that are not considered BSE minimal-risk regions) and from regions of undue risk, even though BSE has not been diagnosed in a native animal in the latter regions. The minimal-risk regions rule provided the basis for allowing the importation of various commodities from regions in which BSE has been detected but that have been evaluated as minimal-risk regions for BSE.

With respect to the issue about Japan meeting the requirements for a minimal-risk region as defined in § 94.0, as mentioned previously, the situation in Japan represents conditions consistent with a controlled-risk region as outlined in the OIE guidelines. We did not evaluate Japan as a minimal-risk region. This rule is commodity-based. The requirements for importing that commodity-whole cuts of boneless beef-protect against the introduction of BSE. Other provisions in APHIS' regulations address risks associated with other diseases. For example, if Japan were to experience an outbreak of foot-and-mouth disease, the requirements of § 94.4, which require cooking or curing, would apply.

With respect to the approach to BSE differing from the approach to other diseases, when it was newly discovered, BSE was limited in its geographic distribution to the United Kingdom and certain other countries in Europe. There was no evidence to suggest the disease existed elsewhere in the world. Designating regions as affected could be done quickly by interim rule as cases were detected. Evaluation of countries for lower risk status (*e.g.*, minimal risk or unaffected), usually involves a risk analysis as well as a rulemaking. The BSE approach (*i.e.*, designation as affected) is consistent with our approach to other diseases, such as African horsesickness, which has never been shown to exist in countries other than in Africa and some countries on the Arabian Peninsula. Also, in contrast to infectious diseases that can be diagnosed relatively quickly, BSE has an extremely long incubation period. Therefore, our regulations for BSE are designed to protect against the introduction of BSE from regions where BSE exists or that present an undue risk of introducing BSE.

An alternative approach to assigning status to a region is to follow a commodity-based approach in which mitigations are defined that are appropriate to the commodity (and the region, if relevant). Existing examples of this include the regulations in § 94.18(b) that allow for the importation of gelatin and milk under certain conditions from any region listed in § 94.18(a). Similarly, this rule will allow the importation of whole cuts of boneless beef from Japan, under the conditions contained in this rule, while continuing to protect against the introduction of BSE into the United States.

The import request submitted to APHIS by the Government of Japan lent itself to a commodity-based approach because it was limited in scope to boneless beef from Japanese cattle. Because Japan was not requesting the importation of live animals, we only considered the risk associated with the importation of that commodity, rather than the risk associated with the importation of live animals and other commodities from Japan. Because whole cuts of boneless beef present a low risk of BSE, we determined that it was not necessary to evaluate the country in light of the minimal-risk region criteria.

OIE Recommendations on BSE

Issue: Several commenters expressed concern that the proposed conditions for whole cuts of boneless beef from Japan are less restrictive than the recommended export conditions contained in Article 2.3.13.1 of the OIE's 2005 Terrestrial Animal Health Code for deboned skeletal muscle meat from anywhere. These commenters pointed out that the proposal did not require that the beef be derived from cattle that are less than 30 months of age and that the cattle be subject to ante- and post-mortem inspections and were not suspect or confirmed BSE cases. The commenters stated that these conditions are contained in the OIE recommendations for the export of deboned skeletal muscle meat from any region. One commenter requested that these additional restrictions be added to the rule. Finally, one commenter also noted that the proposed rule would allow for the importation of boneless beef from cattle over 30 months of age,

which is not allowed from minimal-risk regions.

Response: We appreciate the commenter's question regarding consistency with the current OIE recommendations on BSE. As discussed in the proposed rule and the risk analysis, the conditions for the importation of whole cuts of boneless beef from Japan are consistent with the recommendations for the export of meat and meat products from controlled-risk regions, which are contained in Article 2.3.13.10 of the OIE's 2005 Terrestrial Animal Health Code, not those recommendations for the export of deboned beef from any region. Unlike the OIE recommendations for the free trade of deboned beef from any region, the OIE recommendations for commodities exported from controlled-risk regions do not contain a 30-month-age restriction.

The OIE recommendations, as noted by the commenter, include conditions that the commodity be derived from cattle that were subject to ante- and post-mortem inspections and were not suspect or confirmed BSE cases. These requirements are consistent with FSIS requirements under the Federal Meat Inspection Act (FMIA). In 9 CFR parts 309 and 310, for example, FSIS requires that all livestock offered for slaughter must receive (and pass) ante- and post-mortem inspections. As part of FSIS' equivalence determination process, countries that export commodities to the United States must have meat inspection systems that provide the same level of protection as that provided by systems in the United States. Because the OIE recommendations noted by the commenter are already established requirements under FSIS' regulations, and are, moreover, requirements that pertain to all livestock regardless of the BSE risk status of a region, it was not necessary to include those same requirements in our regulations.

Issue: One commenter asked for clarification on how APHIS determined that Japan could be considered as having controlled-risk status under the OIE guidelines.

Response: APHIS personnel requested written documentation on the BSE status of and conditions in Japan and conducted a site visit to verify the information and gather additional data. We then evaluated the country-specific information in the context of the OIE recommendations on BSE and found that the BSE conditions in Japan are consistent with those conditions for a controlled-risk region contained in Article 2.3.13.4 of the 2005 Terrestrial Animal Health Code. For example, Japanese authorities had conducted an appropriate risk assessment to identify the historical and existing BSE risk factors; the country's surveillance program was consistent with Type A surveillance as defined by OIE in Appendix 3.8.4 of the Code; and the BSE conditions for controlled-risk regions relative to BSE cases, a feed ban, importation of meat-and-bone meal or greaves, epidemiological tracing, and disposition of affected and contact animals were met.

It is important to note that, while we considered the OIE recommendations on BSE in the development of the risk analysis, we based our mitigation measures on a careful analysis of the risk posed by the importation of whole cuts of boneless beef from Japan. BSE infectivity has never been demonstrated in the muscle tissue of cattle infected with BSE at any stage of the disease. Therefore, the most significant risk management strategy for ensuring the safety of whole cuts of boneless beef is the prevention of cross-contamination of the beef with SRMs during stunning and slaughter of the animal. Mitigation measures that prevent contamination of such beef involve procedures for the removal of SRMs and carcass splitting and prohibitions on air-injection stunning and pithing. This rule requires such mitigation measures.

Age Restriction

Issue: One commenter expressed concern that the proposal did not contain an age limitation on whole cuts of boneless beef from Japan and stated that there should be such a restriction, especially since Japan's control measures for BSE have not been in place for a long period of time. Other commenters stated that the lack of a 30-month age restriction on cattle from which the beef is derived for export from Japan is inconsistent with APHIS' rulemakings, specifically, the age restriction for cattle and cattle products contained in the minimal-risk rule. Some of these commenters stated that APHIS provided no justification for allowing imports of beef from animals over 30 months of age from Japan or any other country where BSE is known to exist.

Response: Prior to developing the proposed rule for this action, we analyzed the likelihood that boneless beef imported from Japan would: (1) Contain infectious levels of the BSE agent; and (2) present a risk of exposing U.S. consumers or cattle to BSE, if the imported beef was contaminated with BSE. Based on the potential pathways, APHIS then determined what mitigation measures should be imposed to address the risks associated with whole cuts of boneless beef from Japan. We did not attempt to classify Japan as a minimal-risk region, nor did we include live animals or other meat and meat products. Rather, we limited our analysis to the BSE risk associated with whole cuts of boneless beef. Scientific data show that BSE infectivity in the muscle tissue of cattle examined in either the mouse bioassay or the cattle assays have not been demonstrated to date, regardless of the age of the animal. For these reasons, we consider whole cuts of boneless beef to be inherently low-risk for BSE and determined that it can be safely traded provided that measures are taken to prevent cross-contamination during processing. Such measures are contained in this rule and an age restriction is not necessary.

County of Origin Labeling

Issue: A number of commenters recommended that country of origin labeling be required in the United States so that beef imported from Japan would be so labeled. Some commenters suggested APHIS postpone implementation of this rule until such labeling is in place in this country. Several commenters raised concerns about how the United States would be able to verify the requirement that the beef be derived from cattle born, raised, and slaughtered in Japan without a country of origin labeling requirement. Finally, one commenter expressed concern that, because the proposal did not contain a country-of-origin requirement, any stigma associated with imported Japanese beef would be transferred to the entire U.S. beef supply if the BSE or vCJD incidence in Japan increases.

Response: Under the Farm Security and Rural Investment Act of 2002 and the 2002 Supplemental Appropriations Act, USDA is required to implement a mandatory country of origin labeling program (COOL).[12] USDA's Agricultural Marketing Service (AMS) published a proposed rule on the COOL program on October 30, 2003 (68 FR 61944–61985, Docket No. LS–03–04). Under the proposal, retailers would be required to notify their customers of the country of origin of all beef (including veal), lamb, pork, fish, and selected other perishable commodities being marketed in their stores. In addition, the AMS proposal identified criteria that these commodities must meet to be considered of U.S. origin. In November

[12] AMS USDA; Country of Origin Labeling—Current Status of Country of Origin Labeling. Available at *http://www.ams.usda.gov/cool/status.htm.*

2005, President Bush signed Public Law 109–197, which includes a provision to extend a previous delay of implementation of mandatory COOL for all covered commodities except wild and farm-raised fish and shellfish until September 2008. The COOL program, when implemented, will address the labeling concerns raised by commenters with regard to APHIS' proposed rule. APHIS does not consider it necessary to delay implementation of this rule until those labeling provisions are implemented. In its October 30, 2004, proposal, AMS noted, in discussing Section 10816 of Public Law 107–171 (7 U.S.C. 1638–1638d) regarding COOL that the ''intent of the law is to provide consumers with additional information on which to base their purchasing decisions. It is not a food safety or animal health measure. COOL is a retail labeling program and as such does not address food safety or animal health concerns.''

With respect to the concern expressed about verifying that the beef is derived from cattle born, raised, and slaughtered in Japan, this rule will require that an authorized veterinary official of the Government of Japan certify on an original certificate that the conditions contained in this rule have been met.

BSE Testing

Issue: One commenter requested that, before proceeding with this rule, APHIS explain why the rule does not require BSE testing of cattle slaughtered in Japan in the rule. This commenter stated that the use of rapid tests could assist in eliminating from the food chain clinically healthy cattle with PrP^{sc} (abnormal prion protein) in the central nervous system. The commenter stated that such a mandatory testing requirement must be included in any rule to resume imports from BSE-affected countries or else the United States would have no means of ensuring the continuation of current mitigation measures currently practiced in countries like Japan.

Response: We understand the interest expressed by some commenters in testing certain cattle for slaughter. However, no live animal tests exist for BSE and the currently available postmortem tests, although useful for disease surveillance (i.e., in determining the rate of disease in the cattle population), are not appropriate as food safety indicators. Studies have demonstrated that the earliest point at which current testing methods can detect a positive case of BSE is 2 to 3 months before the animal begins to demonstrate clinical signs. Research also indicates that the incubation period for this disease—the time between initial infection and the manifestation of clinical signs—is generally very long, on the average of about 5 years. Accordingly, we know there is a long period during which, using the current methodology, testing an infected animal that has not demonstrated clinical signs of the disease or is not at the end of the incubation period would, incorrectly, produce negative results. If, however, the infected animal is already exhibiting some type of clinical signs that could be consistent with BSE, then the test is not likely to produce false negative results.

BSE infectivity has never been demonstrated in the muscle tissue of cattle experimentally or naturally infected with BSE at any stage of the disease. Therefore, if BSE is present in a country's cattle population, the most significant risk mitigation measure for ensuring the safety of whole cuts of boneless beef is the prevention of cross-contamination of the beef with SRMs during stunning and slaughter of the animal. This rule includes such risk mitigation measures. For example, this rule requires the removal of SRMs and prohibits the use of air-injection stunning devices and pithing processes on cattle from which the beef is derived.

For these reasons, we do not consider the testing of bovines at slaughter to be scientifically justified or meaningful in the context of either human or animal health. Making this a criterion for the importation of beef from Japan would not contribute to human or animal health protection. A statistically and epidemiologically valid surveillance plan is crucial to monitoring the success of risk mitigation measures, such as a feed ban, but surveillance is not a mitigation measure.

Miscellaneous Comments

Harmonized Two-Way Trade

Issue: Many commenters requested that APHIS not finalize the proposed rule until two-way, harmonized trade can be resumed between the United States and Japan. These commenters expressed concern that Japan has not provided adequate assurances that U.S. producers will be allowed to export beef to Japan. Further, several of these commenters were concerned that U.S. producers would be subject to more stringent export conditions than those faced by exporters of boneless beef from Japan. For example, some commenters expressed concern that U.S. producers will only be allowed to export beef to Japan if the beef is derived from cattle less than 20 months of age. No such age restriction was contained in the proposed rule regarding the importation of boneless beef from Japan. These commenters stated that the export conditions for beef between the two nations should be the same.

In addition, one commenter noted that the proposed rule did not address potential impacts the rule could have on the United States' ability to restore the export markets that remain closed to the U.S. cattle and beef industries. This commenter asked if APHIS has consulted with South Korea and other importing nations that continue to ban U.S. beef and cattle to determine whether the rule would enhance or impede the reopening of these markets. This commenter expressed concern that the rule would be viewed by other nations as exposing the United States to an unacceptable risk. This commenter requested that APHIS provide the public with a list of nations that currently allow the importation of Japanese beef and stated that APHIS should not proceed with the rule until and unless a firm commitment is obtained from all countries that formerly accepted U.S. beef exports that they will-in a timely fashion-reopen their borders to U.S. beef, even if the U.S. resumes imports of Japanese beef.

Response: APHIS does not have authority to restrict trade based on its potential market access effects. Under its statutory authority, APHIS may prohibit or restrict the importation or entry of any animal or article when the agency determines it is necessary to prevent the introduction or dissemination of a pest or disease of livestock. However, APHIS is actively negotiating with trading partners to reestablish our export markets.

Trade With Other BSE-Affected Regions

Issue: One commenter suggested that APHIS make explicit in its final rule that, based on the logic and reference to the new OIE guidelines in the proposal, the United States is now ready to accept safe products from countries that have experienced BSE but have stringent risk mitigation measures in place, following separate risk analyses to be carried out by APHIS. This commenter stated that it expects APHIS is now prepared to use the same approach when evaluating a specific request to authorize the import of whole cuts of boneless beef from the European Union, in particular. In contrast, another commenter expressed concern that the rule would establish a precedent for allowing the importation of commodities from other BSE-affected regions that pose a greater risk of introducing BSE into the United States than does boneless beef from Japan.

Response: As mentioned above, under its statutory authority, APHIS may

prohibit or restrict the importation or entry of any animal or article when the agency determines it is necessary to prevent the introduction or dissemination of a pest or disease of livestock. When we receive a request from a country to allow the importation of commodities, we carefully and thoroughly consider the risk associated with the commodity and the country. In addition, APHIS is currently considering developing a comprehensive set of regulations consistent with the OIE recommendations on BSE.

Importation of Commodities From Minimal-Risk Regions and/or Canada

Issue: One commenter stated that the risk analysis and the OIE guidelines used in support of the proposed rule would also allow the importation of cattle over 30 months of age and beef from those cattle from any minimal-risk region. This commenter stated that, as a result, there is no justified reason to allow the importation of beef from Japan to enter the United States and not provide the same treatment for Canadian cattle and beef. The commenter stated that Canada and other minimal-risk regions should be afforded treatment consistent with Japan and that Canadian cattle over 30 months of age and beef derived from those cattle should be allowed to be imported by APHIS.

Response: APHIS recognizes that the OIE guidelines address the importation of live cattle over 30 months of age and beef from such cattle from regions of different status. However, the scope of this rulemaking is limited to whole cuts of boneless beef derived from cattle born, raised, and slaughtered in Japan. Therefore, the issue of imports of live cattle over 30 months of age and beef from those cattle from minimal-risk regions, including Canada, falls outside the scope of this rulemaking. Nevertheless, as noted in the minimal-risk region rule, APHIS is committed to dealing with the issue of imports of live bovines 30 months of age and over from Canada in further rulemaking.

Issue: One commenter stated that the BSE minimal-risk regions rule should be withdrawn, and that the U.S. geographical BSE risk assessment (GBR) should immediately be raised to BSE GBR IV. This commenter further requested that the United States adhere to the BSE GBR and that USDA work to enhance those assessments to include all animal TSEs.

Response: Consideration of changes to the minimal-risk rule are outside the scope of this rulemaking. The BSE GBRs are conducted by the European Commission. These assessments were initially begun in the late 1990's, under the auspices of the European Commission's Scientific Steering Committee (SSC). Since the functions of the former SSC have now been taken up by the European Food Safety Authority (EFSA), the GBR assessments are done under the EFSA. This assessment process is not a process supervised by the USDA or APHIS, and we cannot change any assessments previously done by the European Commission. It is not clear what the commenter means by requesting that the United States adhere to the BSE GBRs, as these are documents created internally by the European Union for its purposes. APHIS conducts its own risk assessments as necessary for specific rulemaking efforts, incorporating all available information. Such information may refer to an assessment conducted by the country requesting a regulatory change, but it generally would not depend on third party assessments.

The United States considers all animal TSEs in developing regulations related to BSE. However, it should be noted that the various animal TSEs are generally caused by different agents (i.e., scrapie in sheep is different from chronic wasting disease (CWD) in cervids, which is different from BSE in cattle) with different routes of transmission and unique characteristics. Sometimes these processes may be similar, but one cannot automatically assume, for example, that if a country has identified scrapie in sheep that they are therefore at significant risk for other animal TSEs such as CWD or BSE.

CJD and Domestic Compliance With FSIS' BSE-Related Regulations

Issue: One commenter noted that the number of probable and confirmed cases of vCJD cited in the proposed rule was greater than the number of cases cited in the minimal-risk regions final rule and raised questions regarding the significance of this increase in cases over a several month period. This commenter requested that APHIS provide a comparison between the number of deaths attributable to the consumption of beef contaminated with BSE and the number of deaths attributable to the consumption of beef contaminated with other food-borne contaminates such as *Escherichia coli* (*E. coli*) in order to place this increase in vCJD cases in context for the beef and cattle industries.

Response: To date, there have been a total of approximately 170 cases of vCJD reported worldwide since 1996. Most of these cases have been in the United Kingdom. In the United Kingdom, it is estimated that the incidence of deaths from vCJD reached a peak in mid-2000, with 28 deaths that year. For comparison, the Centers for Disease Control (CDC) estimates that foodborne diseases cause approximately 76 million illnesses, 350,000 hospitalizations, and 5,000 deaths in the United States alone each year. Of these, known pathogens account for an estimated 14 million illnesses, 60,000 hospitalizations, and 1,800 deaths annually. These estimates are not attributed to specific food products implicated in each outbreak, but rather to the specific pathogens. The variation in number of reported vCJD cases cited in our minimal-risk regions final rule and the proposed rule for this rulemaking and noted by the commenter is attributable to an update in figures obtained by APHIS and not a spike in the number of vCJD cases reported worldwide.

Issue: Two commenters raised questions regarding the origin of CJD in humans. One commenter noted that there are different strains of TSEs being discovered in ruminants, and that new atypical strains of TSE in cattle look similar to sporadic CJD in humans. Another commenter asked if APHIS has considered whether sporadic CJD in humans might be caused by atypical cases of TSEs that have been found in animals. This commenter further questioned whether blood and other tissues may carry BSE infectivity in cattle infected with atypical strains of the BSE agent or other TSE agents.

Response: Sporadic CJD is the most common form of CJD. It has been found in every country in the world where it has been looked for including countries that are generally considered by the international scientific community to be free of BSE and other TSEs (for example, Australia and New Zealand). In general, it affects about one person per million. No association between sporadic CJD and consumption of animal products in general and/or infected or contaminated bovine products has ever been documented. It is currently believed that sporadic CJD arises through the spontaneous conversion of PrP^{C} (normal cellular prion protein) to PrP^{SC} in an individual.[13] In contrast, atypical cases of BSE in cattle are rare and have been reported in only few countries that experience BSE, such as Italy, Belgium, Japan, and France. It has been speculated that the spontaneous or sporadic form of BSE could exist in cattle, as well as humans.[14]

[13] Stahl, N. and Prusiner, S.B.; (1991) FASEB–J. 5: 2799–807.

[14] Biacabe; 2004 EMBO reports, Vol. 5, No. 1.

APHIS agrees with the commenter that reports indicate that some of the atypical BSE cases, in particular the bovine amyloidotic spongiform encephalopathy (BASE), and sporadic CJD have similar PrP^{SC} patterns. APHIS evaluated the findings in the context of risk of exposure to cattle and humans. Currently, the relevance of the atypical cases is unknown, but at this time there is no indication that any control measures—such as feed bans or SRM requirements—should be modified based on these cases. Additionally, although atypical cases of BSE and sporadic CJD share similarities at this point, there is no evidence that they are linked.

Issue: One commenter expressed concern over the number of citations issued for various SRM violations during the June 2004 enhanced BSE surveillance program in the United States. This commenter questioned whether these incidents of noncompliance may have led to infective materials entering the human or animal food chains. This commenter cited the case of BSE detected in a 12-year-old cow in Texas as evidence that infective materials may have entered the food chain. The commenter suggested that noncompliance reports should be made more easily available to the public in the future.

Response: FSIS inspectors are responsible for verifying the effectiveness of an establishment's procedures. If FSIS personnel determine that an establishment's procedures are ineffective in preventing cross-contamination, the inspectors will take appropriate action. We note that none of the meat from the 12-year-old BSE-infected cow in Texas mentioned by the commenter entered the human food or animal feed chains.

Issue: One commenter stated that the domestic BSE mitigation measures, including the U.S. ruminant feed ban, border controls, and BSE surveillance program, must be strengthened in order to protect public health. The commenter further requested that USDA's Office of the Inspector General (OIG) hold an inquiry into the effectiveness of the BSE surveillance program.

Response: APHIS considers the measures in place to be adequate and based on the best available science. First, available evidence suggests that the feed ban which FDA implements is a critical safeguard against the spread of BSE in the United States. FDA has recently issued a proposed rule to further strengthen the feed ban (70 FR 58570–58601, October 6, 2005). Domestic BSE mitigation measures for border controls are based on risk analyses conducted using the best scientific information available. These are made available for public comment in association with regulations implementing these controls. The BSE surveillance program in the United States was developed by technical experts to help determine whether BSE is present in the U.S. cattle population, and if so, to help estimate at what level. The USDA's OIG is conducting an ongoing audit of the BSE surveillance program.

Other Comments

Issue: One commenter stated that there was no background or supporting information provided along with the proposed rule.

Response: The background information in support of the proposal was provided in our risk analysis and other supporting analyses that were made available to the public concurrent with the proposal. These documents remain available at *http://www.regulations.gov.*

Issue: Several commenters raised issues that fall outside the scope of this rulemaking, including the impact of eating meat on the health of American consumers, the relative quality of beef produced in Japan and the United States, and the necessity and market effects of importing beef from Japan when the United States produces beef domestically.

Response: APHIS does not have authority to restrict trade based on these considerations. Under its statutory authority, APHIS may prohibit or restrict the importation or entry of any animal or article when the Secretary determines it is necessary to prevent the introduction or dissemination of a pest or disease of livestock. While the United States does not have direct control over the quality of products produced in other countries, FSIS requires that the food it regulates be produced under conditions that will provide at least an equivalent level of safety as that produced in the United States. Therefore, we are not making any changes to the rule based on this comment.

Issue: One commenter stated that it would be helpful if the OIE or USDA would define ''controlled BSE-risk country'' and ''effectively enforced ban.''

Response: Article 2.3.13.4 of the OIE's 2005 Terrestrial Animal Health Code lists recommended conditions that a country, zone, or compartment should meet to be considered as controlled BSE risk. These conditions include a consideration of whether a country has identified indigenous cases of BSE and what risk mitigation measures have been imposed. Neither USDA nor the OIE have strictly defined an ''effectively enforced ban.'' The OIE has indicated that it may consider developing such a definition, but this process may take some time. USDA considers effective enforcement of the feed ban as an important measure to control BSE in a specific region. In previous rulemaking, we noted that determining whether a feed ban had been effectively enforced involved a review by APHIS of a number of interrelated factors, including: The existence of a program to gather compliance information and statistics; whether appropriate regulations are in place in the region; the adequacy of enforcement activities (*e.g.*, whether sufficient resources and commitment are dedicated to enforcing compliance); a high level of facility inspections and compliance; accountability of both inspectors and inspected facilities; and adequate recordkeeping.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, without change.

Effective Date

This is a substantive rule that relieves restrictions and, pursuant to the provisions of 5 U.S.C. 553, may be made effective less than 30 days after publication in the **Federal Register**. The Administrator of the Animal and Plant Health Inspection Service has determined that immediate implementation of this rule is warranted to relieve certain restrictions on the importation of whole cuts of boneless beef from Japan that are no longer necessary.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. The rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

Under the Animal Health Protection Act of 2002 (7 U.S.C. 8301 *et seq.*), the Secretary of Agriculture is authorized to promulgate regulations that are necessary to prevent the introduction or dissemination of any pest or disease of livestock into the United States.

This final rule will amend the regulations governing the importation of meat and other edible animal products by allowing, under certain conditions, the importation of whole cuts of boneless beef derived from cattle born, raised, and slaughtered in Japan. This action is taken in response to a request

from the Government of Japan and after conducting an analysis of the risk that indicates that such beef can be imported from Japan under the conditions described in this final rule. These conditions will continue to protect against the introduction of BSE into the United States.

In accordance with 5 U.S.C. 604, we have performed a final regulatory flexibility analysis, which is summarized below, regarding the impact of this rule on small entities.[15] This analysis also serves as our cost-benefit analysis under Executive Order 12866.

We expect that this rule will have little or no economic impact on the majority of consumers and beef producers in the United States because the volume of beef imported from Japan is likely to be small and have only a minor impact on the overall domestic beef market.

In 2001, APHIS placed a ban on the importation of ruminants and most ruminant products from Japan following the confirmation of one case of BSE in a native-born animal in that country. Prior to that ban, U.S. imports of boneless beef from Japan were negligible when compared to total imports of that commodity. Over a 4-year period, 1997–2000, for example, the volume of U.S. imports of boneless beef from Japan—reported to be entirely fresh/chilled, as opposed to frozen—averaged a little less than 9 metric tons per year. This amount was less than 0.005 percent of average annual U.S. imports of fresh/chilled boneless beef worldwide for the same period (202,540 metric tons).[16] The average annual value of U.S. imports of boneless beef from Japan over this 4-year period was $808,000, less than 0.2 percent of the 4-year average annual value of U.S. imports of fresh/chilled boneless beef from all regions ($600 million). Including frozen boneless beef in the comparison over the same 4-year period diminishes Japan's annual average percentage share all the more, to about 0.001 percent of the quantity and about 0.05 percent of the value of all U.S. boneless beef imports. This impact would be further reduced if Japan's share of the U.S. total beef supply (domestic production plus imports minus exports, disregarding carryover stocks) were considered.

Based on the unit price of beef imported into the United States from Japan prior to the 2001 ban on the importation of ruminants and most ruminant products from Japan, it is assumed that all of the boneless beef imported from Japan prior to the ban was Wagyu beef. (The term ''Wagyu,'' which literally translates to Japanese cattle, refers to purebred Japanese Black or Japanese Brown breeds of cattle. Wagyu beef is a high-priced specialty meat widely acclaimed for its flavor and tenderness. ''Kobe beef'' refers to Wagyu beef that is produced in the Kobe area of Japan.) Japan also produces Holstein breed dairy cattle, but it is unlikely that Japan would try to compete in the U.S. import market for lower-grade beef from culled dairy cattle. Accordingly, we expect only Wagyu beef to be imported under the final rule.

We expect that Japan will continue to be a minor supplier of beef to the United States after this final rule becomes effective. We estimate that the volume of imports is likely to range between about 8 metric tons and 15 metric tons per year, a quantity aligned with import levels in the years immediately prior to the ban. There are three reasons for the small import volume. First, the demand for Japanese Wagyu beef in the United States will likely be small, because the beef is expensive. In October 2004, for example, the average actual selling price of Wagyu sirloin in Japanese supermarkets was just under $50 per pound.[17] The price of Japanese Wagyu beef would be higher in the United States because of transportation and other costs associated with the importation of the beef from Japan.

Second, Japanese agricultural officials have indicated to APHIS staff that they expect the volume of Wagyu exports to the United States to be approximately 10 metric tons per year. This quantity aligns with historic import levels, as described above, and would be well below the annual tariff rate quota for Japan of 200 metric tons.[18] Over the 10-year period from 1991 to 2000, U.S. imports of boneless beef—both fresh/chilled and frozen—from Japan never exceeded 27.0 metric tons in any one year.

Finally, Japan's boneless beef exports to countries other than the United States have also been minor. Over the 4-year period 1997–2000, Japan's exports of boneless beef to the world—both fresh/chilled and frozen—averaged only 81 metric tons per year, and the largest export volume in any one of those years was 95 metric tons (in 1999). For fresh/chilled boneless beef alone, the 4-year annual average was 37 metric tons, with no one year exceeding 47 metric tons.[19]

Because we expect that Japan will export only Wagyu beef under this final rule, this action has the potential to affect farmers and ranchers in the United States who raise Wagyu and Wagyu hybrid cattle for the high-end domestic beef market. However, the impact, if any, on these so-called ''Kobe-style'' beef producers is unclear, without an approximation of the quantity of Kobe-style beef sold in the United States and information on the extent to which the two products would directly compete. The number of these producers is unknown, but it is believed to be very small.

Cost-Benefit Analysis

Given the high price and small quantity of Wagyu beef expected to be imported, this final rule is likely to have little impact for most U.S. consumers. A relatively small segment of beef consumers will benefit because they would be allowed, once again, to buy this product in the United States. Importers, brokers and others in the United States who will participate in the importation of Wagyu beef from Japan also stand to benefit, due to the increased business activity.

U.S. beef producers, in general, will not be affected by this final rule; demand is expected to remain low reflecting pre-ban consumption patterns, with a minor impact on less expensive domestically produced beef. Any producer impact of the rule will likely fall upon producers of Kobe-style beef, and then only to the extent that the commodities will be competing for the same niche market.

In general, trade of a commodity increases social welfare. To the extent that consumer choice is broadened and the increased supply of the imported commodity leads to a price decline, gains in consumer surplus will outweigh losses in domestic producer surplus.[20] Although the rule's impact on

[15] A copy of the full economic analysis is available for review on the Regulations.gov Web site. Go to *http://www.regulations.gov,* click on the ''Advanced Search'' tab and select ''Docket Search.'' In the Docket ID field, enter APHIS–2005–0073 then click on ''Submit.'' The economic analysis will appear near the end of the resulting list of documents.

[16] Trade statistics, unless otherwise indicated, are taken from the World Trade Atlas or the Global Trade Atlas (Global Trade Information Services), which report data from the Department of Commerce, U.S. Bureau of the Census. The Harmonized Tariff Schedule (HTS) 6-digit code for fresh/chilled boneless beef cuts is 020130; the HTS code for frozen boneless beef is 020230.

[17] Source: ''Monthly Statistics,'' January 2005, Agricultural & Livestock Industries Corporation. The selling price was calculated using an exchange rate of 105 yen per U.S. dollar, and it is the price for Wagyu sirloin from all regions in Japan, including Kobe.

[18] Harmonized Tariff Schedule of the United States (2005), Chapter 2, Meat and Edible Meat Offal.

[19] Foreign Agricultural Service, USDA.

[20] Consumer surplus is the difference between the amount a consumer is willing to pay for a good and

Continued

the relatively small number of U.S. producers of Kobe-style beef is uncertain, it is expected to provide benefits to consumers (domestic importers, wholesalers, retailers, as well as final consumers) that will exceed any potential losses to domestic producers. The net welfare effect for the United States of reestablished Wagyu beef imports from Japan will be positive.

Effects on Small Entities

We do not expect that this final rule will have significant economic impact on a substantial number of small entities. As discussed above, this rule has the potential to primarily affect farmers and ranchers in the United States who produce Kobe-style beef. The number of these producers is unknown, but it is believed to be very small. The American Wagyu Association, a Wagyu breeder group, lists approximately 75 members in the United States.[21]

The size distribution of Kobe-style beef producers in the United States is also unknown, but it is reasonable to assume that most are small, under the U.S. Small Business Administration's (SBA) standards. This assumption is based on composite data for all beef producers in the United States. In 2002, there were 664,431 U.S. farms in North American Industry Classification System (NAICS) 112111, a classification comprised of establishments primarily engaged in raising cattle. Of the 664,431 farms, 659,009 (or 99 percent) had annual receipts that year of less than $500,000.[22] The SBA's small entity threshold for farms in NAICS 112111 is annual receipts of $750,000.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

National Environmental Policy Act

An environmental assessment and finding of no significant impact have been prepared for this final rule. The environmental assessment provides a basis for the conclusion that the importation of whole cuts of boneless beef from Japan under the conditions specified in this rule will not have a significant impact on the quality of the human environment. Based on the finding of no significant impact, the Administrator of the Animal and Plant Health Inspection Service has determined that an environmental impact statement need not be prepared.

The environmental assessment and finding of no significant impact were 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).

The environmental assessment and finding of no significant impact may be viewed on the Internet at *http://www.regulations.gov*. Go to *http://www.regulations.gov*, click on the ''Advanced Search'' tab and select ''Docket Search.'' In the Docket ID field, enter APHIS–2005–0073 then click on ''Submit.'' The environmental assessment and finding of no significant impact will appear near the end of the resulting list of documents. Copies of the environmental assessment and finding of no significant impact are also available for public inspection at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect copies are requested to call ahead on (202) 690–2817 to facilitate entry into the reading room. In addition, copies may be obtained by writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**.

Paperwork Reduction Act

This final rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 9 CFR Part 94

Animal diseases, Imports, Livestock, Meat and meat products, Milk, Poultry and poultry products, Reporting and recordkeeping requirements.

■ Accordingly, we are amending 9 CFR part 94 as follows:

PART 94—RINDERPEST, FOOT-AND-MOUTH DISEASE, FOWL PEST (FOWL PLAGUE), EXOTIC NEWCASTLE DISEASE, AFRICAN SWINE FEVER, CLASSICAL SWINE FEVER, AND BOVINE SPONGIFORM ENCEPHALOPATHY: PROHIBITED AND RESTRICTED IMPORTATIONS

■ 1. The authority citation for part 94 continues to read as follows:

Authority: 7 U.S.C. 450, 7701–7772, 7781–7786, and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

■ 2. In § 94.18, paragraph (b) is revised to read as follows:

§ 94.18 Restrictions on importation of meat and edible products from ruminants due to bovine spongiform encephalopathy.

* * * * *

(b) Except as provided in paragraph (d) of this section or in §§ 94.19 or 94.27, the importation of meat, meat products, and edible products other than meat (except for gelatin as provided in paragraph (c) of this section, milk, and milk products) from ruminants that have been in any of the regions listed in paragraph (a) of this section is prohibited.

* * * * *

■ 3. A new § 94.27 is added to read as follows:

§ 94.27 Importation of whole cuts of boneless beef from Japan.

Notwithstanding any other provisions of this part, whole cuts of boneless beef derived from cattle that were born, raised, and slaughtered in Japan may be imported into the United States under the following conditions:

(a) The beef is prepared in an establishment that is eligible to have its products imported into the United States under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*) and the regulations in 9 CFR 327.2 and the beef meets all other applicable requirements of the Federal Meat Inspection Act and regulations thereunder (9 CFR chapter III), including the requirements for removal of SRMs and the prohibition on the use of air-injection stunning devices prior to slaughter on cattle from which the beef is derived.

(b) The beef is derived from cattle that were not subjected to a pithing process at slaughter.

(c) An authorized veterinary official of the Government of Japan certifies on an original certificate that the above conditions have been met.

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the amount actually paid. Producer surplus is the amount a seller is paid for the good minus the seller's cost.

[21] Source: American Wagyu Association Web site.

[22] 2002 Census of Agriculture, National Agricultural Statistics Service.

Done in Washington, DC, this 12th day of December 2005.

Charles D. Lambert,

Acting Under Secretary for Marketing and Regulatory Programs.

[FR Doc. 05–24057 Filed 12–12–05; 11:30 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–23252; Directorate Identifier 2004–NM–146–AD; Amendment 39–14414; AD 2005–25–21]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A330–243, –341, –342, and –343 Airplanes Equipped with Rolls-Royce RB211 TRENT 700 Engines

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

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus Model A330–243, –341, –342, and –343 airplanes equipped with Rolls-Royce RB211 TRENT 700 engines. This AD requires modifying the cowl assemblies of the left- and right-hand thrust reversers. This AD results from a review of certification tests of the thrust reverser, which revealed that certain structural components within the C-duct need strengthening to meet high fatigue loads and maintain structural integrity. We are issuing this AD to prevent fatigue cracking of the hinges integrated into the 12 o'clock beam of the thrust reversers, which could result in separation of a thrust reverser from the airplane, and consequent reduced controllability of the airplane.

DATES: This AD becomes effective December 29, 2005.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of December 29, 2005.

We must receive comments on this AD by February 13, 2006.

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

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, room PL–401, Washington, DC 20590.
- Fax: (202) 493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for the service information identified in this AD.

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

SUPPLEMENTARY INFORMATION:

Discussion

The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, notified us that an unsafe condition may exist on certain Airbus Model A330–243, –341, –342, and –343 airplanes equipped with Rolls-Royce RB211 TRENT 700 engines. The DGAC advises that a review of certification tests of the thrust reverser revealed that certain structural components within the C-duct need strengthening to meet high fatigue loads and maintain structural integrity. Unexpected high loads were measured on the hinges integrated into the 12 o'clock beam of the thrust reverser; the 12 o'clock beam forms the upper edge of the C-duct of the thrust reverser on Rolls-Royce engines. This condition, if not corrected, could result in fatigue cracking of the hinges integrated into the 12 o'clock beam of the thrust reversers, separation of a thrust reverser from the airplane, and consequent reduced controllability of the airplane.

Relevant Service Information

Airbus has issued Service Bulletin A330–78–3010, Revision 03, dated April 28, 2004. The service bulletin describes procedures for modifying the cowl assemblies of the left- and right-hand thrust reversers. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. The DGAC mandated the service information and issued French airworthiness directive F–2001–528 R2, dated June 23, 2004, to ensure the continued airworthiness of these airplanes in France.

The service bulletin refers to Rolls-Royce Service Bulletin RB.211–78–C899, Revision 3, dated May 7, 2004, as an additional source of service information for modifying the cowl assemblies of the left- and right-hand thrust reversers. The modification includes related investigative actions, and repair if necessary. The related investigative actions include certain inspections for discrepancies of the bores, bushings, plug holes, and cavity webs of the thrust reversers.

FAA's Determination and Requirements of This AD

These airplane models are manufactured in France and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. We have examined the DGAC's findings, evaluated all pertinent information, and determined that we need to issue an AD for products of this type design that are certificated for operation in the United States.

Therefore, we are issuing this AD to prevent fatigue cracking of the hinges integrated into the 12 o'clock beam of the thrust reversers, which could result in separation of a thrust reverser from the airplane, and consequent reduced controllability of the airplane. This AD requires accomplishing the actions specified in the Airbus service information described previously except as discussed under ''Difference Among the AD, French Airworthiness Directive, and Airbus Service Information.''

Difference Among the AD, French Airworthiness Directive, and Airbus Service Information

The French airworthiness directive and the service information specify a modification that involves replacement of certain thrust reverser C-ducts with new ducts at or before specific total flight cycle thresholds. This AD requires you to replace the affected parts before the accumulation of those thresholds or within 6 months after the effective date of the AD, whichever is later. A table containing those flight cycle thresholds is specified in paragraph (f) of this AD. We have included a 6-month grace period to ensure that any airplane that is close to or has passed its applicable threshold (if imported and placed on the U.S. Register) is not grounded as of the effective date of the AD.

Costs of Compliance

None of the airplanes affected by this action are on the U.S. Register. All airplanes affected by this AD are currently operated by non-U.S. operators under foreign registry; therefore, they are not directly affected by this AD action. However, we consider this AD necessary to ensure that the unsafe condition is addressed if any affected airplane is imported and placed on the U.S. Register in the future.

If an affected airplane is imported and placed on the U.S. Register in the future, the required modification would take about 1 work hour per airplane, at an average labor rate of $65 per work hour. Based on these figures, the estimated cost of the modification would be $65 per airplane.

FAA's Determination of the Effective Date

No airplane affected by this AD is currently on the U.S. Register. Therefore, providing notice and opportunity for public comment is unnecessary before this AD is issued, and this AD may be made effective in less than 30 days after it is published in the **Federal Register**.

Comments Invited

This AD is a final rule that involves requirements that affect flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to submit any relevant written data, views, or arguments regarding this AD. Send your comments to an address listed in the **ADDRESSES** section. Include ''Docket No. FAA–2005–23252; Directorate Identifier 2004–NM–146–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the AD that might suggest a need to modify it.

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

Examining the Docket

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

Authority for This Rulemaking

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

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

For the reasons discussed above, I certify that the regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2005–25–21 Airbus: Amendment 39–14414. Docket No. FAA–2005–23252; Directorate Identifier 2004–NM–146–AD.

Effective Date

(a) This AD becomes effective December 29, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A330–243, –341, –342, and –343 airplanes, certificated in any category; equipped with Rolls-Royce RB211 TRENT 700 engines.

Unsafe Condition

(d) This AD results from a review of certification tests of the thrust reverser, which revealed that certain structural components within the C-duct need strengthening to meet high fatigue loads and maintain structural integrity. The FAA is issuing this AD to prevent fatigue cracking of the hinges integrated into the 12 o'clock beam of the thrust reversers, which could result in separation of a thrust reverser from the airplane, and consequent reduced controllability of the airplane.

Compliance

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

Modification

(f) At the applicable compliance time specified in Table 1 of this AD: Modify the cowl assemblies of the left- and right-hand thrust reversers in accordance with Airbus Service Bulletin A330–78–3010, Revision 03, dated April 28, 2004.

TABLE 1.—MODIFICATION (PART REPLACEMENT) THRESHOLDS

Replace part number—	At the later of the times specified—	
(1) 3410L, 3410R, 3411L, 3411R, 3412R, 3413R.	(i) Before the accumulation of 10,000 total flight cycles since the C-duct was new.	(ii) Within 6 months after the effective date of this AD.
(2) 3414L, 3416R, 3417R	(i) For airplanes modified according to Airbus Service Bulletin A330–78–3010 with more than 7,200 total flight cycles since the C-duct was new: Before the accumulation of 10,000 total flight cycles since the C-duct was new. (ii) For airplanes modified according to Airbus Service Bulletin A330–78–3010 with less than or equal to 7,200 total flight cycles since the C-duct was new: Before the accumulation of 25,000 total flight cycles since the C-duct was new.	(iii) Within 6 months after the effective date of this AD.
(3) 3414L, 3416R, 3417R	(i) For airplanes modified in production by Airbus Modification 47316: Before the accumulation of 25,000 total flight cycles since the C-duct was new.	(ii) Within 6 months after the effective date of this AD.
(4) 3412L, 3414R	(i) For airplanes modified in production by Airbus Modification 46879: Before the accumulation of 25,000 total flight cycles since the C-duct was new.	(ii) Within 6 months after the effective date of this AD.
(5) 3413L, 3415R	(i) Before the accumulation of 40,000 total flight cycles since the C-duct was new.	(ii) Within 6 months after the effective date of this AD.

Note 1: Airbus Service Bulletin A330–78–3010, Revision 03, dated April 28, 2004, refers to Rolls-Royce Service Bulletin RB.211–78–C899, Revision 3, dated May 7, 2004, as an additional source of service information for modifying the cowl assemblies of the left- and right-hand thrust reversers.

Parts Installation

(g) As of the effective date of this AD, no person may install, on any airplane, a cowl assembly of the left- or right-hand thrust reverser if the airplane has exceeded the applicable flight cycle threshold specified in Table 1 of this AD.

Alternative Methods of Compliance (AMOCs)

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

Related Information

(i) French airworthiness directive F–2001–528 R2, dated June 23, 2004, also addresses the subject of this AD.

Material Incorporated by Reference

(j) You must use Airbus Service Bulletin A330–78–3010, Revision 03, dated April 28, 2004, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov;* or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on December 2, 2005.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–23902 Filed 12–13–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–22561; Directorate Identifier 2005–NM–136–AD; Amendment 39–14409; AD 2005–25–16]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model ERJ 170 Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain EMBRAER Model ERJ 170 airplanes. This AD requires doing a general visual inspection of the passenger seat track attachments to determine if the attachment rod is installed and to check the torque value of the attachment bolts, and doing any corrective actions if necessary. This AD results from the finding of missing rods, which attach the passenger seat tracks to the airplane structure to absorb loads. We are issuing this AD to detect and correct missing attachment rods, which could result in reducing the ability of the seat to withstand a hard landing or rejected takeoff and possible injury to passengers.

DATES: This AD becomes effective January 18, 2006.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of January 18, 2006.

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

Contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil, for service information identified in this AD.

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1175; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Examining the Docket

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

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to certain EMBRAER Model ERJ 170 airplanes. That NPRM was published in the **Federal Register** on September 19, 2005 (70 FR 57215). That NPRM proposed to require doing a general visual inspection of the passenger seat track attachments to determine if the attachment rod is installed and to check the torque value of the attachment bolts, and doing any corrective actions if necessary.

Comments

We provided the public the opportunity to participate in the development of this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

This AD affects about 43 airplanes of U.S. registry. The inspection takes about 1 work hour per airplane, at an average labor rate of $65 per work hour. Based on these figures, the estimated cost of the AD for U.S. operators is $2,795, or $65 per airplane.

The modification, if necessary, takes about 2 work hours per airplane, at an average labor rate of $65 per work hour. Required parts are about $860 per airplane. Based on these figures, the estimated cost of the modification is $990 per airplane, if necessary.

Authority for This Rulemaking

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

We are issuing this rulemaking under the authority described in subtitle VII, part A, subpart III, section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2005–25–16 Empresa Brasileira de Aeronautica S.A. (EMBRAER): Amendment 39–14409. Docket No. FAA–2005–22561; Directorate Identifier 2005–NM–136–AD.

Effective Date

(a) This AD becomes effective January 18, 2006.

Affected ADs

(b) None.

Applicability

(c) This AD applies to EMBRAER Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU airplanes, certificated in any category; having serial numbers 17000007 through 17000013 inclusive, 17000015, 17000016, and 17000018 through 17000043 inclusive.

Unsafe Condition

(d) This AD results from the finding of missing rods, which attach the passenger seat tracks to the airplane structure to absorb loads. We are issuing this AD to detect and correct missing attachment rods, which could result in reducing the ability of the seat to withstand a hard landing or rejected takeoff and possible injury to passengers.

Compliance

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

Inspection and Modification if Necessary

(f) Within 700 flight hours after the effective date of this AD, do a general visual inspection of the passenger seat track attachments to determine if the attachment rod is installed and to check the torque value of the attachment bolts, and do any applicable corrective actions, by accomplishing all of the applicable actions specified in the Accomplishment Instructions of EMBRAER Service Bulletin 170–53–0010, dated January 12, 2005. Do any applicable corrective actions before further flight.

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

Alternative Methods of Compliance (AMOCs)

(g)(1) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with 14 CFR 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Material Incorporated by Reference

(h) You must use EMBRAER Service Bulletin 170–53–0010, dated January 12, 2005, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil, for a copy

of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov;* or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on December 2, 2005.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–23903 Filed 12–13–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–22402; Directorate Identifier 2005–NM–133–AD; Amendment 39–14411; AD 2005–25–18]

RIN 2120–AA64

Airworthiness Directives; Sabreliner Model NA–265, NA–265–20, NA–265–30, NA–265–40, NA–265–50, NA–265–60, NA–265–65, NA–265–70, and NA–265–80 Series Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is superseding an existing airworthiness directive (AD), which applies to certain Sabreliner Model NA–265–40, NA–265–50, NA–265–60, NA–265–70, and NA–265–80 series airplanes. That AD currently requires repetitive inspections for discrepancies in the front and rear spars of the wing in the area of the wing center section, and in the lugs on the rear spar and wing trailing edge panel rib, and corrective actions if necessary. This new AD expands the applicability of the existing AD and requires new repetitive inspections for fuel leaks of the front and rear spars of the wing, and for discrepancies in the front and rear spars of the wing in the area of the wing center section, and in the lugs on the rear spar and wing trailing edge panel rib. This AD also requires related investigative and corrective actions, if necessary. This AD results from reports of cracking in the upper and lower flanges of the front and rear spars of the wing near the wing center section, and in the lugs on the rear spar. We are issuing this AD to detect and correct cracking or other discrepancies in these areas, which could result in structural failure of the wing.

DATES: This AD becomes effective January 18, 2006.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of January 18, 2006.

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

Contact Sabreliner Corporation, 18118 Chesterfield Airport Road, Chesterfield, Missouri 63005–1121, for service information identified in this AD.

FOR FURTHER INFORMATION CONTACT: T.N. Baktha, Aerospace Engineer, Airframe Branch, ACE–118W, FAA, Wichita Aircraft Certification Office, 1801 Airport Road, room 100, Mid-Continent Airport, Wichita, Kansas 67209; telephone (316) 946–4155; fax (316) 946–4407.

SUPPLEMENTARY INFORMATION:

Examining the Docket

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

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that supersedes AD 73–18–03, amendment 39–3201 (43 FR 19208, May 4, 1978). The existing AD applies to certain Rockwell International Model NA–265–40, NA–265–50, NA–265–60, NA–265–70, and NA–265–80 series airplanes. That NPRM was published in the **Federal Register** on September 14, 2005 (70 FR 54318). (A correction of that NPRM was published in the **Federal Register** on September 30, 2005 (70 FR 57222).) That NPRM proposed to expand the applicability of the existing AD and require new repetitive inspections for fuel leaks of the front and rear spars of the wing, and for discrepancies in the front and rear spars of the wing in the area of the wing center section, and in the lugs on the rear spar and wing trailing edge panel rib. That NPRM also proposed to require related investigative and corrective actions, if necessary.

Comments

We provided the public the opportunity to participate in the development of this AD. No comments have been received on the NPRM or on the determination of the cost to the public.

Clarification of Alternative Method of Compliance (AMOC) Paragraph

We have revised this action to clarify the appropriate procedure for notifying the principal inspector before using any approved AMOC on any airplane to which the AMOC applies.

Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD with the change described previously. We have determined that this change will neither increase the economic burden on any operator nor increase the scope of the AD.

Costs of Compliance

There are about 77 airplanes of the affected design in the worldwide fleet. This AD affects about 43 airplanes of U.S. registry.

The inspection specified in this AD takes about 12 work hours per airplane, per inspection cycle, at an average labor rate of $65 per work hour. Based on these figures, the estimated cost of the actions specified in this AD for U.S. operators is $33,540, or $780 per airplane, per inspection cycle.

Authority for This Rulemaking

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

We are issuing this rulemaking under the authority described in subtitle VII, part A, subpart III, section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–3201 (43 FR 19208, May 4, 1978) and by adding the following new airworthiness directive (AD):

2005–25–18 Sabreliner Corporation: Amendment 39–14411. Docket No. FAA–2005–22402; Directorate Identifier 2005–NM–133–AD.

Effective Date

(a) This AD becomes effective January 18, 2006.

Affected ADs

(b) This AD supersedes AD 73–18–03.

Applicability

(c) This AD applies to Sabreliner Model NA–265, NA–265–20, NA–265–30, NA–265–40, NA–265–50, NA–265–60, NA–265–65, NA–265–70, and NA–265–80 series airplanes; certificated in any category; as identified in Sabreliner NA–265 Service Bulletin 83–2, revised January 31, 2005.

Unsafe Condition

(d) This AD results from reports of cracking in the upper and lower flanges of the front and rear spars of the wing near the wing center section, and in the lugs on the rear spar. The FAA is issuing this AD to detect and correct cracking or other discrepancies in these areas, which could result in structural failure of the wing.

Compliance

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

Requirements of AD 73–18–03

Repetitive Inspections

(f) For the airplanes listed in Table 1 of this AD: On or before June 18, 1974, unless previously accomplished within 1 year, and at intervals not to exceed 2 years thereafter until the first inspection in accordance with paragraph (j) of this AD has been done, inspect the upper and lower flanges of the front and rear spars in the area of the wing center section, and the lugs on the rear spar and wing trailing edge panel rib, per the instructions of Sabreliner NA–265 Service Bulletin 73–11, revised June 1, 1978; or an equivalent inspection approved by the Manager, Wichita Aircraft Certification Office (ACO), FAA. Inspections done before the effective date of this AD in accordance with Sabreliner NA–265 Service Bulletin 73–11, dated June 15, 1973, are acceptable for compliance with this paragraph.

TABLE 1.—AIRPLANES SUBJECT TO PARAGRAPHS (f), (g), AND (h) OF THIS AD

Model	Affected serial numbers
NA–265–40 ..	282–1 and subsequent.
NA–265–50 ..	287–1.
NA–265–60 ..	306–1 through 306–139 inclusive.
NA–265–70 ..	370–1 through 370–9 inclusive.
NA–265–80 ..	380–1 through 380–61 inclusive.

Corrective Actions

(g) For the airplanes listed in Table 1 of this AD: Prior to further flight, if cracks, corrosion, or breaks in the surface finish are found, during any inspection in accordance with paragraph (f) of this AD, in the front or rear spars in the area of the wing center section, replace with like serviceable parts, or repair in a manner approved by the Manager, Wichita ACO.

(h) For the airplanes listed in Table 1 of this AD: Prior to further flight, if cracks are found, during any inspection in accordance with paragraph (f) of this AD, in the lugs on the rear spar and wing trailing edge rib, replace the cracked parts with like serviceable parts, or repair in a manner approved by the Manager, Wichita ACO.

New Requirements of This AD

Inspections/Repairs Accomplished Previously

(i) Inspections and repairs accomplished before the effective date of this AD in accordance with a method approved by the Chief, Aircraft Engineering Division, FAA Western Region, are acceptable for compliance with paragraphs (f), (g), and (h) of this AD, as applicable.

New Repetitive Inspections

(j) Within 90 days after the effective date of this AD, except as provided by paragraph (j)(1) of this AD: Perform a general visual inspection for fuel leaks; an inspection using a borescope to detect any break in the surface finish, corrosion, or cracking of the upper and lower flanges on the front and rear spars of the wing in the area of the wing center section; a general visual inspection to detect cracking of the lugs on the rear spar and wing trailing edge panel rib; and related investigative actions, as applicable; by doing all applicable actions in accordance with the instructions of Sabreliner NA–265 Service Bulletin 83–2, revised January 31, 2005. Repeat the inspection thereafter at intervals not to exceed 24 months.

(1) If the inspection required by paragraph (j) of this AD has been accomplished within 12 months before the effective date of this AD, the inspection required by paragraph (j) of this AD is not required until 24 months after the most recent inspection in accordance with the requirements of paragraph (j) of this AD.

(2) For airplanes subject to paragraph (f) of this AD: Accomplishing of the initial inspection required by paragraph (j) of this AD terminates the requirements of paragraph (f) of this AD.

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

Corrective Actions

(k) If any fuel leak, break in the surface finish, corrosion, or cracking is found during any inspection required by paragraph (j) of this AD: Before further flight, replace the subject part with a new or serviceable part, or repair the subject part in accordance with a method approved by the Manager, Wichita ACO. Where Sabreliner NA–265 Service Bulletin 83–2, revised January 31, 2005, specifies contacting Sabreliner for an engineering analysis: Before further flight, repair in accordance with a method approved by the Manager, Wichita ACO. For a repair method to be approved by the Manager, Wichita ACO, as required by this paragraph,

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

Actions Accomplished Previously

(l) Inspections and corrective actions accomplished before the effective date of this AD in accordance with the original issue of Sabreliner NA–265 Service Bulletin 83–2, dated March 4, 1983; or Sabreliner NA–265 Service Bulletin 83–2, revised February 29, 1996; are acceptable for compliance with the corresponding actions required by paragraphs (j) and (k) of this AD.

No Reporting Requirement

(m) Although the service bulletins referenced in this AD specify to submit certain information to the manufacturer, this AD does not include that requirement.

Alternative Methods of Compliance (AMOCs)

(n)(1) The Manager, Wichita ACO, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with 14 CFR 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Material Incorporated by Reference

(o) You must use Sabreliner NA–265 Service Bulletin 73–11, revised June 1, 1978; or Sabreliner NA–265 Service Bulletin 83–2, revised January 31, 2005; to perform the actions that are required by this AD, unless the AD specifies otherwise. Sabreliner NA–265 Service Bulletin 73–11, revised June 1, 1978, contains the following effective pages:

Page No.	Date shown on page
1	June 1, 1978.
2–14	June 15, 1973.

The Director of the Federal Register approved the incorporation by reference of these documents in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Sabreliner Corporation, 18118 Chesterfield Airport Road, Chesterfield, Missouri 63005–1121, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov;* or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on December 2, 2005.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–23904 Filed 12–13–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–23251; Directorate Identifier 2002–NM–20–AD; Amendment 39–14413; AD 2005–25–20]

RIN 2120–AA64

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

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

ACTION: Final rule; request for comments.

SUMMARY: The FAA is superseding an existing airworthiness directive (AD), which applies to certain Airbus Model A330–300, A340–200, and 340–300 series airplanes. The existing AD requires repetitive inspections to detect cracking of the fuselage skin in the area of the VHF2 antenna, and repair if necessary. The existing AD also provides for optional terminating action for the repetitive inspections. This new AD requires accomplishment of the previously optional terminating action, and revises the applicability by removing certain airplanes. This AD is prompted by the need to change the applicability of the existing AD and to mandate the formerly optional terminating action. We are issuing this AD to prevent cracking of the fuselage skin in the area of the VHF2 antenna, which could result in depressurization of the airplane.

DATES: Effective December 29, 2005.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 29, 2005.

The incorporation by reference of certain other publications, as listed in the regulations, was approved previously by the Director of the Federal Register as of April 12, 2000 (65 FR 12075, March 8, 2000).

We must receive comments on this AD by February 13, 2006.

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

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, room PL–401, Washington, DC 20590.
- Fax: (202) 493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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

You can examine the contents of this AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., room PL–401, on the plaza level of the Nassif Building, Washington, DC. This docket number is FAA–2005–23251; the directorate identifier for this docket is 2002–NM–20–AD.

Examining the Docket

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

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

SUPPLEMENTARY INFORMATION: On February 29, 2000, the FAA issued AD 2000–05–04, amendment 39–11613 (65 FR 12075, March 8, 2000). That AD applies to certain Airbus Model A330 and A340 series airplanes and requires repetitive inspections to detect cracking of the fuselage skin in the area of the VHF2 antenna, and repair if necessary. That AD also provides for optional terminating action for the repetitive inspections. That action was prompted by issuance of mandatory continuing

airworthiness information by the French civil aviation authority. We issued that AD to detect and correct such cracking, which could result in depressurization of the airplane.

Actions Since Issuance of Previous Rule

Since we issued AD 2000–05–04, the Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, has revised the parallel French airworthiness directives to exclude airplanes that have been modified by Airbus Modification 46025, 46849, or 46900; and to mandate the previously optional terminating action.

Explanation of Relevant New Service Information

Airbus has issued the following service bulletins:

SERVICE INFORMATION

Airbus Service Bulletin—	Describes procedures for repetitive detailed inspections of—	Which could be eliminated by the modification specified in—		
		Airbus Service Bulletin—	Revision—	Dated—
A330–53–3094, Revision 03, dated February 22, 2001; and Revision 04, dated July 23, 2001.	Model A330–300 series airplanes.	A330–53–3097	02	November 21, 2000.
A340–53–4105, Revision 03, dated February 22, 2001, and Revision 04, dated July 23, 2001.	Model A340 series airplanes.	A340–53–4108	02	December 6, 2000.

The revised service bulletins for the terminating modification are essentially the same: They remove certain life limits, but add no new procedures. The DGAC classified Service Bulletins A330–53–3097 and A340–53–4108 as mandatory and issued French airworthiness directives 2001–041(B) and 2001–040(B), both dated January 24, 2001, to ensure the continued airworthiness of these airplanes in France.

Airbus has also issued Service Bulletins A330–53–3112 and A340–53–4124, both dated February 15, 2001, which describe procedures for relocating the VHF2 antenna between stringer 51 and stringer 52, away from the outlet air flow of the air conditioning packs. These service bulletins provide for alternative procedures to those specified in Service Bulletins A330–53–3097 and A340–53–4108 to eliminate the need for the repetitive inspections. The DGAC has approved Service Bulletins A330–53–3112 and A340–53–4124 and considers them optional terminating action for the repetitive inspections.

FAA's Determination and Requirements of This AD

These airplane models are manufactured in France and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. According to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. We have examined the DGAC's findings, evaluated all pertinent information, and determined that we need to issue an AD for products of this type design that are certificated for operation in the United States.

For this reason, we are issuing this AD to supersede AD 2000–05–04. This AD retains the requirements of the existing AD, requires accomplishment of the previously optional terminating action, and adds an alternative terminating action. This AD removes certain airplanes from the applicability of the existing AD. The actions are required to be done in accordance with the service bulletins described previously, except as described below.

Additional Changes to AD

We have made the following additional changes to the AD:

1. We revised the applicability in this AD by updating the service bulletin references to match the applicability of the corresponding French airworthiness directives.

2. The FAA has changed all references to a ''detailed visual inspection'' in the existing AD to ''detailed inspection'' in this new AD. Note 1 in this AD defines that inspection.

3. We have reviewed the figures we have used over the past several years to calculate AD costs to operators. To account for various inflationary costs in the airline industry, we find it necessary to increase the labor rate used in these calculations from $60 per work hour to $65 per work hour. The cost impact information, below, reflects this increase in the specified hourly labor rate.

4. Since we issued AD 2000–05–04, the type certificate data sheet for affected airplanes has been updated. We have revised the applicability of this AD accordingly.

Differences Between AD and Service Bulletins

The revised service bulletins provide repair procedures for cracks up to 14.17 inches. However, no data have been presented that would justify the acceptability of the increased crack length. This AD requires that operators contact the FAA or DGAC for repair instructions of cracks exceeding 9.45 inches.

Costs of Compliance

None of the airplanes affected by this action are on the U.S. Register. All airplanes affected by this AD are currently operated by non-U.S. operators under foreign registry; therefore, they are not directly affected by this AD action. However, we consider this AD necessary to ensure that the unsafe condition is addressed if any affected airplane is imported and placed on the U.S. Register in the future.

The following table provides the estimated costs to comply with this AD for any affected airplane that might be imported and placed on the U.S. Register in the future.

ESTIMATED COSTS

Action	Applicable Airbus Service Bulletin	Work hours	Hourly labor rate (dollars)	Parts cost (dollars)	Cost per airplane (dollars)
Inspection	A330–53–3094 or A340–53–4105	6	65	None required	390, per inspection cycle.
Fuselage skin reinforcement.	A330–53–3097 or A340–53–4108	107	65	0	6,955.
Antenna relocation	A330–53–3112 or A340–53–4124	109	65	2,850	9,935.

FAA's Determination of the Effective Date

No airplane affected by this AD is currently on the U.S. Register. Therefore, providing notice and opportunity for public comment is unnecessary before this AD is issued, and this AD may be made effective in less than 30 days after it is published in the **Federal Register**.

Comments Invited

Although this is a final rule that was not preceded by notice and an opportunity for public comment, we invite you to submit any relevant written data, views, or arguments regarding this AD. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2005–23251; Directorate Identifier 2002–NM–20–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the AD. We will consider all comments received by the closing date and may amend the AD in light of those comments.

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

Authority for This Rulemaking

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

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

For the reasons discussed above, I certify that the regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing amendment 39–11613 (65 FR 12075, March 8, 2000) and adding the following new airworthiness directive (AD):

2005–25–20 Airbus: Amendment 39–14413. Docket No. FAA–2005–23251; Directorate Identifier 2002–NM–20–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective December 29, 2005.

Affected ADs

(b) This AD supersedes AD 2000–05–04.

Applicability

(c) This AD applies to the airplanes, certificated in any category, listed in Table 1 of this AD.

TABLE 1.—APPLICABILITY

Model—	Except those modified in accordance with any applicable service information listed below:		
	Airbus Service Bulletin—		Or Airbus production modification—
Airbus Model A330–301, –321, –322, –323, –341, –342, and –343 airplanes.	A330–53–3097, Revision 02, dated November 21, 2000 (Airbus Modification 46025).	A330–53–3112, dated February 15, 2001 (Airbus Modification 46849).	46900.
Airbus Model A340–211, –212, and –213 airplanes, and Airbus Model A340–311, –312, and –313 airplanes.	A340–53–4108, Revision 02, dated December 6, 2000 (Airbus Modification 46025).	A340–53–4124, dated February 15, 2001 (Airbus Modification 46849).	46900.

Unsafe Condition

(d) This AD was prompted by the need to change the applicability of the existing AD and to mandate the formerly optional terminating action. We are issuing this AD to prevent cracking of the fuselage skin in the area of the VHF2 antenna, which could result in depressurization of the airplane.

Compliance

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

Restatement of Requirements of AD 2000–05–04

Detailed Inspection

(f) At the latest of the times specified in paragraphs (f)(1), (f)(2), (f)(3), and (f)(4) of this AD, as applicable: Perform a detailed inspection (without removal of the VHF2 antenna) of the fuselage skin aft of frame 54, between the airplane centerline and stringer 56R in the area of the VHF2 antenna to detect cracks, in accordance with Airbus Service Bulletin A330–53–3094, Revision 02, dated May 28, 1998, Revision 03, dated February 22, 2001, or Revision 04, dated July 23, 2001 (for Model A330 series airplanes); or Airbus Service Bulletin A340–53–4105, Revision 02, dated May 25, 1998, Revision 03, dated February 22, 2001, or Revision 04, dated July 23, 2001 (for Model A340 series airplanes). Thereafter, if no cracks are detected, repeat the detailed inspection every 36 flight hours until accomplishment of the high frequency eddy current (HFEC) inspection required by paragraph (g) of this AD.

(1) Prior to the accumulation of 900 total flight hours.

(2) Within 1,250 flight hours since accomplishment of the interim repair specified by paragraph C.(4) of the Accomplishment Instructions of the applicable service bulletin, if the interim repair has been accomplished prior to April 12, 2000 (the effective date of AD 2000–05–04).

(3) Within 300 flight hours since the most recent HFEC inspection accomplished in accordance with the applicable service bulletin, if the most recent HFEC inspection has been accomplished prior to April 12, 2000.

(4) Within 36 flight hours after April 12, 2000.

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

High Frequency Eddy Current Inspection

(g) Perform an HFEC inspection to detect cracks of the fuselage skin aft of frame 54, between the airplane centerline and stringer 56R in the area of the VHF2 antenna, in accordance with Airbus Service Bulletin A330–53–3094, Revision 02, dated May 28, 1998, Revision 03, dated February 22, 2001, or Revision 04, dated July 23, 2001; or Service Bulletin A340–53–4105, Revision 02, dated May 25, 1998, Revision 03, dated February 22, 2001, or Revision 04, dated July 23, 2001; at the applicable time specified by paragraph (g)(1) or (g)(2) of this AD. Accomplishment of this inspection terminates the requirements of paragraph (f) of this AD.

(1) For airplanes on which the interim repair specified by paragraph C.(4) of the Accomplishment Instructions of the applicable service bulletin has not been accomplished before April 12, 2000: Prior to the accumulation of 900 total flight hours on the airplane, or within 500 flight hours after April 12, 2000, whichever occurs later. Thereafter, accomplish the follow-on actions of paragraph (h) or (i) of this AD, as applicable.

(2) For airplanes on which the interim repair specified by paragraph C.(4) of the Accomplishment Instructions of the applicable service bulletin has been accomplished before April 12, 2000: Within 1,250 flight hours after accomplishment of the interim repair, or within 500 flight hours after April 12, 2000, whichever occurs later.

Repetitive Inspections

(h) If no crack is detected during the HFEC inspection required by paragraph (g) of this AD, accomplish the repetitive inspections required by paragraph (h)(1) or (h)(2) of this AD, as applicable, until the terminating action required by paragraph (k) of this AD has been done.

(1) For airplanes on which the interim repair specified by paragraph C.(4) of the Accomplishment Instructions of Airbus Service Bulletin A330–53–3094, Revision 02, dated May 28, 1998, Revision 03, dated February 22, 2001, or Revision 04, dated July 23, 2001; or Service Bulletin A340–53–4105, Revision 02, dated May 25, 1998, Revision 03, dated February 22, 2001, or Revision 04, dated July 23, 2001; has not been accomplished before April 12, 2000: Accomplish the actions specified by paragraphs (h)(1)(i) and (h)(1)(ii) of this AD.

(i) Repeat the HFEC inspection specified by paragraph (g) at intervals not to exceed 500 flight hours.

(ii) Within 300 flight hours after each HFEC inspection required by this AD: Perform a detailed inspection (without removal of the VHF2 antenna) of the fuselage skin aft of frame 54, between the airplane centerline and stringer 56R in the area of the VHF2 antenna to detect cracks, in accordance with the applicable service bulletin. Thereafter, if no cracks are detected, repeat the detailed inspection at intervals not to exceed 36 flight hours until accomplishment of the next HFEC inspection required by paragraph (h)(1)(i) of this AD.

(2) For airplanes on which the interim repair specified by paragraph C.(4) of the Accomplishment Instructions of the applicable service bulletin has been accomplished before April 12, 2000: Repeat the HFEC inspection specified by paragraph (g) of this AD at intervals not to exceed 1,250 flight hours.

Corrective Actions

(i) If any crack is detected during any inspection required by paragraph (k), (l), or (m) of this AD, and the interim repair specified by paragraph C.(4) of the Accomplishment Instructions of Airbus Service Bulletin A330–53–3094, Revision 02, dated May 28, 1998, Revision 03, dated February 22, 2001, or Revision 04, dated July 23, 2001; or Service Bulletin A340–53–4105, Revision 02, dated May 25, 1998, Revision 03, dated February 22, 2001, or Revision 04, dated July 23, 2001; has not been accomplished: Prior to further flight, accomplish the actions specified by paragraph (i)(1) or (i)(2) of this AD, as applicable.

(1) If only one crack is detected and that crack is 9.45 inches or less, and is within the limits specified by the applicable service bulletin: Install the interim repair specified in paragraph C.(4) of the Accomplishment Instructions of the applicable service bulletin. Thereafter, repeat the HFEC inspection specified by paragraph (g) of this AD at intervals not to exceed 1,250 flight

hours, until the terminating action required by paragraph (k) of this AD has been done.

Note 2: The interim repair referenced by this AD consists of cutting out the cracked portion of the fuselage skin, and installing a filler plate in the skin cutout, two doublers, and shims, as described in paragraph C.(4) of the Accomplishment Instructions of Airbus Service Bulletin A330–53–3094, Revision 02, dated May 28, 1998, Revision 03, dated February 22, 2001, or Revision 04, dated July 23, 2001 (for Model A330 series airplanes); or Airbus Service Bulletin A340–53–4105, Revision 02, dated May 25, 1998, Revision 03, dated February 22, 2001, or Revision 04, dated July 23, 2001 (for Model A340 series airplanes).

Note 3: Accomplishment of the interim repair in accordance with paragraph 4.3 of Airbus Industrie All Operator Telex (AOT) 53–10, dated September 24, 1997, is acceptable for compliance with the requirements of paragraph (i)(1) of this AD.

(2) If any crack is detected that is longer than 9.45 inches, or is outside the limits specified by the service bulletin, or if more than one crack is detected: Repair in accordance with a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the Direction Générale de l'Aviation Civile (DGAC) (or its delegated agent).

(j) If any crack is detected during any inspection required by paragraph (f), (g), or (h) of this AD, and the interim repair specified by paragraph C.(4) of the Accomplishment Instructions of Airbus Service Bulletin A330–53–3094, Revision 02, dated May 28, 1998, Revision 03, dated February 22, 2001, or Revision 04, dated July 23, 2001; or Airbus Service Bulletin A340–53–4105, Revision 02, dated May 25, 1998, Revision 03, dated February 22, 2001, or Revision 04, dated July 23, 2001; has been accomplished: Prior to further flight, repair in accordance with a method approved by the Manager, International Branch, ANM–116; or the DGAC (or its delegated agent).

New Requirements of This AD

Terminating Action

(k) Within 18 months after the effective date of this AD: Do the actions specified in either paragraph (k)(1) or (k)(2). Accomplishment of either action terminates the repetitive inspections required by paragraphs (f), (g), (h) and (i)(1) of this AD.

(1) Reinforce the fuselage skin between FR54 and FR55 in the area of the VHF2 antenna, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A330–53–3097, Revision 02, dated November 21, 2000 (for Model A330 series airplanes); or A340–53–4108, Revision 02, dated December 6, 2000 (for Model A340 series airplanes); as applicable.

(2) Relocate the VHF2 antenna between stringer 51 and stringer 52, in accordance with Airbus Service Bulletin A330–53–3112 (for Model A330 series airplanes) or A340–53–4124 (for Model A340 series airplanes), both dated February 15, 2001; as applicable.

(l) Work done before the effective date of this AD in accordance with an applicable source listed in Table 2 of this AD is acceptable for compliance with the corresponding requirements of paragraph (k) of this AD.

TABLE 2.—CREDIT FOR PRIOR MODIFICATION

Model	Service information	Revision	Date
A330–300	Airbus Service Bulletin A330–53–3097	Original	July 29, 1998.
A330–300, A340	Airbus production Modification 46025	(done in production)	
A340	Airbus Service Bulletin A340–53–4108	Original	July 31, 1998.

Alternative Methods of Compliance

(m)(1) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, is authorized to approve alternative methods of compliance for this AD.

(2) Before using any AMOC approved in accordance with 14 CFR 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Related Information

(n) The subject of this AD is addressed in French airworthiness directives 2001–040(B) and 2001–041(B), both dated January 24, 2001.

Material Incorporated by Reference

(o) Unless otherwise specified in this AD, the actions must be done in accordance with the service information listed in Table 3 of this AD, as applicable.

TABLE 3.—MATERIAL INCORPORATED BY REFERENCE

Airbus Service Bulletin	Revision level	Date
A330–53–3094	02	May 28, 1998.
A330–53–3094	03	February 22, 2001.
A330–53–3094	04	July 23, 2001.
A330–53–3097	02	November 21, 2000.
A330–53–3112	Original	February 15, 2001.
A340–53–4105	02	May 25, 1998.
A340–53–4105	03	February 22, 2001.
A340–53–4105	04	July 23, 2001.
A340–53–4108	02	December 6, 2000.
A340–53–4124	Original	February 15, 2001.

(1) The incorporation by reference of the service information listed in Table 4 of this AD is approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

TABLE 4.—MATERIAL NEWLY INCORPORATED BY REFERENCE

Airbus Service Bulletin	Revision level	Date
A330–53–3094	03	February 22, 2001.
A330–53–3094	04	July 23, 2001.
A330–53–3097	02	November 21, 2000.
A330–53–3112	Original	February 15, 2001.

TABLE 4.—MATERIAL NEWLY INCORPORATED BY REFERENCE—Continued

Airbus Service Bulletin	Revision level	Date
A340–53–4105	03	February 22, 2001.
A340–53–4105	04	July 23, 2001.
A340–53–4108	02	December 6, 2000.
A340–53–4124	Original	February 15, 2001.

(2) The incorporation by reference of the service information listed in Table 5 of this AD was approved previously by the Director of the Federal Register as of April 12, 2000 (65 FR 12075, March 8, 2000).

TABLE 5.—MATERIAL PREVIOUSLY INCORPORATED BY REFERENCE

Airbus Service Bulletin	Revision level	Date
A330–53–3094	02	May 28, 1998.
A340–53–4105	02	May 25, 1998.

(3) Copies may be obtained from Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on December 2, 2005.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–23901 Filed 12–13–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–22384; Directorate Identifier 2005–NM–131–AD; Amendment 39–14412; AD 2005–25–19]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A300 B2 Series Airplanes, Model A300 B4 Series Airplanes, Model A310–200 Series Airplanes, Model A310–300 Series Airplanes; and Model A300 B4–600, B4–600R, and F4–600R Series Airplanes, and Model C4–605R Variant F Airplanes (Collectively Called A300–600 Series Airplanes)

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

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus transport category airplanes. This AD requires repetitive eddy current inspections for cracks of the stiffener fittings of the fuselage at frame (FR) 12A, and corrective actions if necessary. This AD also provides a terminating action for the inspections. This AD results from reports of cracks on the upper attachment fitting of the stiffener fitting at FR12A. We are issuing this AD to prevent failure of the stiffener fittings, which could result in the reduced structural integrity of the floor and rods around FR 12A.

DATES: This AD becomes effective January 18, 2006.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of January 18, 2006.

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

Contact Jacques Leborgne, Airbus Customer Service Directorate, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, fax (+33) 5 61 93 36 14, for service information identified in this AD for Model A300 B2 series airplanes and Model A300 B4 series airplanes. Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for service information identified in this AD for Model A310–200 series airplanes, Model A310–300 series airplanes, and Model A300–600 series airplanes.

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

SUPPLEMENTARY INFORMATION:

Examining the Docket

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

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to certain Airbus transport category airplanes. That NPRM was published in the **Federal Register** on September 12, 2005 (70 FR 53739). That NPRM proposed to require repetitive eddy current inspections for cracks of the stiffener fittings of the fuselage at frame (FR) 12A, and corrective actions if necessary. The NPRM also provided a terminating action for the inspections.

Comments

We provided the public the opportunity to participate in the development of this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Clarification of Alternative Method of Compliance (AMOC) Paragraph

We have revised this action to clarify the appropriate procedure for notifying the principal inspector before using any approved AMOC on any airplane to which the AMOC applies.

Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD with the change described previously. We have determined that this change will neither increase the economic burden on any operator nor increase the scope of the AD.

Costs of Compliance

This AD will affect about 202 airplanes of U.S. registry. The inspection will take between 57 and 64 work hours per airplane, at an average labor rate of $65 per work hour. Based on these figures, the estimated cost of the inspection for U.S. operators is between $748,410 and $840,320, or between $3,705 and $4,160 per airplane, per inspection cycle.

Authority for This Rulemaking

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

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2005–25–19 Airbus: Amendment 39–14412. Docket No. FAA–2005–22384; Directorate Identifier 2005–NM–131–AD.

Effective Date

(a) This AD becomes effective January 18, 2006.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A300 B2–1A, B2–1C, B2K–3C, and B2–203 airplanes; Model A300 B4–2C, B4–103, and B4–203 airplanes; Model A300 B4–601, B4–603, B4–620, and B4–622 airplanes; Model A300 B4–605R and B4–622R airplanes; Model A300 F4–605R and F4–622R airplanes; Model A300 C4–605R Variant F airplanes; Model A310–203, –204, –221, and –222 airplanes; and Model A310–304, –322, –324, and –325 airplanes; certificated in any category; except for airplanes on which Airbus Modification 12662 has been done in production.

Unsafe Condition

(d) This AD results from reports of cracks on the upper attachment fitting of the stiffener fitting at frame (FR) 12A. We are issuing this AD to prevent failure of the stiffener fittings, which could result in the reduced structural integrity of the floor and rods around FR12A.

Compliance

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

Inspections

(f) At the applicable initial inspection threshold specified in Table 1 of this AD or within the applicable grace period specified in Table 2 of this AD, whichever occurs later: Do an eddy current inspection for cracks of the stiffener fittings of the fuselage at FR 12A, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300–53–0365, Revision 01 (for Model A300 B2–1A, B2–1C, B2K–3C, and B2–203 airplanes, and Model A300 B4–2C, B4–103, and B4–203 airplanes); Airbus Service Bulletin A300–53–6138, Revision 01 (for Model A300 B4–601, B4–603, B4–620, and B4–622 airplanes, Model A300 B4–605R and B4–622R airplanes, Model A300 F4–605R and F4–622R airplanes, and Model A300 C4–605R Variant F airplanes); or Airbus Service Bulletin A310–53–2117, Revision 01 (for Model A310–203, –204, –221, and –222 airplanes, and Model A310–304, –322, –324, and –325 airplanes); all dated April 4, 2005; as applicable. Repeat the inspection thereafter at intervals not to exceed the applicable compliance time specified in Table 1 of this AD until the actions specified in paragraph (h) of this AD are done.

TABLE 1.—COMPLIANCE TIMES FOR INITIAL AND REPETITIVE INSPECTIONS

For airplanes identified as—	Do the initial inspection prior to the accumulation of—	And repeat at intervals not to exceed—
Configuration 01 in Airbus Service Bulletin A300–53–0365, Revision 01, dated April 4, 2005.	19,300 total flight cycles	11,450 flight cycles.
Configuration 02 in Airbus Service Bulletin A300–53–0365, Revision 01, dated April 4, 2005.	15,500 total flight cycles	9,200 flight cycles.
Configuration 01 in Airbus Service Bulletin A300–53–6138, Revision 01, dated April 4, 2005.	19,300 total flight cycles	11,450 flight cycles.
Configuration 02 in Airbus Service Bulletin A300–53–6138, Revision 01, dated April 4, 2005.	17,600 total flight cycles	11,450 flight cycles.
Configuration 03 in Airbus Service Bulletin A300–53–6138, Revision 01, dated April 4, 2005.	12,700 total flight cycles	8,000 flight cycles.

TABLE 1.—COMPLIANCE TIMES FOR INITIAL AND REPETITIVE INSPECTIONS—Continued

For airplanes identified as—	Do the initial inspection prior to the accumulation of—	And repeat at intervals not to exceed—
Configuration 04 in Airbus Service Bulletin A300–53–6138, Revision 01, dated April 4, 2005.	10,200 total flight cycles	6,400 flight cycles.
Configuration 01 in Airbus Service Bulletin A310–53–2117, Revision 01, dated April 4, 2005.	19,300 total flight cycles	11,450 flight cycles.
Configuration 02 in Airbus Service Bulletin A310–53–2117, Revision 01, dated April 4, 2005.	17,600 total flight cycles	11,450 flight cycles.
Configuration 03 in Airbus Service Bulletin A310–53–2117, Revision 01, dated April 4, 2005.	12,700 total flight cycles	8,000 flight cycles.

TABLE 2.—GRACE PERIOD FOR THE INITIAL INSPECTION

For Airbus Model—	Grace period is—
A300 B2–1A, B2–1C, B2K–3C, and B2–203 airplanes	Within 2,500 flight cycles after the effective date of this AD.
A300 B4–2C, B4–103, and B4–203 airplanes; A300 B4–601, B4–603, B4–620, and B4–622 airplanes; A300 B4–605R and B4–622R airplanes; A300 F4–605R and F4–622R airplanes; A300 C4–605R Variant F airplanes; A310–203, –204, –221, and –222 airplanes; and A310–304, –322, –324, and –325 airplanes.	Within 2,000 flight cycles after the effective date of this AD.

Corrective Action

(g) If any cracking is found during any inspection required by paragraph (f) of this AD, before further flight, do the replacement and installation specified in paragraph (h) of this AD.

Terminating Action

(h) Replacing the existing fitting on FR12A with a FR12A crossbeam and installing a new web between FR12A and FR13 at stringer 26 in accordance with Airbus Service Bulletin A300–53–0364, Revision 02, dated September 24, 2004 (for Model A300 B2–1A, B2–1C, B2K–3C, and B2–203 airplanes, and Model A300 B4–2C, B4–103, and B4–203 airplanes); Airbus Service Bulletin A300–53–6137, Revision 03, dated April 4, 2005 (for Model A300 B4–601, B4–603, B4–620, and B4–622 airplanes, Model A300 B4–605R and B4–622R airplanes, Model A300 F4–605R and F4–622R airplanes, and Model A300 C4–605R Variant F airplanes); or Airbus Service Bulletin A310–53–2116, Revision 02, dated September 24, 2004 (for Model A310–203, –204, –221, and –222 airplanes, and Model A310–304, –322, –324, and –325 airplanes); as applicable; and except as required by paragraph (i) of this AD; constitutes terminating action for the requirements of this AD.

(i) Where the service bulletins specify to contact the manufacturer for certain information, before further flight, do the terminating action according to a method approved by either the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the DGAC (or its delegated agent).

Actions Accomplished According to Previous Issue of Service Bulletin

(j) Actions accomplished before the effective date of this AD according to the Airbus service bulletins specified in Table 3 of this AD are considered acceptable for compliance with the corresponding actions specified in this AD.

TABLE 3.—PREVIOUS ISSUES OF SERVICE BULLETINS

Airbus Service Bulletin	Revision level	Date
A300–53–0364	Original	December 1, 2003.
A300–53–0364	01	May 5, 2004.
A300–53–0365	Original	December 1, 2003.
A300–53–6137	Original	December 1, 2003.
A300–53–6137	01	May 5, 2004.
A300–53–6137	02	September 24, 2004.
A300–53–6138	Original	December 1, 2003.
A310–53–2116	Original	December 1, 2003.
A310–53–2116	01	May 5, 2004.
A310–53–2117	Original	December 1, 2003.

No Reporting Required

(k) Although the service bulletins referenced in this AD specify to submit certain information to the manufacturer, this AD does not include that requirement.

Alternative Methods of Compliance (AMOCs)

(l)(1) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Related Information

(m) French airworthiness directive F–2005–084, dated May 25, 2005, also addresses the subject of this AD.

Material Incorporated by Reference

(n) You must use the service information listed in Table 4 of this AD to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of these documents in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Jacques Leborgne, Airbus Customer Service Directorate, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, fax (+33) 5 61 93 36 14, for service information identified

in this AD for Airbus Model A300 B2–1A, B2–1C, B2K–3C, and B2–203 airplanes; and Airbus Model A300 B4–2C, B4–103, and B4–203 airplanes. Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for service information identified in this AD for Airbus Model A300 B4–601, B4–603, B4–620, and B4–622 airplanes; Airbus Model A300 B4–605R and B4–622R airplanes; Airbus Model A300 F4–605R and F4–622R airplanes; Airbus Model A300 C4–605R Variant F airplanes; Model A310–203, –204, –221, and –222 airplanes; and Airbus Model A310–304, –322, –324, and –325 airplanes. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov;* or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

TABLE 4.—MATERIAL INCORPORATED BY REFERENCE

Airbus Service Bulletin	Revision level	Date
A300–53–0364	02	September 24, 2004.
A300–53–0365, excluding Appendix 01	01	April 4, 2005.
A300–53–6137	03	April 4, 2005.
A300–53–6138, excluding Appendix 01	01	April 4, 2005.
A310–53–2116	02	September 24, 2004.
A310–53–2117, excluding Appendix 01	01	April 4, 2005.

Issued in Renton, Washington, on December 2, 2005.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–23900 Filed 12–13–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–22525; Directorate Identifier 2005–NM–149–AD; Amendment 39–14410; AD 2005–25–17]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–135BJ, –135ER, –135KE, –135KL, and –135LR Airplanes; and Model EMB–145, 145ER, –145MR, –145LR, –145XR, –145MP, and –145EP Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain EMBRAER airplanes listed above. This AD requires modifying the drain system of the auxiliary power unit (APU) by installing a scavenge pump and, for certain airplanes, replacing the APU exhaust assembly. This AD results from a report of fuel leaking from the APU feeding line and accumulating inside the APU compartment because the drain system is inadequate when the APU is running. We are issuing this AD to prevent fuel accumulation and subsequent flammable fuel vapors in the APU cowling, which, combined with an ignition source, could result in a fire or explosion.

DATES: This AD becomes effective January 18, 2006.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of January 18, 2006.

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

For service information identified in this AD, contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil.

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1175; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Examining the Docket

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

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to certain EMBRAER Model EMB–135BJ, –135ER, –135KE, –135KL, and –135LR airplanes; and Model EMB–145, –145ER, –145MR, –145LR, –145XR, –145MP, and –145EP airplanes. That NPRM was published in the **Federal Register** on September 29, 2005 (70 FR 56858). That NPRM proposed to require modifying the drain system of the auxiliary power unit (APU) by installing a scavenge pump and, for certain airplanes, replacing the APU exhaust assembly.

Comments

We provided the public the opportunity to participate in the development of this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Changes to Proposed AD

Since we issued the proposed AD, EMBRAER has revised Service Bulletin 145–49–0029, which was cited in the proposed AD as the appropriate source of service information for the modification on all but Model EMB–135BJ airplanes. The procedures in Revision 02, dated October 14, 2005, are essentially the same as those described in the original version. We have revised paragraph (f) in this AD accordingly.

Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD with the changes described previously.

Costs of Compliance

This AD affects about 800 airplanes of U.S. registry. The pump installation takes about 15 work hours per airplane, at an average labor rate of $65 per work hour. Required parts cost about $1,768 or $1,967 per airplane. Based on these figures, the estimated cost of this action

for U.S. operators is $2,194,400–$2,353,600, or $2,743 or $2,942 per airplane.

The number of airplanes subject to the APU exhaust assembly replacement is unknown. If accomplished, this action would take about 6–7 work hours per airplane, at an average labor rate of $65 per work hour. Required parts would cost about $9,828 or $12,844 per airplane. Based on these figures, the estimated cost of this action for U.S. operators is $10,218–$13,299 per airplane.

Authority for This Rulemaking

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

We are issuing this rulemaking under the authority described in subtitle VII, part A, subpart III, section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2005–25–17 Empresa Brasileira de Aeronautica S.A. (EMBRAER): Amendment 39–14410. Docket No. FAA–2005–22525; Directorate Identifier 2005–NM–149–AD.

Effective Date

(a) This AD becomes effective January 18, 2006.

Affected ADs

(b) None.

Applicability

(c) This AD applies to EMBRAER Model EMB–135BJ, –135ER, –135KE, –135KL, and –135LR airplanes; and Model EMB–145, –145ER, –145MR, –145LR, –145XR, –145MP, and –145EP airplanes; certificated in any category; equipped with Model C–14 auxiliary power units (APUs); except those airplanes with serial numbers 14500927 and subsequent.

Unsafe Condition

(d) This AD results from a report of fuel leaking from the APU feeding line and accumulating inside the APU compartment because the drain system is inadequate when the APU is running. We are issuing this AD to prevent fuel accumulation and subsequent flammable fuel vapors in the APU cowling, which, combined with an ignition source, could result in a fire or explosion.

Compliance

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

Installation of Scavenge Pump Drain

(f) Within 5,000 flight hours after the effective date of this AD, modify the APU compartment drain system by installing a scavenge pump on it by doing all actions specified in the Accomplishment Instructions of EMBRAER Service Bulletin 145LEG–49–0006 (for Model EMB–135BJ airplanes), dated April 20, 2005; or 145–49–0029 (for all remaining airplanes), Revision 02, dated October 14, 2005. A modification before the effective date of this AD in accordance with EMBRAER Service Bulletin 145–49–0029, dated April 20, 2005; or Revision 01, dated July 13, 2005, is also acceptable for compliance with the requirements of this paragraph, as applicable.

Concurrent Requirements

(g) For airplanes with an APU cowling part number 145–52979–401 or 145–52979–403: Before or concurrently with the pump drain installation required by paragraph (f) of this AD, replace the APU exhaust assembly by doing all actions specified in the Accomplishment Instructions of EMBRAER Service Bulletin 145–49–0023, Revision 01, dated April 25, 2005. Replacement before the effective date of this AD in accordance with EMBRAER Service Bulletin 145–49–0023, dated November 23, 2004, is also acceptable for compliance with the requirements of this paragraph.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Related Information

(i) Brazilian airworthiness directive 2005–08–05, effective September 6, 2005, also addresses the subject of this AD.

Material Incorporated by Reference

(j) To perform the actions that are required by this AD, unless the AD specifies otherwise, you must use the service bulletins identified in Table 1 of this AD, as applicable. The Director of the Federal Register approved the incorporation by reference of these documents in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. For a copy of this service information, contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., room PL–401, Nassif Building, Washington, DC; on the internet at *http://dms.dot.gov*; or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

TABLE 1.—MATERIAL INCORPORATED BY REFERENCE

Service bulletin	Revision level	Date
EMBRAER Service Bulletin 14LEG–49–0006	Original	April 20, 2005.
EMBRAER Service Bulletin 145–49–0029	02	October 14, 2005.
EMBRAER Service Bulletin 145–49–0023	01	April 25, 2005.

Issued in Renton, Washington, on December 2, 2005.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–23899 Filed 12–13–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–21715; Directorate Identifier 2004–NM–277–AD; Amendment 39–14416; AD 2005–25–23]

RIN 2120–AA64

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

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

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Boeing Model 767–200 and –300 series airplanes. This AD requires measuring the turnbuckle gap of the inflation cylinder of the off-wing emergency escape slide; corrective action if necessary; and installing a safety device on the inflation cylinder of the off-wing emergency escape slide. This AD results from a report indicating that the inflation trigger cable may inadvertently disconnect from the inflation turnbuckle of the inflation cylinder of the off-wing emergency escape slide, due to incorrect spacing of the cable insertion gap; and additional reports indicating that the pull force increase mechanism on the off-wing charged cylinder assemblies of the escape slide may be inadvertently disengaged. We are issuing this AD to prevent failed deployment of the emergency escape slide during an emergency, which could impede an evacuation and result in injury to passengers or airplane crewmembers, or inadvertent inflation and loss of an emergency escape slide during flight, which could result in possible structural damage to the airplane.

DATES: This AD becomes effective January 18, 2006.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of January 18, 2006.

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

Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207, for service information identified in this AD.

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

SUPPLEMENTARY INFORMATION:

Examining the Docket

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

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to certain Boeing Model 767–200 and –300 series airplanes. That NPRM was published in the **Federal Register** on July 6, 2005 (70 FR 38821). That NPRM proposed to require measuring the turnbuckle gap of the inflation cylinder of the off-wing emergency escape slide; corrective action if necessary; and installing a safety device on the inflation cylinder of the off-wing emergency escape slide.

Comments

We provided the public the opportunity to participate in the development of this AD. We have considered the comments received.

Supportive Comment

One commenter concurs with the content of the NPRM.

Requests To Extend Compliance Time

Several commenters ask that the compliance time for the actions specified in paragraph (f) of the NPRM be extended to 36 months. The commenters make their requests to extend the compliance time for several reasons, including:

- To align the proposed actions with existing maintenance schedules for corresponding levels of maintenance on escape slide systems and increased efficiency and management of spare parts stocks of escape slides.
- To correspond with the compliance time specified in the Goodrich service information (referenced in the NPRM) of accomplishing the actions at the next scheduled maintenance visit.
- To be consistent with slide restoration intervals that allow the modifications of the inflation cylinder to be accomplished in a controlled shop environment. In addition, accomplishing the actions within 18 months would require operators to significantly increase spare parts stock for escape slides, which would cause an undue burden and substantial cost increase.
- To be consistent with the removal of the off-wing escape slide cylinders from the airplane for cylinder hydrostatic testing and overhaul, which eliminates the need for multiple removals. Additional removals would increase the potential for injuries to maintenance personnel and damage to parts.

We agree that the compliance time may be extended. We have reconsidered the urgency of the unsafe condition and the amount of work related to the required actions, in addition to the fact that our intent was to require the actions be accomplished during regular maintenance visits. We find that extending the compliance time from 18 to 36 months will not adversely affect safety, and, for the majority of affected operators, will allow the required actions to be performed during regularly scheduled maintenance at a base where special equipment and trained maintenance personnel will be available if necessary. We have changed the

compliance time for accomplishing the actions required by paragraph (f) of this AD accordingly.

Request To Revise Goodrich Service Bulletin

Two commenters ask that Goodrich Service Bulletin 130104–25–328, Revision 1, dated July 23, 2003, referenced in the NPRM as an additional source of service information for accomplishing the actions, be revised to include a change to the part numbers for modified off-wing cylinder assemblies. One commenter states that this should be done in order to track compliance with the AD.

We disagree with the commenters' request. Revision 1 of the service bulletin already specifies a change to the part numbers for the off-wing cylinder assemblies and the regulator valve to account for the modification. The parts are identified in Table 6 of the Accomplishment Instructions of the service bulletin. We have made no change to the AD in this regard.

Request To Increase Work Hours

One commenter asks that we increase the amount of time needed to complete the proposed actions to 6 work hours per airplane.

We do not agree that it is necessary to revise the work hour estimates of the NPRM, which reflect only the actual time needed for accomplishing the actions based on the best data available from the manufacturer. The work hours do not include the time for planning, access and close, and associated administrative actions. The compliance times in this AD should allow ample time for operators to do the required actions at the same time as scheduled major airplane inspection and maintenance activities, which would reduce the additional time associated with special scheduling. We have made no change to the AD in this regard.

Clarification of Alternative Method of Compliance (AMOC) Paragraph

We have changed this AD to clarify the appropriate procedure for notifying the principal inspector before using any approved AMOC on any airplane to which the AMOC applies.

Conclusion

We have carefully reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We have determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Costs of Compliance

There are about 696 airplanes of the affected design in the worldwide fleet. This AD will affect about 297 airplanes of U.S. registry.

The inspection takes about 1 work hour per airplane, at an average labor rate of $65 per work hour. Based on these figures, the estimated cost of the inspection for U.S. operators is $19,305, or $65 per airplane.

The safety device installation takes about 3 work hours per airplane, at an average labor rate of $65 per work hour. Required parts cost is minimal. Based on these figures, the estimated cost of the installation for U.S. operators is $57,915, or $195 per airplane.

Authority for This Rulemaking

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

We are issuing this rulemaking under the authority described in subtitle VII, part A, subpart III, section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2005–25–23 Boeing: Amendment 39–14416. Docket No. FAA–2005–21715; Directorate Identifier 2004–NM–277–AD.

Effective Date

(a) This AD becomes effective January 18, 2006.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Boeing Model 767–200 and –300 series airplanes; certificated in any category; equipped with off-wing emergency escape slides; as identified in Boeing Special Attention Service Bulletin 767–25–0358, dated September 18, 2003; and Boeing Special Attention Service Bulletin 767–25–0317, dated June 27, 2002.

Unsafe Condition

(d) This AD was prompted by a report indicating that the inflation trigger cable may inadvertently disconnect from the inflation turnbuckle of the inflation cylinder of the off-wing emergency escape slide, due to incorrect spacing of the cable insertion gap; and additional reports indicating that the pull force increase mechanism (PFIM) on the off-wing charged cylinder assemblies of the escape slide may be inadvertently disengaged. We are issuing this AD to prevent failed deployment of the emergency escape slide during an emergency, which could impede an evacuation and result in injury to passengers or airplane crewmembers, or inadvertent inflation and loss of an emergency escape slide during flight, which could result in possible structural damage to the airplane.

Compliance

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

Measurement/Corrective Action

(f) Within 36 months after the effective date of this AD: Accomplish the actions specified in paragraphs (f)(1) and (f)(2) of this AD.

(1) Measure the turnbuckle gap of the inflation cylinder of the off-wing emergency escape slides to ensure it meets the maximum allowable spacing limit and do applicable corrective actions by doing all the actions specified in the Accomplishment Instructions of Boeing Special Attention Service Bulletin 767–25–0358, dated September 18, 2003. Accomplish any corrective action before further flight in accordance with the service bulletin.

(2) Install a safety device on the PFIM of the inflation cylinder of the off-wing emergency escape slides, and part-mark the inflation cylinder as applicable, by doing all the actions specified in the Accomplishment Instructions of Boeing Special Attention Service Bulletin 767–25–0317, dated June 27, 2002.

Note 1: Goodrich Service Bulletins 130104–25–342, dated July 23, 2003; and 130104–25–328, Revision 1, dated July 23, 2003; may be used as additional sources of service information for accomplishing the actions.

Parts Installation

(g) As of the effective date of this AD, no person may install an inflation cylinder of the off-wing emergency escape slides on any airplane, unless it has been modified according to paragraph (f) of this AD.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, Seattle Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with 14 CFR 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Material Incorporated by Reference

(i) You must use Boeing Special Attention Service Bulletin 767–25–0358, dated September 18, 2003; and Boeing Special Attention Service Bulletin 767–25–0317, dated June 27, 2002; as applicable, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of these documents in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov*; or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

Issued in Renton, Washington, on December 6, 2005.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–23957 Filed 12–13–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD13–05–023]

RIN 1625–AA09

Drawbridge Operation Regulations; Willamette River, Portland, OR

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is revising the drawbridge operation regulations for bridges on the Willamette River, Oregon. The modification will reorganize the text into a more understandable format with minor editing of the regulations and change the operating regulations for the draw of the Burnside Bridge across the Willamette River, mile 12.4, at Portland, Oregon. The change will enable the bridge owner to provide single-leaf operation of the Burnside Bridge, except during the Rose Festival, to facilitate major structural and mechanical rehabilitation of the bridge.

DATES: This rule is effective January 2, 2006.

ADDRESSES: Comments and materials received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket [CG13–05–023] and are available for inspection or copying at the Waterways Management Branch between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Austin Pratt, Chief, Bridge Section, (206) 220–7282.

SUPPLEMENTARY INFORMATION:

Regulatory History

On August 22, 2005, we published a notice of proposed rulemaking (NPRM) entitled ''Drawbridge Operation Regulations; Willamette River, Portland, Oregon'' in the **Federal Register** (70 FR 48929). We received no letters commenting on the proposed rule. No public meeting was requested, and none was held.

Regulatory Information

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Preliminary analysis indicates that most vessel operators will not be inconvenienced by the special operations. Large oceangoing vessels do not normally travel this far upstream on the Willamette and the majority of recreational vessels can pass the drawbridge without an opening. Tugs and tows are the most common vessels that would have to proceed with extra caution. There is a single frequent user of the drawspan, who agreed to the plan prior to publication of the NPRM. The Burnside Bridge is part of a heavily traveled commuter arterial that serves downtown Portland.

Background and Purpose

The operating regulations currently in effect for the drawbridges on the Willamette River are at 33 CFR 117.897. The regulations as they are currently written are confusing as to which exceptions apply to which bridge. The reorganization of the text will enhance and facilitate comprehension of the regulations' meaning.

The rule will enable Multnomah County, the owner of the Burnside Bridge, to rehabilitate the structure. The work includes repairing the drawbridge mechanism, replacing the concrete deck and repairing corroded steel. One side will be disabled throughout the period. The operable side will be indicated via Local Notice to Mariners.

The Burnside Bridge in the closed position provides 65.5 feet of vertical clearance above 0.0 datum Corps of Engineers at the center of the bascule and 205 feet of horizontal clearance. Drawbridge openings are provided on average 40 times monthly for recreational vessels, tugs and tows, and floating construction equipment. This averages less than twice a day for opening frequency.

The current regulation provides that the spans need not open for the passage of vessels from 7 a.m. to 9 a.m. and from 4 p.m. to 6 p.m. Monday through Friday, except New Years Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day. From 8 a.m. to 5 p.m., Monday through Friday, one hour's notice is required for all openings and two hours notice at all other times. The draw operates on signal during Rose Festival Week and whenever the river level reaches and remains above +12 feet.

Reorganization of Text

This rule will permanently reorganize the text of 33 CFR 117.897. This reorganization would not significantly alter the substantive regulations therein. Currently, the regulation is confusing as to which exceptions to normal bridge operations apply to which bridges. This permanent change will enhance and facilitate comprehension of the regulation. The bridge-specific sound signals will be deleted because they have not been used by mariners for years. Therefore, the signal shall default to the general sound signal of one prolonged blast followed by one short blast found in 33 CFR 117.15.

The regulations covering the Union Pacific railroad bridge, mile 84.3, at Salem will be removed because under a bridge permit amendment the bridge has been converted to a fixed span and is therefore no longer an operating drawbridge.

Change of Burnside Bridge Operating Regulation

This rule will provide Multnomah County the opportunity to provide much needed maintenance by allowing it to operate only one leaf instead of two. During Rose Festival double-leaf openings will be provided. Recreational vessels should be able to easily pass safely through a single-leaf opening. Most recreational vessels do not require an opening of the draw. Tugs and tows may experience greater difficulty because of winds, currents, loading, etc. The bridge owner is offering an assist tug for such vessels if 4-hour notice is given for this assistance. This offer is not embodied in this rule.

Preliminary analysis indicates that most vessel operators will not be inconvenienced by the special operations. Large oceangoing vessels do not normally travel this far upstream on the Willamette and the majority of recreational vessels can pass the drawbridge without an opening. Tugs and tows are the most common vessels that would have to proceed with extra caution. There is a single frequent user of the drawspan. The Burnside Bridge is part of a heavily traveled commuter arterial that serves downtown Portland.

Discussion of Comments and Changes

No comments or letters were received in response to the NPRM. No changes to the proposed regulation were made.

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.

The Coast Guard expects minimal impact from this rule because most vessels will be able to safely pass through a single-leaf opening without tug assistance.

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 would not have a significant economic impact on a substantial number of small entities. 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 Austin Pratt, Chief, Bridge Section, at (206) 220–7282. 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 affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This 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 would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it 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 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 Information and Regulatory Affairs has not designated this as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

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

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

Environment

We have analyzed this rule under Commandant Instruction M16475.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 (32)(e) of the Instruction, from further environmental documentation. There are no expected environmental consequences of the action that would require further analysis and documentation.

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1(g); Department of Homeland Security Delegation No. 0170.1; section 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

■ 2. Revise section 117.897 to read as follows:

§ 117.897 Willamette River.

(a) The draws of the Union Pacific railroad bridge, mile 119.6 at Albany; and mile 164.3 near Harrisburg, need not open for the passage of vessels. However the draws shall be returned to operable condition within six months after notification by the District Commander to do so.

(b) The draw of the Oregon State highway bridge, mile 132.1 at Corvallis, shall open on signal if at least seven days notice is given. However, the draw need not be opened on Saturdays, Sundays, and Federal Holidays.

(c) The draws of the bridges listed in paragraph (c)(3) of this section shall open on signal if appropriate advance notice is given subject to the following requirements and exceptions:

(1) The draws need not open for the passage of vessels from 7 a.m. to 9 a.m. and 4 p.m. to 6 p.m. every Monday through Friday; except that on New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day, the draws shall open in accordance with the notice requirements of paragraph (c)(3) below.

(2) During Rose Festival Week or when the water elevation reaches and remains above +12 feet, no advance notice is required to request opening, except during the normal closed periods in (c)(1) above.

(3)(i) Broadway Bridge, Portland, mile 11.7. No advance notice required, however any periods where the draws are not required to be opened do not apply to oceangoing vessels of 750 gross tons or over.

(ii) Steel Bridge (upper deck only), Portland, mile 12.1. From 8 a.m. to 5 p.m. Monday through Friday, one hour's notice shall be given for draw openings. At all other times, two hours notice is required.

(iii) Burnside Bridge, Portland, mile 12.4. Only single-leaf openings will be provided, except that double-leaf openings will be provided during Rose Festival. From 9 a.m. to 4 p.m. Monday through Friday notice at least one hour in advance shall be given for draw openings. At all other times, notice at least two hours in advance is required.

(iv) Morrison Bridge, Portland, mile 12.8, from 8 a.m. to 5 p.m. Monday through Friday, one hour's notice shall be given for draw openings. At all other times, two hours notice is required.

(v) Hawthorne Bridge, Portland, mile 13.1, no advance notice required.

Dated: December 5, 2005.

R.R. Houck,

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

[FR Doc. 05–24003 Filed 12–13–05; 8:45 am]

BILLING CODE 4910–15–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–3028, MB Docket No. 05–34, RM–10761]

Radio Broadcasting Services; Mt. Enterprise, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document denies a petition filed by Charles Crawford and grants a counterproposal filed by E-String Wireless, Ltd., by allotting Channel 231A at Mt. Enterprise, Texas with a site restriction of 12.5 kilometers (7.8 miles) north at reference coordinates 32–01–48 NL and 94–39–38 WL. *See* 70 FR 8559, published February 22, 2005. Additionally, the application for New FM Station, Channel 230A at Lufkin, File No. BMPH–20050329AAA, will be referred to the Technical Processing Group located in the Audio Division for processing.

DATES: Effective January 9, 2006.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order,* MB Docket No. 05–34, adopted November 23, 2005, and released November 25, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center, 445 12th Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20054, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.* The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Mt. Enterprise, Channel 231A.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–23979 Filed 12–13–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–3013; MB Docket No. 05–46, RM–11156; MB Docket No. 05–109, RM–11192]

Radio Broadcasting Services; Hornbeck, LA; and Mojave and Trona, CA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Audio Division, at the request of Charles Crawford, allots Channel 269A at Hornbeck, Louisiana, as the community's first local FM service. Channel 269A can be allotted to Hornbeck, Louisiana, in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.2 km (4.5 miles) west of Hornbeck. The coordinates for Channel 269A at Hornbeck, Louisiana, are 31–18–42 North Latitude and 93–28–12 West Longitude. *See* **SUPPLEMENTARY INFORMATION** *infra*.

DATES: Effective January 9, 2006.

FOR FURTHER INFORMATION CONTACT: Deborah Dupont, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MB Docket Nos. 05–46 and 05–109, adopted November 23, 2005, and released November 25, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, (800) 378–3160, or via the company's Web site, *http://www.bcpiweb.com*. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* U.S.C. 801(a)(1)(A).

The Audio Division further, at the request of Dana J. Puopolo, allots Channel 255A at Mojave, California, as the community's third local FM service. Channel 255A can be allotted to Mojave, California, in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.3 km (6.4 miles) northeast of Mojave. The coordinates for Channel 255A at Mojave, California, are 35–06–07 North Latitude and 118–04–41 West Longitude. Concurrence in the allotment by the Government of Mexico is required because the proposed allotment is located within 320 kilometers (199 miles) of the U.S.-Mexican border. Although Mexican concurrence has been requested, notification has not yet been received. If a construction permit for Channel 255A at Mojave, California, is granted prior to receipt of formal concurrence by the Mexican government, the authorization will include the following condition: ''Operation with the facilities specified herein for Mojave, California, is subject to modification, suspension, or termination without right to hearing, if found by the Commission to be necessary I order to conform to the Mexico-United States FM Broadcast Agreement, or if specifically objected to by the Government of Mexico.'' In order to accommodate that allotment, the Audio Division further, at the request of Dana J. Puopolo, substitutes Channel 247A for vacant Channel 255A at Trona, California. Channel 247A can be allotted to Trona, California, in compliance with the Commission's minimum distance separation requirements at city reference coordinates, without site restriction. The coordinates for Channel 247A at Trona, California, are 35–45–46 North Latitude and 117–22–19 West Longitude.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under California, is amended by adding Channel 255A at Mojave, by removing Channel 255A and by adding Channel 247A at Trona.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–24032 Filed 12–13–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–3011; MM Docket No. 01–151; RM–10167, RM–10567]

Radio Broadcasting Services; Eminence, Lebanon, Linn, Potosi and Rolla, MO

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document grants a Counterproposal filed by Four Him Enterprises, LLC in response to the *Notice of Proposed Rule Making* in this proceeding. *See* 66 FR 38410, July 24, 2001. Specifically, the license of Station KHZR, Channel 249C3, Potosi, Missouri, is modified to specify operation on Channel 249C2.To accommodate this upgrade, this document makes four related channel substitutions. Channel 248A is substituted for vacant Channel 276A at Linn, Missouri. The license of Station KDAA, Channel 248A, Rolla, Missouri, is modified to specify operation on Channel 276A. The license of Station KJEL, Channel 279C, Lebanon, Missouri, is modified to specify operation on Channel 279C0. This document allots Channel 281A to Eminence, Missouri, to provide a first local service. The reference coordinates for the Channel 249C2 allotment at Potosi, Missouri, are 37–58–30 NL and 90–48–30 WL. The reference coordinates for the Channel 276A allotment at Rolla, Missouri, are 37–57–50 NL and 91–45–54 WL. The reference coordinates for the Channel 281A allotment at Eminence, Missouri, are 37–14–30 NL and 91–26–00 WL. The reference coordinates for the Channel 248A allotment at Linn, Missouri, are

38–29–06 NL and 91–51–06 WL. The reference coordinates for the Channel 279C0 allotment at Lebanon, Missouri, are 37–41–06 NL and 92–41–40 WL. This document also dismisses BPH–20030401ABZ and a separate Petition for Reconsideration filed by Four Him Enterprises, LLC. With this action, the proceeding is terminated.

DATES: Effective January 9, 2006.

FOR FURTHER INFORMATION CONTACT: Robert Hayne, Media Bureau, (202) 418–2177.

SUPPLEMENTARY INFORMATION: This is a synopsis of the *Report and Order* in MM Docket No. 01–151 adopted November 23, 2005, and released November 25, 2005. The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio Broadcasting.

■ Part 73 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the table of FM Allotments under Missouri, is amended by adding Eminence, Channel 281A, removing Channel 279C and adding Channel 279C0 at Lebanon, removing Channel 276A and adding Channel 248A at Linn, removing Channel 249C3 and adding Channel 249C2 at Potosi and by removing Channel 248A and adding Channel 276A at Rolla.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–24033 Filed 12–13–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–3027; MB Docket No. 05–17, RM–11113, RM–11114]

Radio Broadcasting Services; Connersville, IN, Erlanger, KY, Lebanon, KY, Lebanon Junction, KY, Madison, IN, New Haven, KY, Norwood, OH, Richmond, IN, and Springfield, KY

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document grants a petition filed by Rodgers Broadcasting seeking the substitution of Channel 262A for Channel 262B at Connersville, Indiana, reallotment of Channel 262A from Connersville, Indiana to Norwood, Ohio, as its first local service and modification of Station WIFE(FM) license accordingly. *See* 70 FR 7219, published February 11, 2005. The document also grants the substitution of Channel *265A for vacant Channel *266A at Madison, Indiana; the substitution of Channel 267B1 for Channel 267B at Richmond, Indiana and modification of the FM Station WFMG license accordingly; the substitution of Channel 266A for Channel 265A at Erlanger, Kentucky, and modification of the FM Station WIZF license accordingly; and the substitution of Channel 265A for Channel 265C3 at Lebanon, Kentucky, and modification of the WLSK(FM) license accordingly. *See* **SUPPLEMENTARY INFORMATION**.

DATES: Effective January 9, 2006.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order*, MB Docket No. 05–17, adopted November 23, 2005, and released November 25, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center, 445 Twelfth Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20054, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

Channel 262A can be allotted to Norwood provided there is a site restriction of 9.4 kilometers (5.8 miles) southwest at coordinates 39–07–19 NL and 84–32–52 WL. Channel 266A can be allotted to Erlanger at Station's WIZF current license site at coordinates 39–06–18 NL and 84–33–24 WL. Channel 265A can be allotted to Madison at its current reference site at coordinates 38–49–15 NL and 85–18–46 WL. Channel 267B1 can be allotted to Richmond provided there is a site restriction of 11.6 kilometers (7.2 miles) northwest at coordinates 39–55–09 NL and 84–57–47 WL. Channel 265A can be allotted to Lebanon provided there is a site restriction 9.6 kilometers (6.0 miles) northeast at coordinates 37–38–50 NL and 85–11–50 WL.

This document also dismissed the petition jointly filed by Washington County CBC, Inc., licensee of Station WAKY–FM, Channel 274A, Springfield, Kentucky, Elizabethtown CBC, Inc., licensee of Station WTHX, Channel 297A, Lebanon Junction, Kentucky and CBC of Marion County, Inc., licensee of Station WLSK, Channel 265C3, Lebanon, Kentucky, requesting the reallotment of Channel 297A from Lebanon Junction to New Haven, Kentucky, as its first local service and modification of the Station WTHX(FM) license and the Amended Proposal jointly filed by Washington County CBC, Inc., Elizabethtown CBC, Inc., CBC of Marion County, Inc., Newberry Broadcasting, Inc., licensee of Station WHHT(FM), Channel 294A, Horse Cave, Kentucky, and Cumulus Licensing LLC, licensee of Stations WNFN(FM), Channel 294A, Belle Meade, Tennessee, WRQQ(FM), Channel 246C2, Goodlettsville, Tennessee, WQQK(FM), Channel 221A, Hendersville, Tennessee, and WWTN(FM), Channel 259C, Manchester, Tennessee.

Additionally, the document dismisses the counterproposal filed by Indiana Community Radio, licensee of noncommercial educational Station WJCF, Channel 201A, Morristown, Indiana and a proposal filed by Hoosier Public Radio Corporation, licensee of noncommercial educational Station WFCI, Channel 208A, Franklin, Indiana.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Indiana, is amended by removing Connersville, Channel 262B, by removing Channel *266A and adding Channel *265A at Madison, by removing Channel 267B and by adding Channel 267B1 at Richmond.

■ 3. Section 73.202(b), the Table of FM Allotments under Kentucky, is amended by removing Channel 265A and adding Channel 266A at Erlanger, by removing Channel 265C3 and adding Channel 265A at Lebanon.

■ 4. Section 73.202(b), the Table of FM Allotments under Ohio, is amended by adding Norwood, Channel 262A.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–24034 Filed 12–13–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–3012; MM Docket No. 02–253; RM–10317 and 10872]

Radio Broadcasting Services; Sanderson, Texas

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Audio Division, at the request of Big Bend Broadcasting, allots Channel 274C1 at Sanderson, Texas, as the community's second local FM service. Channel 274C1 can be allotted to Sanderson, Texas, in compliance with the Commission's minimum distance separation requirements with a site restriction of 17.6 km (11.0 miles) south of Sanderson. The coordinates for Channel 274C1 at Sanderson, Texas, are 29–59–17 North Latitude and 102–26–32 West Longitude. The Government of Mexico has concurred in this allotment, which is located within 320 kilometers (199 miles) of the U.S.-Mexican border.

DATES: Effective January 9, 2006.

FOR FURTHER INFORMATION CONTACT: Deborah Dupont, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MM Docket No. 02–253, adopted November 23, 2005, and released November 25, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, (800) 378–3160, or via the company's Web site, *http://www.bcpiweb.com*. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Channel 274C1 at Sanderson.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–24035 Filed 12–13–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–3059, MB Docket No. 03–120, RM–10591, RM–10839]

Radio Broadcasting Services; Chattanooga, Halls Crossroads, Harrogate, and Lake City, TN

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document grants a counterproposal to reallot and change the community of license for Station WXJB(FM) from Channel 243A at Harrogate, TN, to Channel 244A at Halls Crossroads, TN. The document also denies a mutually exclusive proposal to allot Channel 244A to Lake City, TN. Although each proposal would result in a first local service, a first local service at Halls Crossroads is preferred because it has a larger population than Lake City. *See* 68 FR 33669, June 5, 2003. *See also* **SUPPLEMENTARY INFORMATION.**

DATES: Effective January 9, 2006.

FOR FURTHER INFORMATION CONTACT: Andrew J. Rhodes, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MB Docket 03–120, adopted November 23, 2005, and released November 25, 2005. The full text of this decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*. The Commission will send a copy of the *Report and Order* in this proceeding in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

The reference coordinates for Channel 244A at Halls Crossroads, TN, are 36–09–43 NL and 83–58–33 WL. The document also downgrades Station WDOD–FM, Chattanooga, TN, from Channel 243C to Channel 243C0 at reference coordinates 35–09–39 NL and 85–19–11 WL.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Tennessee, is amended by removing Channel 243C and adding Channel 243C0 at Chattanooga, adding Channel 244A, Halls Crossroads, and removing Channel 243A at Harrogate.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–24036 Filed 12–13–05; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[I.D. 120505A]

Notification of U.S. Fish Quotas and an Effort Allocation in the Northwest Atlantic Fisheries Organization (NAFO) Regulatory Area

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

ACTION: Final rule; notification of U.S. fish quotas and an effort allocation.

SUMMARY: NMFS announces that fish quotas and an effort allocation are available for harvest by U.S. fishermen in the Northwest Atlantic Fisheries Organization (NAFO) Regulatory Area. This action is necessary to make available to U.S. fishermen a fishing privilege on an equitable basis.

DATES: All fish quotas and the effort allocation are effective January 1, 2006, through December 31, 2006. Expressions of interest regarding U.S. fish quota allocations for all species except 3L shrimp will be accepted throughout 2006. Expressions of interest regarding the U.S. 3L shrimp quota allocation and the 3M shrimp effort allocation will be accepted through December 29, 2005.

ADDRESSES: Expressions of interest regarding the U.S. effort allocation and quota allocations should be made in writing to Patrick E. Moran in the NMFS Office of Sustainable Fisheries, at 1315 East-West Highway, Silver Spring, MD 20910 (phone: 301–713–2276, fax: 301–713–2313, e-mail: *pat.moran@noaa.gov*).

Information relating to NAFO fish quotas, NAFO Conservation and Enforcement Measures, and the High Seas Fishing Compliance Act (HSFC) Permit is available from Sarah McLaughlin, at the NMFS Northeast Regional Office at One Blackburn Drive, Gloucester, Massachusetts 01930 (phone: 978–281–9279) and from NAFO on the World Wide Web at *http://www.nafo.ca*.

FOR FURTHER INFORMATION CONTACT: Patrick E. Moran, 301–713–2276.

SUPPLEMENTARY INFORMATION:

Background

NAFO has established and maintains conservation measures in its Regulatory Area that include one effort limitation fishery as well as fisheries with total allowable catches (TACs) and member nation quota allocations. The principal species managed are cod, flounder, redfish, American plaice, halibut, capelin, shrimp, and squid. At the 2005 NAFO Annual Meeting, the United States received fish quota allocations for three NAFO stocks and an effort allocation for one NAFO stock to be fished during 2006. The species, location, and allocation (in metric tons or effort) of these U.S. fishing opportunities, as found in Annexes I.A, I.B, and I.C of the 2006 NAFO Conservation and Enforcement Measures, are as follows:

(1) Redfish	NAFO Division 3M.	69 mt.
(2) Squid (*Illex*)	NAFO Subareas 3 & 4.	453 mt.
(3) Shrimp	NAFO Division 3L.	245 mt.
(4) Shrimp	NAFO Division 3M.	1 vessel/100 days.

Additionally, U.S. vessels may be authorized to fish any available portion of the 627 mt allocation of oceanic redfish in NAFO Subarea 2 and Divisions 1F and 3K allocated to NAFO members that are not also members of the Northeast Atlantic Fisheries Commission. Fishing opportunities may also be authorized for U.S. fishermen in the ''Others'' category for: Division 3LNO yellowtail flounder (76 mt); Division 3NO white hake (500 mt); Division 3LNO skates (500 mt); and Division 3O redfish (100 mt). Procedures for obtaining NMFS authorization are specified here.

U.S. Fish Quota Allocations

Expressions of interest to fish for any or all of the U.S. fish quota allocations and ''Others'' category allocations in NAFO will be considered from U.S. vessels in possession of a valid High Seas Fishing Compliance (HSFC) permit, which is available from the NMFS Northeast Regional Office (see **ADDRESSES**). All expressions of interest should be directed in writing to Patrick E. Moran (see **ADDRESSES**). Letters of interest from U.S. vessel owners should include the name, registration, and home port of the applicant vessel as required by NAFO in advance of fishing operations. In addition, any available information on intended target species and dates of fishing operations should be included. To ensure equitable access by U.S. vessel owners, NMFS may promulgate regulations designed to choose one or more U.S. applicants from among expressions of interest.

Note that vessels issued valid HSFC permits under 50 CFR 300 are exempt from multispecies permit, mesh size, effort-control, and possession limit restrictions, specified in 50 CFR 648.4, 648.80, 648.82 and 648.86, respectively, while transiting the U.S. exclusive economic zone (EEZ) with multispecies on board the vessel, or landing multispecies in U.S. ports that were caught while fishing in the NAFO Regulatory Area, provided:

(1) The vessel operator has a letter of authorization issued by the Regional Administrator on board the vessel;

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

(3) When transiting the U.S. EEZ, all gear is properly stowed in accordance with one of the applicable methods specified in 50 CFR 648.23(b); and

(4) The vessel operator complies with the HSFC permit and all NAFO conservation and enforcement measures while fishing in the NAFO Regulatory Area.

U.S. 3M Effort Allocation

Expressions of interest in harvesting the U.S. portion of the 2006 NAFO 3M shrimp effort allocation (1 vessel/100 days) will be considered from owners of U.S. vessels in possession of a valid HSFC permit. All expressions of interest should be directed in writing to Patrick E. Moran (see **ADDRESSES**).

Letters of interest from U.S. vessel owners should include the name, registration and home port of the applicant vessel as required by NAFO in advance of fishing operations. In the event that multiple expressions of interest are made by U.S. vessel owners, NMFS may promulgate regulations designed to choose one U.S. applicant from among expressions of interest.

NAFO Conservation and Management Measures

Relevant NAFO Conservation and Enforcement Measures include, but are not limited to, maintenance of a fishing logbook with NAFO-designated entries; adherence to NAFO hail system requirements; presence of an on-board observer; deployment of a functioning, autonomous vessel monitoring system; and adherence to all relevant minimum size, gear, bycatch, and other

requirements. Further details regarding these requirements are available from the NMFS Northeast Regional Office, and can also be found in the current NAFO Conservation and Enforcement Measures on the Internet (see **ADDRESSES**).

Chartering Arrangements

In the event that no adequate expressions of interest in harvesting the U.S. portion of the 2006 NAFO 3L shrimp quota allocation and/or 3M shrimp effort allocation are made on behalf of U.S. vessels, expressions of interest will be considered from U.S. fishing interests intending to make use of vessels of other NAFO Parties under chartering arrangements to fish the 2006 U.S. quota allocation for 3L shrimp and/or the effort allocation for 3M shrimp. Under NAFO rules in effect through 2006, a vessel registered to another NAFO Contracting Party may be chartered to fish the U.S. effort allocation provided that written consent for the charter is obtained from the vessel's flag state and the U.S. allocation is transferred to that flag state. NAFO Parties must be notified of such a chartering operation through a mail notification process.

A NAFO Contracting Party wishing to enter into a chartering arrangement with the United States must be in full current compliance with the requirements outlined in the NAFO Convention and Conservation and Enforcement Measures including, but not limited to, submission of the following reports to the NAFO Executive Secretary: provisional monthly catches within 30 days following the calendar month in which the catches were made; provisional daily catches of shrimp taken from Division 3L; provisional monthly fishing days in Division 3M within 30 days following the calendar month in which the catches were made; observer reports within 30 days following the completion of a fishing trip; and an annual statement of actions taken in order to comply with the NAFO Convention. Furthermore, the United States may also consider a Contracting Party's previous compliance with the NAFO incidental catch limits, as outlined in the NAFO Conservation and Enforcement Measures, before entering into a chartering arrangement.

Expressions of interest from U.S. fishing interests intending to make use of vessels from another NAFO Contracting Party under chartering arrangements should include information required by NAFO regarding the proposed chartering operation, including: the name, registration and flag of the intended vessel; a copy of the charter; the fishing opportunities granted; a letter of consent from the vessel's flag state; the date from which the vessel is authorized to commence fishing on these opportunities; and the duration of the charter (not to exceed six months). More details on NAFO requirements for chartering operations are available from NMFS (see **ADDRESSES**). In addition, expressions of interest for chartering operations should be accompanied by a detailed description of anticipated benefits to the United States. Such benefits might include, but are not limited to, the use of U.S. processing facilities/personnel; the use of U.S. fishing personnel; other specific positive effects on U.S. employment; evidence that fishing by the chartered vessel actually would take place; and documentation of the physical characteristics and economics of the fishery for future use by the U.S. fishing industry.

In the event that multiple expressions of interest are made by U.S. fishing interests proposing the use of chartering operations, the information submitted regarding benefits to the United States will be used in making a selection. In the event that applications by U.S. fishing interests proposing the use of chartering operations are considered, all applicants will be made aware of the allocation decision as soon as possible. Once the allocation has been awarded for use in a chartering operation, NMFS will immediately take appropriate steps to notify NAFO and transfer the U.S. 3L shrimp quota allocation and/or the 3M shrimp effort allocation to the appropriate Contracting Party.

After reviewing all requests for allocations submitted, NMFS may decide not to grant any allocations if it is determined that no requests meet the criteria described in this notice. All individuals/companies submitting expressions of interest to NMFS will be contacted if an allocation has been awarded. Please note that if the U.S. portion of the 2006 NAFO 3L shrimp quota allocation and/or 3M shrimp effort allocation is awarded to a U.S. vessel or a specified chartering operation, it may not be transferred without the express, written consent of NMFS.

Dated: December 8, 2005.

John H. Dunnigan,

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

[FR Doc. 05–24026 Filed 12–13–05; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 70, No. 239
Wednesday, December 14, 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 AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1207

[Docket No. FV–05–711]

Potato Research and Promotion Plan; Section 610 Review

AGENCY: Agricultural Marketing Service.

ACTION: Notice of regulatory review and request for comments.

SUMMARY: This document announces the Agricultural Marketing Service's (AMS) review of the Potato Research and Promotion Plan (conducted under the Potato Research and Promotion Act), under the criteria contained in Section 610 of the Regulatory Flexibility Act (RFA).

DATES: Written comments on this document must be received by February 13, 2006.

ADDRESSES: Interested persons are invited to submit written comments concerning this notice of review to the Docket Clerk, Research and Promotion Branch, Fruit and Vegetable Programs (FV), Agricultural Marketing Service (AMS), USDA, Stop 0244, Room 2535–S, 1400 Independence Avenue, SW., Washington, DC 20250–0244. Comments should be submitted in triplicate and will be made available for public inspection at the above address during regular business hours. Comments may also be submitted electronically to: *Daniel.manzoni@usda.gov* or Internet: *http://www.regulations.gov.* All comments should reference the docket number and the date and page number of this issue of the **Federal Register**. A copy of this notice may be found at: *http://www.ams.usda.gov/fv/rpdocketlist.htm.*

FOR FURTHER INFORMATION CONTACT: Daniel Rafael Manzoni, Research and Promotion Branch, FV, AMS, USDA, Stop 0244, 1400 Independence Avenue, SW., Room 2535–S, Washington, DC 20250–0244; telephone: (888) 720–9915; fax: (202) 205–2800; or e-mail: *daniel.manzoni@usda.gov.*

SUPPLEMENTARY INFORMATION: The Potato Research and Promotion Act of 1971, as amended, (7 U.S.C. 2611 *et seq.*) authorized the Potato Research and Promotion Plan which is industry operated and funded, with oversight by USDA. The Potato Research and Promotion Plan objective is to carry out an effective and continuous coordinated program of research, development, advertising, and promotion designed to strengthen potatoes' competitive position, and to maintain and expand domestic and foreign markets for potatoes and potato products.

The Potato Research and Promotion Plan (7 CFR part 1207) became effective on March 9, 1972 and was implemented on September 15, 1972 when assessments began. The plan was amended in May 1984, to increase the maximum assessment rate from 1 cent per hundredweight to 0.5 percent of the previous 10-year average price received by growers.

Assessments under this program are used to fund promotional campaigns and to conduct research in the areas of U.S. marketing, and international marketing and to enable it to exercise its duties in accordance with the Plan.

The Potato Research and Promotion Plan is administered by the National Potato Promotion Board (Board), which is composed of producer members, importer members, and one public member appointed by the Secretary of Agriculture from nominations submitted by eligible groups. Producer membership on the Board is based upon potato production within each State. Importer members, limited to five, are based upon the amount of potatoes, potato products, and seed potatoes imported into the U.S. All members serve terms of three years.

AMS published in the **Federal Register** (63 FR 8014; February 18, 1999) its plan to review certain regulations, including the Potato Research and Promotion Plan, (conducted under the Potato Research and Promotion Act), under criteria contained in Section 610 of the Regulatory Flexibility Act (RFA; 5 U.S.C. 601–612). The plan was updated in the **Federal Register** on August 14, 2003 (68 FR 48574). Because many AMS regulations impact small entities, AMS decided, as a matter of policy, to review certain regulations which, although they may not meet the threshold requirement under section 610 of the RFA, warrant review. Accordingly, this notice and request for comments is made for the Potato Research and Promotion Plan.

The purpose of the review is to determine whether the Potato Research and Promotion Plan should be continued without change, amended, or rescinded (consistent with the objectives of the Potato Research and Promotion Act of 1971) to minimize the impacts on small entities. AMS will consider the continued need for the Potato Research and Promotion Plan; the nature of complaints or comments received from the public concerning the Potato Research and Promotion Plan; the complexity of the Potato Research and Promotion Plan; the extent to which the Potato Research and Promotion Plan overlaps, duplicates, or conflicts with other Federal rules, and, to the extent feasible, with State and local regulations; and the length of time since the Potato Research and Promotion Plan has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the Potato Research and Promotion Plan.

Written comments, views, opinions, and other information regarding the Potato Research and Promotion Plan's impact on small businesses are invited.

Dated: December 8, 2005.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E5–7332 Filed 12–13–05; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1209

[Docket No. FV–05–710]

Mushroom Promotion, Research, and Consumer Information Order; Section 610 Review

AGENCY: Agricultural Marketing Service.

ACTION: Notice of regulatory review and request for comments.

SUMMARY: This document announces the Agricultural Marketing Service's (AMS) review of the Mushroom Promotion,

Research, and Consumer Information Order (conducted under the Mushroom Promotion, Research, and Consumer Information Act), under the criteria contained in Section 610 of the Regulatory Flexibility Act (RFA).

DATES: Written comments on this document must be received by February 13, 2006.

ADDRESSES: Interested persons are invited to submit written comments concerning this notice of review to the Docket Clerk, Research and Promotion Branch, Fruit and Vegetable Programs (FV), Agricultural Marketing Service (AMS), USDA, Stop 0244, Room 2535–S, 1400 Independence Avenue, SW., Washington, DC 20250–0244. Comments should be submitted in triplicate and will be made available for public inspection at the above address during regular business hours. Comments may also be submitted electronically to: *Deborah.simmons@usda.gov* or Internet: *http://www.regulations.gov.* All comments should reference the docket number and the date and page number of this issue of the **Federal Register.** A copy of this notice may be found at: *http://www.ams.usda.gov/fv/rpdocketlist.htm.*

FOR FURTHER INFORMATION CONTACT: Debbie Simmons, Research and Promotion Branch, FV, AMS, USDA, Stop 0244, 1400 Independence Avenue, SW., Room 2535–S, Washington, DC 20250–0244; telephone: (888) 720–9915 fax: (202) 205–2800; or e-mail: *Deborah.simmons@usda.gov.*

SUPPLEMENTARY INFORMATION: The Mushroom Promotion, Research, and Consumer Information Act of 1990, (7 U.S.C. 6101 *et seq.*) authorized the Mushroom Promotion, Research, and Consumer Information Program which is industry operated and funded, with oversight by USDA. The program's objective is to carry out an effective, continuous, and coordinated program of promotion, research, consumer information, and industry information designed to strengthen the mushroom industry's position in the marketplace, maintain and expand existing markets and uses for mushrooms, develop new markets and uses for mushrooms, and to carry out programs, plans, and projects designed to provide maximum benefits to the mushroom industry.

The program became effective on January 8, 1993, when the Mushroom Promotion, Research, and Consumer Information Order (7 CFR part 1209) was issued. Assessments began in 1993 at the rate of 0.0025 cents per pound and have fluctuated from 0.0010 to 0.0045 cents per pound. The current rate is 0.0024 cents per pound.

Assessments under this program are used to fund retail category management, research concerning nutritional attributes of mushrooms, foodservice training, and industry information and to enable it to exercise its duties in accordance with the Order.

The program is administered by the Mushroom Council (Council) which is composed of producers and may include importers, appointed by the Secretary of Agriculture from nominations submitted by eligible producers or importers. Producer membership on the Board is based upon mushroom production within each of four predestinated geographic regions within the U.S. and a fifth region representing importers, when imports, on average, equal or exceed 35,000,000 pounds of mushrooms annually. All members serve terms of three years.

AMS published in the **Federal Register** (63 FR 8014; February 18, 1999) its plan to review certain regulations, including the Mushroom Promotion, Research, and Consumer Information Order, (conducted under the Mushroom Promotion, Research, and Consumer Information Act), under criteria contained in Section 610 of the Regulatory Flexibility Act (RFA; 5 U.S.C. 601–612). The plan was updated in the **Federal Register** on August 14, 2003 (68 FR 48574). Because many AMS regulations impact small entities, AMS decided, as a matter of policy, to review certain regulations which, although they may not meet the threshold requirement under section 610 of the RFA, warrant review. Accordingly, this notice and request for comments is made for the Mushroom Promotion, Research, and Consumer Information Order.

The purpose of the review is to determine whether the Mushroom Promotion, Research, and Consumer Information Order should be continued without change, amended, or rescinded (consistent with the objectives of the Mushroom Promotion, Research, and Consumer Information Act of 1990) to minimize the impacts on small entities. AMS will consider the continued need for the Order; the nature of complaints or comments received from the public concerning the Order; the complexity of the Order; the extent to which the Order overlaps, duplicates, or conflicts with other Federal rules, and, to the extent feasible, with State and local regulations; and the length of time since the Order has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the Order.

Written comments, views, opinions, and other information regarding the Order's impact on small businesses are invited.

Dated: December 8, 2005.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E5–7336 Filed 12–13–05; 8:45 am]

BILLING CODE 3410–02–P

FEDERAL ELECTION COMMISSION

11 CFR Part 109

[Notice 2005–28]

Coordinated Communications

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Election Commission requests comment on proposed revisions to its regulations regarding communications that have been coordinated with Federal candidates and political party committees. The Commission's current rules set out a three-prong test for determining whether a communication is ''coordinated'' with, and therefore an in-kind contribution to, a Federal candidate or a political party committee. In *Shays* v. *FEC,* the Court of Appeals invalidated one aspect of the so-called content prong of the coordinated communications test, because the court believed that the Commission had not provided adequate explanation and justification for the current rules under the Administrative Procedure Act. To comply with the decision of the Court of Appeals, and to address other issues involving the coordinated communication rules, the Commission is issuing this Notice of Proposed Rulemaking. No final decision has been made by the Commission on the issues presented in this rulemaking. Further information is provided in the supplementary information that follows.

DATES: Comments must be received on or before January 13, 2006. The Commission will hold a hearing on the proposed rules on January 25 or 26, 2006, or both at 9:30 a.m. Anyone wishing to testify at the hearing must file written comments by the due date and must include a request to testify in the written comments.

ADDRESSES: All comments must be in writing, must be addressed to Mr. Brad C. Deutsch, Assistant General Counsel, and must be submitted in either e-mail, facsimile, or paper copy form. Commenters are strongly encouraged to submit comments by e-mail or fax to

ensure timely receipt and consideration. E-mail comments must be sent to either *coordination@fec.gov* or submitted through the Federal eRegulations Portal at *www.regulations.gov.* If e-mail comments include an attachment, the attachment must be in either Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments must be sent to (202) 219–3923, with paper copy follow-up. Paper comments and paper copy follow-up of faxed comments must be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. All comments must include the full name and postal service address of the commenter or they will not be considered. The Commission will post comments on its website after the comment period ends. The hearing will be held in the Commission's ninth-floor meeting room, 999 E Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. Brad C. Deutsch, Assistant General Counsel, Ms. Amy Rothstein, or Mr. Ron B. Katwan, Attorneys, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of 2002, Pub. L. 107–155, 116 Stat. 81 (2002) (''BCRA''), amended the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* (the ''Act''), in a number of respects. In the portion of BCRA relevant to this proceeding, Congress repealed the Commission's pre-BCRA regulations regarding ''coordinated general public political communications'' and directed the Commission to promulgate new regulations on ''coordinated communications'' in their place. Pub. L. 107–155, sec. 214(b), (c) (2002). On December 17, 2002, the Commission adopted regulations at 11 CFR 109.21 to implement BCRA's provisions regarding payments for communications that are coordinated with a candidate, a candidate's authorized committee, or a political party committee. *See Final Rules and Explanation and Justification on Coordinated and Independent Expenditures,* 68 FR 421 (Jan. 3, 2003) (''*2002 Coordination Final Rules*'').

Under the Act, as amended by BCRA, an expenditure ''made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of'' a Federal candidate, a candidate's authorized committee, the national, State, or local committee of a political party, or agents of any of the foregoing, is an in-kind contribution to the candidate or political party committee with which it has been coordinated, and is thus subject to the limitations, prohibitions, and reporting requirements of the Act. 2 U.S.C. 441a(a)(7)(B)(i) and (ii). An ''expenditure'' is any payment ''made by any person for the purpose of influencing any election for Federal office.'' [1] 2 U.S.C. 431(9)(A)(i).

Thus, under the Act, a payment for a communication constitutes an in-kind contribution if two conditions are satisfied. First, the payment must qualify as an ''expenditure''; that is, it must be made for the purpose of influencing a Federal election. Second, the payment must be made ''in cooperation, consultation, or concert, with, or at the request or suggestion of'' a candidate or political party committee or agents thereof. In addition, the Act provides that any disbursement for an ''electioneering communication'' [2] that is coordinated with a candidate, a candidate's authorized committee, a political party committee, or agents thereof, is an in-kind contribution to the candidate or political party supported by the communication. 2 U.S.C. 441a(a)(7)(C).

To implement these provisions of the Act, 11 CFR 109.21 sets forth a three-prong test for determining whether a communication is a coordinated communication, and therefore an in-kind contribution to, a candidate, a candidate's authorized committee, or a political party committee. *See* 11 CFR 109.21(a). First, the communication must be paid for by someone other than a candidate, a candidate's authorized committee, a political party committee, or their agents (the ''payment prong''). *See* 11 CFR 109.21(a)(1). Second, the communication must meet one of four content standards (the ''content prong''). *See* 11 CFR 109.21(a)(2) and (c). Third, the communication must meet one of five conduct standards (the ''conduct prong''). *See* 11 CFR 109.21(a)(3) and (d). A communication must satisfy all three prongs to be a ''coordinated communication.''

[1] In addition, the Act specifically provides that the financing of the republication of campaign materials prepared by the candidate, the candidate's authorized committee, or agents thereof, is an expenditure. 2 U.S.C. 441a(a)(7)(B)(iii).

[2] The Act and Commission regulations define an electioneering communication as any broadcast, cable, or satellite communication that (1) refers to a clearly identified candidate for Federal office; (2) is publicly distributed within 60 days before a general election or 30 days before a primary election for the office sought by the candidate referenced in the communication; and (3) can be received by 50,000 or more persons within the geographic area that the candidate referenced in the communication seeks to represent. *See* 2 U.S.C. 434(f)(3)(C); 11 CFR 100.29.

I. The Content Prong

This rulemaking is being initiated in response to court decisions that invalidated one aspect of the ''content prong'' of the coordinated communication test. *See Shays* v. *FEC,* 337 F. Supp. 2d 28 (D.D.C. 2004) (''*Shays District*''), *aff'd, Shays* v. *FEC,* 414 F.3d 76 (D.C. Cir. 2005) (''*Shays Appeal*'') (*pet. for reh'g en banc denied* Oct. 21, 2005) (No. 04–5352). As described more fully below, the District Court held the content prong as a whole to be invalid, while the Court of Appeals held the Commission's justification for one aspect of the content prong (specifically, the 120-day time frame in the fourth content standard) to be inadequate.

The purpose of the content prong is to ''ensure that the coordination regulations do not inadvertently encompass communications that are not made for the purpose of influencing a Federal election.'' *2002 Coordination Final Rules* at 426. Accordingly, each of the four content standards that comprise the ''content prong'' identifies a category of communications that satisfies the content prong because its ''subject matter is reasonably related to an election.'' *Id.* at 427.

The first content standard is satisfied if the communication is an electioneering communication. *See* 11 CFR 109.21(c)(1). This content standard implements the statutory directive, described above, that disbursements for coordinated electioneering communications be treated as in-kind contributions to the candidate or political party supported by the communication.

The second content standard is satisfied by a public communication [3] made at any time that disseminates, distributes, or republishes campaign materials prepared by the candidate, the

[3] 11 CFR 100.26 defines ''public communication'' as ''a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising. The term public communication shall not include communications over the Internet.'' The District Court rejected the definition of ''public communication'' in the Commission's regulations because the definition categorically excludes all Internet communications. *Shays District* at 70. To comply with the *Shays District* decision, the Commission issued a Notice of Proposed Rulemaking that proposes to include certain Internet communications in the definition of ''public communication.'' *See Notice of Proposed Rulemaking on Internet Communications,* 70 FR 16967 (April 4, 2005). The proposed revision to the definition of ''public communication'' would have the effect of including certain Internet communications in the definition of ''coordinated communication,'' as well. The Commission has not yet issued final rules in this rulemaking.

candidate's authorized committee, or agents thereof. *See* 11 CFR 109.21(c)(2). This content standard implements the Congressional mandate that the Commission's rules on coordinated communications address the ''republication of campaign materials.'' *See* Pub. L. 107–155, sec. 214(c)(1) (2002).

The third content standard is satisfied if a public communication made at any time expressly advocates the election or defeat of a clearly identified candidate for Federal office. *See* 11 CFR 109.21(c)(3); *see also* 11 CFR 100.22. The Commission concluded that express advocacy communications, no matter when such communications are made, can be reasonably construed only as for the purpose of influencing an election.

The fourth content standard is satisfied if a public communication (1) refers to a political party or a clearly identified Federal candidate; (2) is publicly distributed or publicly disseminated 120 days or fewer before an election;[4] and (3) is directed to voters in the jurisdiction of the clearly identified Federal candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot. *See* 11 CFR 109.21(c)(4).

In adopting the 120-day time frame for public communications for the fourth content standard, the Commission sought to create a bright-line rule for public communications that fall short of express advocacy and do not republish campaign materials. The 120-day time frame ''focuses the regulation on activity reasonably close to an election, but not so distant from the election as to implicate political discussion at other times.'' *2002 Coordination Final Rules* at 430. The Commission noted that its intent was ''to require as little characterization of the meaning or the content of the communication, or inquiry into the subjective effect of the communication on the reader, viewer, or listener as possible.'' *2002 Coordination Final Rules* at 430 (citing *Buckley* v. *Valeo,* 424 U.S. 1, 42–44 (1976)). The Commission emphasized that the regulation ''is applied by asking if certain things are true or false about the face of the public communication or with limited reference to external facts on the public record.'' *Id.*

In adopting this time frame, the Commission relied on the fact that, in BCRA, Congress defined ''Federal election activity'' (''FEA''), in part, as voter registration activity ''during the period that begins on the date that is 120 days'' before a Federal election. The Commission reasoned that, in doing so, Congress ''deem[ed] that period of time before an election to be reasonably related to that election.'' *Id.* (citing 2 U.S.C. 431(20)(A)(i)).

II. Overview of Court Decisions in *Shays* v. *FEC*

In *Shays District,* the District Court held that the Commission's coordinated communication regulations did not survive the second step of *Chevron* review.[5] *Shays District* at 61–62. Specifically, the court concluded that limiting the coordinated communication definition to communications that satisfy the content standards at 11 CFR 109.21(c)(1) through (4) would ''undercut[] [the Act's] statutory purpose of regulating campaign finance and preventing circumvention of the campaign finance rules.'' *Id.* at 63. The District Court reasoned that communications that have been coordinated with a candidate, a candidate's authorized committee, or a political party committee have value for, and therefore are in-kind contributions to, that candidate or committee, *regardless of the content, timing, or geographic reach* of the communications. *See Shays District* at 63–64.

The Court of Appeals, however, disagreed ''with the district court's suggestion that any standard looking beyond collaboration to content would necessarily 'create an immense loophole,' thus exceeding the range of permissible readings under *Chevron* step two.'' *Shays Appeal* at 99–100. The Court of Appeals noted that ''we can hardly fault the [Commission's] effort to develop an objective, bright-line test [that] does not unduly compromise the Act's purposes.'' *Shays Appeal* at 99 (internal quotations omitted). Moreover, the Court of Appeals expressly ''reject[ed] Shays and Meehan's argument that [the Act] precludes content-based standards under Chevron Step One.'' *Id.* As the Court of Appeals emphasized, ''time, place, and content may be critical indicia of communicative purpose. While election-related intent is obvious, for example, in statements urging voters to 'elect' or 'defeat' a specified candidate or party, the same may not be true of [other types of] ads [.]'' *Id.* Instead, the Court of Appeals found that ''the challenged regulation's fatal defect is not that the [Commission] drew distinctions based on content, time, and place, but rather that, contrary to the [Administrative Procedure Act], the Commission offered no persuasive justification for * * * the 120-day time-frame and the weak restraints applying outside of it.'' *Id.* at 100. Specifically, the Court of Appeals concluded that, by limiting ''coordinated communications'' made outside of the 120-day window to communications containing express advocacy or the republication of campaign materials, ''the [Commission] has in effect allowed a coordinated communication free-for-all for much of each election cycle.'' *Id.*

The Court of Appeals found that the Commission had not adequately explained why ''120 days reasonably defines the period before an election when non-express advocacy likely relates to purposes other than 'influencing' a Federal election.'' *Id.* at 101. Regarding the Commission's reliance on Congress's use of a 120-day time frame in BCRA's definition of FEA as voter registration activity, the Court observed that the Commission had provided no evidence that voter registration activity occurs on cycles similar to ''coordinated communications.'' *Id.* at 100.

For these reasons, the Court of Appeals concluded that the Commission had not provided adequate explanation under the Administrative Procedure Act (''APA'') for the Commission's decision to exclude communications distributed more than 120 days before an election, unless a communication contains express advocacy or republishes campaign materials. Therefore, the Court of Appeals affirmed the District Court's invalidation of the Commission's coordinated communication rules. *Id.* at 101.

III. Alternative Proposals for Revising the Content Prong in 11 CFR 109.21(c)

The Commission is considering the seven alternatives described below to comply with the Court of Appeals decision in *Shays Appeal.* The regulatory text for each alternative,

[4] The term ''election'' includes general elections, primary elections, runoff elections, caucuses or conventions, and special elections. *See* 11 CFR 100.2.

[5] The District Court described the *first* step of the *Chevron* analysis, which courts use to review an agency's regulations: ''a court first asks 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *See Shays District,* at 51 (*quoting Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council,* 467 U.S. 837, 842–43 (1984)). According to the District Court, in the *second* step of the *Chevron* analysis, the court determines if the agency's interpretation is a permissible construction of the statute that does not ''unduly compromise'' [the Act's] purposes by ''creat[ing] the potential for gross abuse.'' *See Shays District* at 91, *citing Orloski* v. *FEC,* 795 F.2d 156, 164–65 (D.C. Cir. 1986) (internal citations omitted).

except one,[6] is set forth at the end of this NPRM. The Commission seeks comment on each alternative, including responses to the following questions: Is the alternative too broad or too narrow? Would the alternative potentially include public communications that are not made for the purpose of influencing a Federal election and that therefore should not be restricted and treated as in-kind contributions? Conversely, would the alternative potentially exclude public communications that are made for the purpose of influencing a Federal election and therefore should be treated as an in-kind contribution, provided that the payment and conduct prongs are also satisfied? The Commission invites commenters to provide examples of communications from previous election cycles demonstrating that an alternative may be either underinclusive or overinclusive. Would the alternative address the Court of Appeals' concerns regarding the potential for circumvention of the Act and for corruption or the appearance of corruption? Would the alternative properly effectuate congressional intent? Would the alternative provide sufficient guidance to individuals and organizations seeking to be actively involved in politics and to comply with the Commission's coordination rules?

The Commission notes that the alternatives presented in this NPRM are not limited to the exact terms of the regulatory language set forth for each alternative at the end of the NPRM. Instead, as the narrative describing each alternative makes clear, the final rules may be a variation of one of the alternatives or even a combination of components from different alternatives. The Commission specifically invites comment on whether a combination of components from several different alternatives would be appropriate. The Commission also seeks comment on whether it should adopt a content standard that is not presented as one of the alternatives in this NPRM.

In addition, given that the content prong and the conduct prong of the coordinated communication test were intended to work together, the Commission seeks comment on whether adopting a given alternative with respect to the content prong would necessitate changing the conduct prong in 11 CFR 109.21(d) to ensure that only communications made for the purpose of influencing a Federal election are covered. If so, what amendments to the conduct prong should the Commission consider making?

[6] *See* note 11 below.

Alternative 1—Retain Current 11 CFR 109.21(c)(4) but Revise the Explanation and Justification

Alternative 1 would retain the current coordinated communication test at 11 CFR 109.21, including the 120-day time frame in the fourth content standard at 11 CFR 109.21(c)(4)(ii), but would revise the Explanation and Justification for 11 CFR 109.21(c)(4)(ii) by providing further explanation supporting the 120-day time frame.[7]

The Court of Appeals emphasized that justifying the 120-day time frame, or another time frame, requires the Commission to undertake a factual inquiry to determine whether the temporal line that it draws ''reasonably defines the period before an election when non-express advocacy likely relates to purposes other than 'influencing' a Federal election'' or whether it ''will permit exactly what BCRA aims to prevent: evasion of campaign finance restrictions through unregulated collaboration.'' *Shays Appeal* at 101–02. Accordingly, the Commission seeks comment on the following questions raised by the Court of Appeals in *Shays Appeal* regarding the 120-day time frame:

(1) Are a significant number of communications outside the 120-day period made for the purpose of influencing Federal elections, or are communications to influence Federal elections predominantly made within 120 days of an election? Are there specific examples from the 2004 election cycle of communications that the current coordination rules should have reached but did not or, conversely, examples of communications that the current rules should not have reached but did? *Id.* at 102.

(2) Do communications made for the purpose of influencing House, Senate, and Presidential races—all covered by this rule—occur during approximately the same periods in relation to the general election or the primary election, or should different time frames apply to each? *Id.*

(3) If the Commission were to retain the 120-day time frame, would persons aiming to influence elections shift spending outside of that period to avoid the rules' restrictions? Would the same phenomenon potentially take place if the Commission adopted a time frame longer or shorter than 120 days before a Federal election? In 2004, was there any evidence that spending shifted outside the 120-day period to avoid the rules' restrictions? *Id.*

The Commission specifically invites comments in the form of empirical data that show the time periods before an election in which electoral communications generally occur. Do outside persons make electoral communications during time frames that differ from candidates or parties? Do early electoral communications, for example, that occur more than 120 days before an election, have an effect on election results?

On its website, the Commission posts reports filed pursuant to the Act and Commission regulations. Some of these reports include information on independent expenditures by political committees filed under 11 CFR 104.4 and by persons other than political committees under 11 CFR 109.10. Additionally, all political committees must report coordinated expenditures along with all other in-kind contributions under 11 CFR 109.21(b)(3), while political party committees must report their coordinated party expenditures separately under 11 CFR 109.37. *See* Form 3X, line 25 (summarizing entries from Schedule F). For the convenience of commenters, the Commission has extracted these data from the reports and posted them on its website.[8] Do the data provide an empirical basis for retaining the 120-day time frame or establishing another time frame? For example, the data appear to indicate that, during the 2004 election cycle, (1) coordinated party expenditures made in connection with the general election were made mostly after September 1, 2004—roughly within 60 days of the general election, and (2) independent expenditures were made mostly after July 27, 2004—roughly within 90 days of the general election.[9] The Commission invites statistical analyses of these data. Specifically, to what extent is it possible to extrapolate from any identified patterns in party committee coordinated expenditures to

[7] Although this first alternative proposal to implement the appellate court's decision in *Shays Appeal* would not change 11 CFR 109.21(c)(4), the regulatory text of Alternative 1 as set forth at the end of this NPRM reflects proposed changes to 11 CFR 109.21(c)(4)(ii), to address situations in which multiple candidates for Federal office appear in a given public communication. *See* Section IV–3 below.

[8] These data are available at *http://www.fec.gov/press/coordruledata.shtml.*

[9] A political party committee authorized to make coordinated expenditures may make such expenditures in connection with the general election before or after its candidate has been nominated. *See* 2 U.S.C. 441a(d), 11 CFR 109.34. *See also* 11 CFR 109.32(a). Generally, it is less likely that such expenditures would be made much before a candidate has been nominated. The Commission also notes that expenditures reported by political party committees as ''coordinated expenditures'' include not only expenditures for communications but also all other coordinated expenditures.

expenditures for coordinated communications by outside groups? Do the data support the conclusion that communications made for the purpose of influencing an election are almost always made, or are generally made, within the last 60 to 90 days before an election?

The Commission also seeks comment on whether other existing analyses provide a basis for choosing a particular time frame. *See, e.g.*, Michael M. Franz et al., *The Election after Reform: Money, Politics and the Bipartisan Campaign Reform Act* ch. 7 (Michael J. Malbin ed., Rowman and Littlefield, forthcoming Mar. 2006), *available at http://www.cfinst.org/studies/ElectionAfterReform/chapters.html;* Ken Goldstein & Joel Rivlin, *Political Advertising in the 2002 Elections* ch. 3 (forthcoming), *available at http://polisci.wisc.edu/tvadvertising;* Craig B. Holman, *Buying Time 2000: Television Advertising in the 2000 Federal Elections* 52–59 (2001), *available at http://www.brennancenter.org/programs/buyingtime2000.html;* Jonathan Krasno & Kenneth Goldstein, *The Facts About Television Advertising and the McCain-Feingold Bill,* 35(2) PS: Political Science and Politics 207 (2002), *draft available at http://www.cfinst.org/studies/papers/goldstein&krasno.pdf;* Donald F. McGahn, Remarks at Campaign Finance Reform Forum, Campaign Finance Institute (Jan. 14, 2005),[10] *available at www.cfinst.org/transcripts/pdf/1–14–05_Transcript_PanelThree.pdf.; see also* data compiled by the University of Wisconsin Advertising Project, *available at http://polisci.wisc.edu/tvadvertising.*

Alternative 2—Adopt a Different Time Frame

The Commission seeks comment on whether a time frame other than 120 days would be more appropriate in bringing public communications that are made for the purpose of influencing a Federal election within the coordination regulations, while filtering out public communications that are not made for this purpose.[11] Does empirical evidence support the adoption of a different time frame? Some States hold primary elections early in the election year. Under the current rule, a public communication that refers to a clearly identified candidate and is distributed within the 120-day period preceding a primary election would satisfy the content standard at 11 CFR 109.21(c)(4), but the same public communication distributed shortly after the primary but still more than 120 days before the subsequent general election would not satisfy that standard. Accordingly, rather than retain the current rule covering communications made within the 120-day period before an election, whether primary or general, should the Commission adopt a time frame that covers an uninterrupted period of time starting 120 days (or some other time period) before the primary election up to and including the day of the general election?

The Commission also invites comment on whether to adopt a time frame covering the period from January 1 of each election year through the day of the general election. Would such an ''election year'' time frame begin too late for States that hold primaries early in the year? Conversely, would an ''election year'' time frame begin too early for States that hold primaries in September? Would such a time frame be appropriate for Presidential elections?

In addition, the Commission seeks comment on whether to adopt a tiered approach, under which the range of communications that satisfy the fourth content standard would depend on the communication's proximity to an election. For example, for communications made within 120 days before an election, the fourth content standard could be modified to capture any public communication that refers to a political party or clearly identified Federal candidate and is directed to the voters in the relevant geographical areas. For communications made between 120 and 240 days before an election, the fourth content standard could capture only public communications that promote, attack, support, or oppose (''PASO'') a political party or a clearly identified Federal candidate.[12] The Commission invites commenters to provide examples of communications from previous election cycles to show whether a given time frame would be either underinclusive or overinclusive.

Alternative 3—Eliminate the Time Restriction From 11 CFR 109.21(c)(4)

Alternative 3 would revise 11 CFR 109.21(c)(4) by eliminating any time restriction from the fourth content standard. Specifically, Alternative 3 would remove the requirement that a public communication be publicly distributed or otherwise publicly disseminated 120 days or fewer before an election. *See* 11 CFR 109.21(c)(4)(ii). Alternative 3 would, however, retain the requirements that (1) the public communication refer to a political party or clearly identified candidate and (2) be directed to voters in the jurisdiction of the clearly identified candidate or to voters in the jurisdiction in which one or more candidates of the political party appear on the ballot. *See* 11 CFR 109.21(c)(4)(i) and (iii). Thus, under this alternative, any public communication that refers to a clearly identified candidate or political party and is directed to voters in the relevant jurisdiction would satisfy the content prong of the coordinated communication test, regardless of when it is distributed.

The Commission seeks comment on whether the fourth content standard without a time frame would still be effective in distinguishing communications made for the purpose of influencing a Federal election from communications made for other purposes, such as communications made for the purpose of lobbying for or against certain legislation. The Court of Appeals noted that ''to qualify as 'expenditure' in the first place, spending must be undertaken 'for the purpose of influencing' a federal election * * * [T]ime, place, and content may be critical indicia of communicative purpose. While election-related intent is obvious, for example, in statements urging voters to 'elect' or 'defeat' a specified candidate or party, the same may not be true of ads identifying a federal politician but focusing on pending legislation[.]'' *Shays Appeal* at 99. Does the fact that a communication refers to a clearly identified candidate or a political party and is directed to voters in the relevant geographical area by itself provide strong evidence that the communication is made for the purpose of influencing a Federal election, even if the communication is made a year or more before that election? Does the Commission have the statutory authority to regulate ''other categories of non-electioneering speech—non-express advocacy, for example—outside the 120 days''? *Id.* at 101. How should the Commission separate communications made for the purpose of influencing a Federal election from those without such purpose?

The Commission also invites commenters to provide examples of communications from previous election cycles to show whether Alternative 3

[10] ''The hotspot of the campaign didn't start until late September. * * * This cycle was very compressed when it came to the heavy spending. It eventually had in essence a four-week sprint as opposed to the eight- to ten-week sprint that we used to pay for.''

[11] Because Alternative 2 does not propose a specific time frame, this NPRM does not set forth regulatory text for Alternative 2.

[12] *See* Alternative 4 below for a more detailed discussion of the PASO standard.

would be either underinclusive or overinclusive.

Alternative 4—Replace the Content Standard in 11 CFR 109.21(c)(4) With a ''PASO'' Test

Alternative 4 would replace the content standard in 11 CFR 109.21(c)(4) with a new standard providing that a public communication would satisfy the content prong of the coordinated communication test if it refers to a political party or a clearly identified Federal candidate, is directed to voters in the jurisdiction of the clearly identified Federal candidate or to voters in a jurisdiction in which one or more Federal candidates of a political party are on the ballot, and the communication PASOs the political party or the clearly identified Federal candidate.[13] Would such a standard have the potential to be unconstitutionally vague in practical application? Or, conversely, would such a standard '' 'provide explicit standards for those who apply them ' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited' ''? *McConnell* v. *FEC,* 540 U.S. 93, 170 n.64 (2003) (quoting *Grayned* v. *City of Rockford,* 408 U.S. 104, 108–109 (1972)).

Alternatively, the Commission invites comment on whether Alternative 4, instead of using a PASO standard, should create a safe harbor exemption from the coordinated communication rules for certain kinds of communications. A communication that satisfies these criteria would, as a matter of law, not be treated as a coordinated communication. For example, such criteria could include the following:

- The communication is devoted exclusively to a particular pending legislative or executive branch matter.
- The communication's reference to a clearly identified Federal candidate is limited to urging the public to contact that candidate to persuade the candidate to take a particular position on the pending legislative or executive branch matters.
- The communication does not refer to the political party affiliation or the political ideology (*e.g.*, ''liberal,'' ''conservative,'' etc.) of a clearly identified Federal candidate.
- The communication does not refer to a clearly identified Federal candidate's record or position on any issue.
- The communication does not refer to a clearly identified Federal candidate's character, qualifications, or fitness for office.
- The communication does not refer to an election, voters or the voting public, or anyone's candidacy.

If this criteria-based approach is adopted, should any of the criteria be eliminated from, or added to, the list? If adopted, should the regulation provide that a communication must meet all of the criteria on the list to qualify for the safe harbor exemption or should the regulation follow a more flexible approach and provide that a communication may meet some but not necessarily all of the criteria on the list and still qualify for the exemption? Should satisfaction of one or more specific criteria on the list, by itself, be sufficient to qualify for the exemption? By contrast, should any one or more criteria be critical to the analysis such that failure to meet these criteria would prohibit an organization from taking advantage of the safe harbor?

The Commission seeks comment as to whether Alternative 4 should incorporate a time period limitation, such as a specific number of days before an election. If so, should this time period be 120 days before an election or should a different time frame be adopted? The Commission invites commenters to submit supporting empirical data. The Commission also invites commenters to provide examples of communications from previous election cycles to show whether Alternative 4 would be either underinclusive or overinclusive.

Alternative 5—Eliminate the Time Restriction From 11 CFR 109.21(c)(4) for Political Committees Only

Alternative 5 would adopt a bifurcated test under which application of the 120-day time frame would depend on the identity of the person paying for the public communication. If a registered political committee, or an organization that is required to register as a political committee, pays for a public communication that refers to a political party or a clearly identified Federal candidate and the public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more of the candidates of the political party appear on the ballot, then that public communication would be deemed as a matter of law to have been made for the purpose of influencing a Federal election. Such a public communication, when paid for by a political committee, would be deemed to have been made for the purpose of influencing a Federal election regardless of when it is distributed, because a political committee is an organization whose major purpose is to influence elections.[14] Alternatively, should the time frame be eliminated only for public communications that are paid for by registered political committees or organizations that are required to register as political committees if the communication PASOs a political party or a clearly identified Federal candidate?

Under Alternative 5, if the person paying for the public communication is not a registered political committee or an organization that is required to register as a political committee, then the public communication would satisfy the content standard at 11 CFR 109.21(c)(4) only if it occurs 120 days or fewer before an election or during whatever other time frame might be adopted. Are there data to justify the 120-day window? Do the data support another time frame?

The Commission seeks comment on how such a bifurcated test would apply to other entities, such as non-Federal candidates and their campaign organizations. The Commission further seeks comment on how such a bifurcated test should apply to entities organized under section 527 of the Internal Revenue Code that are not registered with the Commission as political committees. The Commission also seeks comment on the effect that this alternative approach would have on a candidate who has contacts that meet the conduct standard with an organization that is not registered as a political committee. If that organization

[13] The PASO standard is found in BCRA and applies primarily to candidates and political party committees with respect to FEA. *See* 2 U.S.C. 431(20)(A)(iii). But Congress also applied the PASO standard to the activity of certain tax-exempt organizations. For example, BCRA prohibits party committees from soliciting funds for, or making or directing donations to, certain tax-exempt organizations that make expenditures or disbursements for FEA, which includes public communications that PASO a Federal candidate. *See* 2 U.S.C. 431(20)(A)(iii) and 441i(d)(1). BCRA also directed the Commission not to exempt any communications that PASO a clearly identified Federal candidate from the electioneering communication provisions. *See* 2 U.S.C. 434(f)(3)(B)(iv). The Commission provided examples of communications that PASO and communications that do not PASO in Advisory Opinion 2003–25.

[14] The Act defines a ''political committee'' as any committee, club, association, or other group of persons that receives ''contributions'' or makes ''expenditures'' aggregating in excess of $1,000 during a calendar year. 2 U.S.C. 431(4)(A). *See also* 11 CFR 100.5. In *Buckley* v. *Valeo,* 424 U.S. 1 (1976), the Supreme Court, in order to avoid vagueness, narrowed the Act's references to ''political committee'' to prevent their ''reach [to] groups engaged purely in issue discussion.'' 424 U.S. at 79. The Court concluded that ''[t]o fulfill the purposes of the Act [the words 'political committee'] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'' *Id.*

is subsequently found to have inappropriately failed to register as a political committee based on activity that was not known to the candidate, should the Commission provide in the regulation that the candidate would not be deemed to have accepted an in-kind contribution from the organization?

In addition, the Commission invites commenters to provide examples of communications from previous election cycles to show whether Alternative 5 would be either underinclusive or overinclusive.

Alternative 6—Replace the Fourth Content Standard in 11 CFR 109.21(c)(4) With a Standard Covering Public Communications Made for the Purpose of Influencing a Federal Election

Alternative 6 would replace the fourth content standard in 11 CFR 109.21(c)(4) with a new standard that would closely track the statute and simply require a communication to be a public communication made for the purpose of influencing a Federal election. The effect of adopting Alternative 6 would be to restrict some public communications that are not covered by current 11 CFR 109.21(c)(4), *i.e.*, communications that are made for the purpose of influencing a Federal election but that are either: (1) Made more than 120 days before an election, or (2) made at any time and do not refer to a political party or a clearly identified Federal candidate. In addition, Alternative 6 would exclude from regulation some communications that are covered by current 11 CFR 109.21(c)(4), *i.e.*, communications that are made within 120 days of an election and that do refer to a political party or a clearly identified Federal candidate but that are not made for the purpose of influencing a Federal election.

Whether a given public communication is for the purpose of influencing a Federal election would depend on the facts and would be decided on a case-by-case basis. This is the approach some Commissioners used before 2002 when the Commission adopted a content prong for its coordinated communication regulations. Under such a case-by-case approach, some public communications would be treated as having been made for the purpose of influencing a Federal election, even though no Federal candidate or political party is referenced in the communication, and regardless of how far in advance of an election such a communication is made. This approach would result in some public communications being restricted as coordinated communications without having to meet a content standard defined in the Commission's regulations. The Commission seeks comment on whether such a case-by-case approach is appropriate and whether it would provide sufficient guidance to candidates, their authorized committees, political party committees, and outside organizations. Would such a standard have the potential to be unconstitutionally vague in practical application? Or, conversely, would such a standard '' 'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited' ''? *McConnell*, 540 U.S. at 170 n.64 (quoting *Grayned,* 408 U.S. at 108–109); *compare Buckley* v. *Valeo,* 424 U.S. 1, 24, n. 24, 46–47, n. 53, 78 (Payments for media advertisements ''controlled by or coordinated with the candidate'' are treated as contributions, and ''for the purpose of influencing'' phrase ''presents fewer problems in connection with the definition of a contribution because of the limiting connotation created by the general understanding of what constitutes a political contribution.''). The Commission also invites commenters to provide examples of communications from previous election cycles to show whether Alternative 6 would be either underinclusive or overinclusive.

Alternative 7—Eliminate the Content Prong in 11 CFR 109.21(c) and Replace It With the Requirement That the Communication Be a Public Communication as Defined in 11 CFR 100.26

Alternative 7 would eliminate the entire content prong in 11 CFR 109.21(c), and would replace it with the requirement that the communication be a public communication as defined in 11 CFR 100.26.[15] Alternative 7 would also make some conforming amendments. Alternative 7 would be based on the assumption that if an organization or individual works with a candidate or a political party in making a public communication, then the communication inherently has value to the political entity it is coordinated with, regardless of timing or content. Accordingly, in Alternative 7, any public communication that satisfies the *conduct* prong of the coordinated communication test at 11 CFR 109.21(d) would be deemed to have been made for the purpose of influencing a Federal election and thus be a ''coordinated communication,'' regardless of whether it refers to a clearly identified Federal candidate or political party and regardless of when or to whom the communication is distributed.

The Commission notes that, even though Alternative 7 would eliminate the entire content prong, it would nonetheless comply with the statutory requirement that disbursements for coordinated electioneering communications be in-kind contributions to the candidate supported by them and with the congressional mandate that the Commission's coordination rules address the ''republication of campaign materials.'' Specifically, under Alternative 7, *all* public communications (including electioneering communications and communications that republish campaign materials) would be coordinated communications as long as they satisfy the conduct prong.

The Commission seeks comment on whether the conduct prong by itself, without any content prong, would be effective in distinguishing between public communications made for the purpose of influencing a Federal election and public communications made for other purposes, such as public communications made for the purpose of lobbying for or against certain legislation, or for supporting charitable or other non-political causes. Assuming that it is true that a candidate or political party would not coordinate with an outside organization or individual if the resulting communication did not have value for the candidate or political party, does such value necessarily consist of influencing the candidate's election or the election of a political party's candidates? Would the conduct prong by itself, without any content prong, have the potential to be unconstitutionally vague in practical application? Or, conversely, would such a regulation '' 'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited' ''? *McConnell,* 540 U.S. at 170 n.64 (quoting *Grayned,* 408 U.S. at 108–109). The Commission also invites commenters to provide examples of communications from previous election cycles to show whether Alternative 7 would be either underinclusive or overinclusive.

IV. Other Issues Regarding the Content Prong

The Commission also seeks comment on the following related issues.

[15] *See* note 3 above.

1. The ''Directed to Voters'' Requirement in 11 CFR 109.21(c)(4)(iii)

In the event that the Commission decides to retain a content prong, the Commission seeks comment on modifying the requirement in the fourth content standard that a public communication must be directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot. *See* 11 CFR 109.21(c)(4)(iii). While the Act and Commission regulations defining ''electioneering communications'' require that 50,000 or more persons be able to receive the communication in the relevant geographic area, the fourth content standard does not specify how many persons must be able to receive a communication for it to be classified as a coordinated communication. *See* 2 U.S.C. 434(f)(3)(C); 11 CFR 100.29(b)(3)(ii)(A) and (b)(5). Should 109.21(c)(4)(iii) be deemed satisfied if *any* person in the relevant geographic area can receive the communication? Should 11 CFR 109.21(c)(4)(iii) be changed to specify a minimum number of persons that must be able to receive the communication? If so, what should the required minimum number of persons be? Has the current regulation without a required minimum number presented any difficulties to, or created any confusion for, those seeking to comply with it?

The Commission notes that the fourth content standard applies to ''public communications,'' and thus to communications made by means of newspapers, magazines, periodicals, billboards, mass mailing, and telephone banks. *See* 11 CFR 100.26. Is it appropriate to set a minimum for the ''directed to voters'' requirement that would exclude small and medium sized publications? If so, should the minimum number be based on the number of copies distributed or on estimates of the number of readers reached by the publications? Similarly, the definition of ''public communication'' includes limited communications, such as 501 pieces of mail or 501 telephone calls of an identical or substantially similar nature. *See* 2 U.S.C. 431(23) and (24); 11 CFR 100.26, 100.27, 100.29. Would it be appropriate to exclude such limited mass mailings or telephone banks from the ''directed to voters'' requirement as *de minimis* even though they come within the Commission's definition of ''public communication''?

Under the current rules, the second and third content standards (*i.e.*, the republication of campaign material and the express advocacy standards) do not contain a ''directed to voters'' requirement. Are communications that satisfy these standards so clearly made for the purpose of influencing a Federal election that a ''directed to voters'' requirement is unnecessary? In the alternative, should such a requirement be added to these two content standards as well?

The Commission also seeks comment on whether to exempt from the coordination regulations communications that are distributed in the jurisdiction of a clearly identified congressional candidate when such distribution is part of, and incidental to, a larger advertising campaign. For example, an advertisement distributed nationally on cable television that refers to a U.S. Representative seeking reelection as one of several sponsors of a piece of legislation will presumably reach voters in the U.S. Representative's district. In such a case, the voters in the U.S. Representative's district would be reached only incidentally as part of the larger lobbying campaign. Would an exemption for communications that reach voters in the jurisdiction of the clearly identified congressional candidate only incidentally provide a reliable way of distinguishing communications that are made for the purpose of influencing a Federal election from lobbying or issue advocacy communications? Would such a standard be sufficiently clear to provide persons with prior notice of the types of communications that are affected? For such a standard to provide effective prior notice, must the Commission specify how many viewers are ''incidental''? In the alternative, should the Commission define ''incidental'' in terms of a certain ratio between the number of persons who can receive the communication in the State or district of the clearly identified Senate or House candidate and the number of persons who can receive the communication outside that State or district? Should such an exemption be limited to public communications that are distributed nationwide? The Commission also invites comment on whether the regulations should provide that such an exemption would apply only if a communication does not PASO the clearly identified candidate.

2. Federal Candidate Endorsements of, and Solicitations of Funds for, Other Federal or Non-Federal Candidates or State Ballot Initiatives

The Commission invites comment regarding the application of the coordinated communication test to situations in which Federal candidates endorse, or solicit funds for, other Federal and non-Federal candidates or State ballot initiatives. In Advisory Opinion 2004–01, the Commission considered a television advertisement that featured President Bush endorsing a congressional candidate. The advertisement was publicly distributed within 120 days of the Presidential primary in the State in which the advertisement aired. The Commission concluded that the ''material involvement'' conduct standard in 11 CFR 109.21(d)(2) was satisfied because the President's agents ''review[ed] the final script in advance of the President's appearance in the advertisements for legal compliance, factual accuracy, quality, consistency with the President's position and any content that distracts from or distorts the 'endorsement' message that the President wishes to convey.'' [16] Advisory Opinion 2004–01. Similarly, in Advisory Opinion 2003–25, the Commission considered an advertisement featuring a U.S. Senator's endorsement of a candidate for mayor. In that opinion, the Commission determined that it was highly implausible that a Federal candidate would appear in a communication endorsing a local candidate without being materially involved in one or more of the decisions listed in the ''material involvement'' conduct standard.

The Commission seeks comment on whether to exempt from the coordinated communication rules a Federal candidate's appearance or use of a candidate's name in a communication to endorse other Federal or non-Federal candidates. Do such endorsements benefit the endorsing candidate? The Commission also invites comment on whether any such exemption should be limited to communications that do not PASO the endorsing candidate. Does the fact that the *endorsing* candidate appears in the communication inevitably promote the endorsing candidate?

Similarly, the Commission seeks comment on whether to exempt from the coordinated communication rules a Federal candidate's appearance in a communication that solicits funds for

[16] The Commission further determined that, for advertisements distributed within 120 days of the Presidential primary in the State in which the advertisement aired, the advertisements' production and distribution costs paid for by the congressional candidate's committee but attributable to the President's authorized committee were contributions to the President's committee by the congressional candidate's committee, but that no contribution would result if the President's committee reimbursed the congressional candidate's committee for its attributable share of the costs.

other Federal or non-Federal candidates, party committees, political action committees, or other political committees. Do such solicitations benefit the candidate who makes them? The Commission also invites comment on whether any such exemption should be limited to communications that do not PASO the soliciting candidate, or, in the alternative, do not expressly advocate the election or defeat of the soliciting candidate.

The Commission also seeks comment on whether a similar exemption from the coordinated communication rules should also apply to a Federal candidate's appearance in communications that endorse, or solicit funds for, State ballot initiatives.

3. Proposed Clarification of Application of 120-day Time Frame Requirement in 11 CFR 109.21(c)(4)(ii)

Advisory Opinion 2004–01, discussed above, concerned President Bush's appearance in a television advertisement paid for by a congressional candidate where President Bush endorsed that congressional candidate. The Commission determined that any airing of the advertisement that occurred more than 120 days before the Presidential primary in the State in which the advertisement aired was not an in-kind contribution to President Bush because it did not satisfy the fourth content standard (*i.e.*, 11 CFR 109.21(c)(4)). In making this determination, the Commission looked at whether the communication was aired within 120 days before the non-paying candidate's (*i.e.*, President Bush's) election rather than whether it was aired within 120 days before the paying congressional candidate's election. The regulatory text for Alternative 1 reflects the Commission's proposal to amend its coordinated communication rules to incorporate the approach taken in Advisory Opinion 2004–01 and to make clear that the time frame applies only to the election of a Federal candidate who is clearly identified and who has not paid for the communication.

This alteration would clarify that no in-kind contribution is made under the coordinated communication regulations to a candidate for Federal office who is referred to in a public communication if the referenced candidate will not appear as a Federal candidate on a ballot within 120 days of the distribution of the communication. *See* Advisory Opinion 2005–18, Concurring Opinion of Chairman Thomas, Vice Chairman Toner, Commissioners Mason, McDonald, and Weintraub.

For example, a Senator whose reelection is not until 2008 appears in an advertisement with a 2006 House candidate. The advertisement is aired within 120 days of the House candidate's election, is paid for by the House candidate's campaign committee, and is aired in the State where the Senator will seek reelection in 2008. This advertisement would not be an in-kind contribution to the Senator because the advertisement was not aired within 120 days of the Senator's 2008 election.

The Commission seeks comment on whether the proposed language properly effectuates this clarification.

V. Issues Regarding the Conduct Prong

The conduct prong of the Commission's coordinated communication regulations was not challenged in *Shays* v. *FEC.* Nonetheless, the Commission is taking this opportunity to evaluate how certain aspects of the conduct prong work in practice.

1. The ''Request or Suggest'' Conduct Standard in 11 CFR 109.21(d)(1)

The first conduct standard of the coordinated communications test is satisfied if a communication is created, produced or distributed at the request or suggestion of a candidate, a candidate's authorized committee, or a political party committee, or their agents. *See* 11 CFR 109.21(d)(1). The Commission invites comment on whether, even if the Commission decides to retain the *content* prong of the coordinated communication test, it should provide that if the first *conduct* standard is satisfied, the communication would automatically qualify as a coordinated communication without also having to satisfy any of the standards contained in the *content* prong. If a public communication is made at the request or suggestion of a candidate or a political party, then does that communication presumptively have value to the political entity that it was coordinated with, regardless of timing or content? Would such a proposal capture communications that are not made for the purpose of influencing elections? Are there examples of public communications, such as lobbying communications or communications supporting charitable or other non-political causes, that are made at the ''request or suggestion'' of a Federal candidate but that do not have value for the candidate's campaign?

2. The ''Common Vendor'' and ''Former Employee'' Conduct Standards in 11 CFR 109.21(d)(4) and (5)

The fourth standard of the conduct prong of the coordinated communication rules involves common vendors, and the fifth standard involves former employees. See 11 CFR 109.21(d)(4) and (5). The Commission intended these standards to implement Congress's requirement in BCRA that the Commission address ''the use of a common vendor'' and ''persons who previously served as an employee of a candidate or a political party committee'' in the context of coordination. BCRA, Pub. L. No. 107–55, sec. 214(c)(2) and (3) (2002).

The ''common vendor'' conduct standard is satisfied if (1) the person paying for the communication contracts with, or employs, a ''commercial vendor'' to create, produce, or distribute the communication, (2) the commercial vendor has a previous or current relationship with the political party committee or the clearly identified candidate referred to in the communication that puts the commercial vendor in a position to acquire material information about the plans, projects, activities, or needs of the candidate or political party committee, and (3) the commercial vendor uses or conveys material information to the person paying for the communication about the plans, projects, activities, or needs of the candidate or political party committee, or material information used by the commercial vendor in serving the candidate or political party committee. *See* 11 CFR 109.21(d)(4).

The ''former employee'' conduct standard is satisfied if (1) the person paying for the communication was, or is, employing a person who was an employee of the candidate or the political party committee clearly identified in the communication, and (2) the former employee uses or conveys material information to the person paying for the communication about the plans, projects, activities, or needs of the candidate or political party committee, or material information used by the former employee in serving the candidate or political party committee. *See* 11 CFR 109.21(d)(5).

The first three conduct standards in 11 CFR 109.21(d)(1)–(3) are satisfied only if either the principals themselves (*i.e.*, candidates, their authorized committees, or political party committees) or their agents coordinate with the person paying for the

communication.[17] However, because commercial vendors and former employees might not be agents of a candidate or a political party committee at the time they use or convey material information to a person paying for a communication, the ''common vendor'' and the ''former employee'' conduct standards can be satisfied by persons other than the principals themselves or their agents. The Commission seeks comment on whether it should change the coordinated communication regulations to cover common vendors and former employees only if these common vendors and former employees are agents under the Commission's definition of agent in 11 CFR 109.3.[18] Does the Commission have authority under the Act to make this change? If the Commission does make this change, would such agents then be covered by the first three conduct standards in 11 CFR 109.21(d)(1)–(3) or would the ''common vendor'' and the ''former employee'' conduct standards still cover some activities not captured by the first three conduct standards? If the Commission revises the common vendor and former employee conduct standards to cover only common vendors and former employees who are also agents, would that render these two conduct standards superfluous? If so, should the Commission then eliminate the conduct standards in 11 CFR 109.21(d)(4) and (5)? Given that BCRA specifically required the Commission to promulgate regulations that addressed payments for the use of common vendors and for communications directed or made by persons who previously served as employees of a candidate or political party, does the Commission have authority under the Act to eliminate 11 CFR 109.21(d)(4) and (5)?

In the rulemaking proceeding that resulted in the *2002 Coordination Final Rules,* the Commission received many comments on the common vendor conduct standard. Some of the comments expressed concern about the potential liability that would attach under the common vendor standard to candidates and party committees who employ the same vendors as other candidates and party committees because of the limited number of qualified vendors in a given geographic area.

The Commission addressed this and other concerns in the *2002 Coordination Final Rules* by limiting the common vendor conduct standard to commercial vendors whose usual and normal business includes the creation, production, or distribution of communications; who have provided certain enumerated services to a candidate or party committee that put the vendor in a position to acquire information about the plans, projects, activities or needs of the candidate or party committee material to the creation, production, or distribution of the communication; who provide the specified services during the current election cycle; and who use or convey information about the candidate's or party committee's campaign plans, projects, activities or needs that is material to the creation, production, or distribution of the communication. *See* 68 FR 436–37. The Commission also excluded lobbying activities and information not related to a campaign from the scope of the rule.

The Commission stated that it did not anticipate that a person who hired a vendor and followed prudent business practices would be inconvenienced by the common vendor conduct standard. *See id.* at 437. The Commission now invites comments on whether this supposition has proven to be correct.

The Commission also seeks comment on whether it should create a rebuttable presumption that a common vendor or former employee has not engaged in coordinated conduct under 11 CFR 109.21(d)(4) and (5), if the common vendor or former employee has taken certain specified actions, such as the use of so-called ''firewalls,'' to ensure that no material information about the plans, projects, activities, or needs of a candidate or political party committee is used or conveyed to a third party. The Commission considered and rejected proposals to establish rebuttable presumptions and safe harbors in the common vendor conduct standard in the *2002 Coordination Final Rules. See id.* More recently, however, the Commission recognized in the context of the first three conduct standards (11 CFR 109.21(d)(1)–(3)) that the presence of a firewall between staff assigned by a political committee to work directly with a candidate and staff assigned by the political committee to work on advertisements supporting that candidate was sufficient to refute certain allegations of coordination in a particular case. *See* Matter Under Review (''MUR'') 5506, First General Counsel's Report at 5–8 (Commission found no reason to believe EMILY's List had violated section 441a of the Act based, in part, on a representation by EMILY's List that it had created a firewall whereby employees, volunteers, and consultants who handle advertising buys are ''barred, as a matter of policy, from interacting with federal candidates, political party committees, or the agents of the foregoing. These employees, volunteers and consultants are also barred from interacting with others within EMILY's List regarding specified candidates or officeholders.'').

If the Commission decides to establish a rebuttable presumption or safe harbor in the common vendor and former employee conduct standards, what factors should the Commission consider in determining whether an effective firewall exists? Is the role of a firewall best addressed on a case-by-case basis through the enforcement process? Aside from setting up firewalls, are there other actions by a common vendor, former employee, or the political committees that engage them that the Commission should consider a safe harbor?

The common vendor conduct standard and the former employee conduct standard incorporate the current election cycle[19] as a temporal limit on their application. *See* 11 CFR 109.21(d)(4)(ii), (d)(5)(i). In the *2002 Coordination Final Rules*, the Commission explained that ''[t]he election cycle provides a clearly defined period of time that is reasonably related to an election.'' *2002 Coordination Final Rules* at 436. The Commission invites comments on how this temporal limit works in practice. Is information about a candidate's campaign plans, products,

[17] The first conduct standard addresses communications produced at the request or suggestion of a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing. See 11 CFR 109.21(d)(1). The second conduct standard addresses communications with which a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing has been materially involved. *See* 11 CFR 109.21(d)(2). The third conduct standard addresses communications produced after one or more substantial discussions between the person paying for the communication, or that person's employees or agents, and the candidate clearly identified in the communication, the candidate's authorized committee, the candidate's opponent, or the opponent's authorized committee, or an agent of any of the foregoing. *See* 11 CFR 109.21(d)(3).

[18] The definition of ''agent'' includes any person who has actual authority ''to make or authorize a communication that meets one or more of the content standards set forth in 11 CFR 109.21(c)'' on behalf of a political party committee or a Federal candidate or officeholder. *See* 11 CFR 109.3(a)(2) and (b)(2). For reasons unrelated to the issues addressed in this rulemaking, the *Shays District* court held that the Commission's definition of agent at 11 CFR 109.3 violated APA requirements and remanded the regulation to the Commission for action consistent with its decision. *Shays District* at 88. In order to comply with the *Shays District* decision, the Commission has issued an NPRM that sought comment on whether the Commission should retain the current definition of ''agent'' and on several alternatives for revising the definition. *See Notice of Proposed Rulemaking on the Definition of ''Agent'' for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures,* 70 FR 5382 (Feb. 2, 2005). The Commission has not yet issued final rules in this rulemaking.

[19] The term ''election cycle'' is defined in 11 CFR 100.3(b).

activities, or needs of such an ephemeral nature that its strategic significance dissipates shortly after the information is communicated, which may be long before the end of the election cycle, or does the information remain relevant throughout the election cycle? If the Commission concludes that the strategic value of such information does not necessarily last throughout an entire election cycle, should the Commission change the common vendor and former employee conduct standards to cover a shorter time frame? If so, how long should such a time frame be? Should the Commission adopt a 60-day time frame based on the Commission's determination, underlying its longstanding rule with respect to polling results, that such information outside of the 60-day time frame is of very little value? [20] Alternatively, does the Commission's experience with the polling regulations provide evidence that the Commission should adopt a 180-day window for its coordination regulations? Alternatively, would retention of the election cycle time frame in the current rule more accurately align the rule with existing campaign practices?

3. The Use of Publicly Available Information in ''Coordinated Communications''—Proposed 11 CFR 109.21(g)

The Commission seeks comment on whether to create a safe harbor that would make clear as a matter of law that (1) the use of publicly available information in connection with a public communication by any person paying for that public communication does not satisfy any of the conduct standards, and (2) a candidate's or political party committee's conveyance of publicly available information to any person paying for a public communication does not satisfy any of the conduct standards. This safe harbor in proposed 11 CFR 109.21(g) would cover situations in which a candidate, authorized committee, or political party committee has conveyed information publicly, such as, for example, at a campaign rally or on the candidate's or party's Web site or in a press release, or where such information is otherwise publicly available, such as having appeared in newspaper, television, or other press reports. Should such a safe harbor also cover situations in which the person paying for the communication has received the information both from the candidate, authorized committee, or political party committee, in a non-public context and also from a public source? How should the rules treat a situation in which the person paying for the communication did, in fact, receive the information only from the candidate, authorized committee, or political party committee, but could also have obtained the same information from a public source?

The Commission also seeks comment on whether, if it adopts this safe harbor for the use of publicly available information, the burden of establishing whether the information was publicly available should be on the Commission or on the party seeking to make use of the safe harbor. If that burden were on the Commission, how would the Commission be able to establish that the information was not publicly available at the relevant time, given that some information, especially information available through the Internet, may be in the public domain only for a limited time period?

4. Relationship Between Conduct and Content Standards

If the Commission broadens or eliminates the content standard for coordinated communications, the Commission seeks comment on whether it would be appropriate to narrow or otherwise modify any of the conduct standards. Are the conduct and content standards properly understood as dynamic and working in conjunction with each other?

VI. Issue Regarding the Payment Prong

The payment prong (11 CFR 109.21(a)(1)) of the Commission's coordinated communication regulations was not challenged in *Shays v. FEC*. Nonetheless, the Commission is taking this opportunity to seek comment on whether it should clarify one aspect of the payment prong. Specifically, the Commission seeks comment on whether ''in whole or in part'' should be added to 11 CFR 109.21(a)(1) of the coordinated communication rules. The amendment would clarify that the payment prong is satisfied if a person other than the candidate, the candidate's authorized committee, or political party committee, pays for only part of the costs of the communication. Under this proposed amendment, 11 CFR 109.21(a)(1) would be revised to read, ''Is paid, in whole or in part, by a person other than that candidate, authorized committee, political party committee, or agent of any of the foregoing.'' Does this amendment best effectuate the intended clarification of the payment prong? Would this clarification alter the application of the content or conduct prongs of the coordinated communication rules? Would this clarification inadvertently capture communications properly attributed under the time and space rules set forth at 11 CFR 106.1(a)(1)?

VII. Party Coordinated Communications (11 CFR 109.37)

The Commission notes that its ''party coordinated communication'' regulation at 11 CFR 109.37 also contains a three-prong test for determining whether a communication is coordinated between a candidate and a political party committee. Although not addressed in the *Shays* cases, the ''party coordinated communication'' test in 11 CFR 109.37 has a content prong that is substantially the same as the one for ''coordinated communications'' in 11 CFR 109.21(c).[21] *See* 11 CFR 109.37(a)(2). If the Commission decides to revise current 11 CFR 109.21 as described in the alternatives set forth above, the Commission seeks comment on whether it should make conforming changes to the party coordinated communication regulations in 11 CFR 109.37.

In addressing the conduct of national party officers under the national party soft money ban at 2 U.S.C. 441i(a), the Supreme Court stated, ''[n]othing on the face of [section 441i(a)] prohibits national party officers, whether acting in their official or individual capacities, from sitting down with state and local party committees or candidates to plan and advise how to raise and spend soft money. As long as the national party officer does not personally spend, receive, direct, or solicit soft money, [section 441i(a)] permits a wide range of joint planning and electioneering activity.'' *McConnell*, 540 U.S. at 160 (citing to Brief for Intervenor-

[20] The Commission's regulations on allocation of polling expenses at 11 CFR 106.4(g) provide that a candidate or political committee that receives poll results from a third party who commissioned and paid for the poll may report the value of the in-kind contribution as an allocated percentage of the original cost of the poll, so long as the candidate or political committee received the poll results more than 15 days after the initial recipient received such results. Section 106.4(g) of the Commission's rules provides three tiers of discounted allocation based on how long the gap is between the original receipt of poll results and their receipt by a candidate or political committee—poll results received by a candidate or political committee between 16 and 60 days following receipt by the initial recipient may be allocated at 50 percent of the original cost; between 61 and 180 days the allocation is at 5 percent of original cost; beyond 180 days, a candidate or political committee need not allocate any amount.

[21] 11 CFR 109.37(a)(2) differs from 11 CFR 109.21(c) in two ways: first, it does not contain a separate content standard for electioneering communications and, second, the content standard in section 109.37(a)(2)(iii), the equivalent of the fourth content standard in section 109.21(c)(4), can be satisfied only by reference to a clearly identified Federal candidate and not, as in section 109.21(c)(4), also by reference to a political party.

Defendants Sen. John McCain *et al.* in No. 02–1674 *et al.*, p. 22, which stated that ''BCRA leaves parties and candidates free to coordinate campaign plans and activities, political messages, and fund raising goals with one another''); *see* also Advisory Opinion 2005–02 (incorporating such principles). The Commission seeks comment on the relevance, if any, of this statement to the Commission's coordinated communication regulations. Does *McConnell* render the application of the conduct standards to coordination between a candidate and a political party committee at 11 CFR 109.37(a)(3) obsolete? Does it preclude a finding of coordination under the material involvement prong at 11 CFR 109.21(d)(2)? Does the relationship between national party candidates and their parties justify adopting more permissive conduct standards for ''party coordinated communications'' in 11 CFR 109.37 than for coordinated communications in 11 CFR 109.21? If so, how should the conduct standards for ''party coordinated communications'' be amended?

Certification of No Effect Pursuant to 5 U.S.C. 605(b)

Regulatory Flexibility Act

The Commission certifies that the attached proposed rules, if promulgated, would not have a significant economic impact on a substantial number of small entities. The basis for this certification is that any individuals and not-for-profit entities that would be affected by these proposed rules would not be ''small entities'' under 5 U.S.C. 601. The definition of ''small entity'' does not include individuals, but classifies a not-for-profit enterprise as a ''small organization'' if it is independently owned and operated and not dominant in its field. 5 U.S.C. 601(4).

Moreover, any State, district, and local party committees that would be affected by these proposed rules would be not-for-profit committees that do not meet the definition of ''small organization.'' State political party committees are not independently owned and operated because they are not financed and controlled by a small identifiable group of individuals, and they are affiliated with the larger national political party organizations. In addition, the State political party committees representing the Democratic and Republican parties have a major controlling influence within the political arena of their State and are thus dominant in their field. District and local party committees are generally considered affiliated with the State committees and need not be considered separately.

Furthermore, any separate segregated funds that would be affected by these proposed rules would be not-for-profit political committees that do not meet the definition of ''small organization'' because they are financed by a combination of individual contributions and financial support for certain expenses from corporations, labor organizations, membership organizations, or trade associations, and therefore are not independently owned and operated.

Most of the other political committees that would be affected by these proposed rules would be not-for-profit committees that do not meet the definition of ''small organization.'' Most political committees are not independently owned and operated because they are not financed by a small identifiable group of individuals. In addition, most political committees rely on contributions from a large number of individuals to fund the committees' operations and activities.

To the extent that any State party committees representing minor political parties or any other political committees might be considered ''small organizations,'' the number that would be affected by this proposed rule would not be substantial, particularly the number that would coordinate expenditures with candidates or political party committees in connection with a Federal election. Accordingly, to the extent that any other entities may fall within the definition of ''small entities,'' any economic impact of complying with these rules would not be significant.

With respect to commercial vendors whose clients include political party committees or other political committees, the proposed rules consider ways to reduce the existing regulatory restrictions. Thus, rather than adding an economic burden, the proposed rules would potentially have a beneficial economic impact on such commercial vendors.

List of Subjects in 11 CFR Part 109

Elections, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, the Federal Election Commission proposes to amend Subchapter A of Chapter I of Title 11 of the *Code of Federal Regulations* as follows:

PART 109—COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 441a(a) AND (d), AND PUB. L. 107–55 SEC. 214(c))

1. The authority citation for Part 109 would continue to read as follows:

Authority: 2 U.S.C. 431(17), 434(c), 438(a)(8), 441a, 441d; Sec. 214(c) of Pub. L. 107–55, 116 Stat. 81.

Alternative 1

2. Section 109.21 would be amended by revising paragraphs (c)(1) and (c)(4) to read as follows:

§ 109.21 What is a ''coordinated communication''?

* * * * *

(c) *Content standards.* Each of the types of content described in paragraphs (c)(1) through (c)(4) satisfies the content standard of this section.

(1) An electioneering communication under 11 CFR 100.29.

(2) A public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing, unless the dissemination, distribution, or republication is excepted under 11 CFR 109.23(b). For a communication that satisfies this content standard, see paragraph (d)(6) of this section.

(3) A public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office.

(4) A public communication, as defined in 11 CFR 100.26, and about which each of the following statements in paragraphs (c)(4)(i), (ii), and (iii) of this section is true. Payment for a public communication that otherwise satisfies paragraphs (c)(4)(i), (ii), and (iii) of this section is not an in-kind contribution to a candidate if the public communication is not publicly distributed or otherwise publicly disseminated 120 days or fewer before that candidate's own election.

(i) The public communication refers to a political party or to a clearly identified candidate for Federal office;

(ii) The public communication is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special, or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and

(iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or

more candidates of the political party appear on the ballot.

* * * * *

Alternative 3

3. Section 109.21 would be amended by revising paragraphs (c)(4) to read as follows:

§ 109.21 What is a ''coordinated communication''?

* * * * *

(c) * * *

(4) A public communication, as defined in 11 CFR 100.26, and about which each of the following statements in paragraphs (c)(4)(i) and (ii) of this section is true.

(i) The public communication refers to a political party or to a clearly identified candidate for Federal office; and

(ii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.

* * * * *

Alternative 4

4. Section 109.21 would be amended by revising paragraph (c)(4) to read as follows:

§ 109.21 What is a ''coordinated communication''?

* * * * *

(c) * * *

(4) A public communication, as defined in 11 CFR 100.26, and about which each of the following statements in paragraphs (c)(4)(i), (ii), and (iii) of this section is true.

(i) The public communication refers to a political party or to a clearly identified candidate for Federal office;

(ii) The public communication promotes, supports, attacks, or opposes or the political party or clearly identified candidate for Federal office; and

(iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.

* * * * *

Alternative 5

5. Section 109.21 would be amended revising the introductory language for paragraph (c) and by adding a new paragraph (c)(5) to read as follows:

§ 109.21 What is a ''coordinated communication''?

* * * * *

(c) *Content standards.* Each of the types of content described in paragraphs (c)(1) through (c)(5) satisfies the content standard of this section.

* * * * *

(5) A public communication, as defined in 11 CFR 100.26, and about which each of the following statements in paragraphs (c)(5)(i), (ii), and (iii) of this section is true.

(i) The public communication is made by a political committee, as defined in 11 CFR 100.5;

(ii) The public communication refers to a political party or to a clearly identified candidate for Federal office; and

(iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.

* * * * *

Alternative 6

6. Section 109.21 would be amended by revising paragraph (c)(4) to read as follows:

§ 109.21 What is a ''coordinated communication''?

* * * * *

(c) * * *

(4) A public communication, as defined in 11 CFR 100.26, that is made for the purpose of influencing an election for Federal office.

* * * * *

Alternative 7

7. Section 109.3 would be amended by revising paragraphs (a)(2) and (b)(2) to read as follows:

§ 109.3 Definitions.

* * * * *

(a) * * *

(2) To make or authorize an electioneering communication as defined in 11 CFR 100.29 or a public communication as defined in 11 CFR 100.26.

* * * * *

(b) * * *

(2) To make or authorize an electioneering communication as defined in 11 CFR 100.29 or a public communication as defined in 11 CFR 100.26.

* * * * *

8. Section 109.21 would be amended by:

a. Revising paragraph (a)(2);

b. Removing and reserving paragraph (c)

c. Revising the first sentence of paragraph (d)(6) to read as set forth below.

The additions and revisions would read as follows:

§ 109.21 What is a ''coordinated communication''?

* * * * *

(a) * * *

(2) Is an electioneering communication as defined in 11 CFR 100.29 or a public communication as defined in 11 CFR 100.26; and

* * * * *

(c) [Removed and reserved.].

(d) * * *

(6) *Dissemination, distribution, or republication of campaign material.* A communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing, shall satisfy the conduct standards of paragraphs (d)(1) through (d)(3) of this section only on the basis of conduct by the candidate, the candidate's authorized committee, or the agents of any of the foregoing, that occurs after the original preparation of the campaign materials that are disseminated, distributed, or republished. * * *

* * * * *

Proposed Safe Harbor for Use of Publicly Available Information

9. Section 109.21 would be amended by adding a new paragraph (g) to read as follows:

§ 109.21 What is a ''coordinated communication''?

* * * * *

(g) *Safe harbor for use of publicly available information.*

(1) The use of publicly available information by any person paying for a public communication in connection with a public communication does not satisfy any of the conduct standards in paragraph (d) of this section.

(2) A candidate's or political party committee's conveyance of publicly available information to any person paying for a public communication does not satisfy any of the conduct standards in paragraph (d) of this section.

Proposed Clarification of ''Payment Prong''

10. Section 109.21 would be amended by revising paragraph (a)(1) to read as follows:

§ 109.21 What is a ''coordinated communication''?

(a) * * *

(1) Is paid for, in whole or in part, by a person other than that candidate, authorized committee, political party

committee, or agent of any of the foregoing when the communication:

* * * * *

Dated: December 8, 2005.

Scott E. Thomas,

Chairman, Federal Election Commission.

[FR Doc. E5–7293 Filed 12–13–05; 8:45 am]

BILLING CODE 6715–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2005–23075; Airspace Docket 05–ASO–12]

Proposed Establishment of Class E Airspace; Nicholasville, KY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to establish Class E airspace at Nicholasville, KY. Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedures (SIAPs) Runway (RWY) 9 and RWY 27 have been developed for Lucas Field Airport. As a result, controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to contain the SIAPs and for Instrument Flight Rules (IFR) operations at Lucas Field Airport. The operating status of the airport will change from Visual Flight Rules (VFR) to include IFR operations concurrent with the publication of the SIAPs.

DATES: Comments must be received on or before January 13, 2006.

ADDRESSES: Send comments on this proposal to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the docket number FAA–2005–23075; Airspace Docket 05–ASO–12, at the beginning of your comments. You may also submit comments on the Internet at *http://dms.dot.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket office (telephone 1–800–647–5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division, Federal Aviation Administration, Room 550, 1701 Columbia Avenue, College Park, Georgia 30337.

FOR FURTHER INFORMATION CONTACT: Mark D. Ward, Manager, Airspace and Operations Branch, Eastern En Route and Oceanic Service Area, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5586.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2005–23075/Airspace Docket No. 05–ASO–12.'' The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://dms.dot.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov* or the Superintendent of Document's Web page at *http://www.access.gpo.gov/nara.* Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration, Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) to establish Class E airspace at Nicholasville, KY. Class E airspace designations for airspace areas extending upward from 700 feet or more above the surface of the earth are published in Paragraph 6005 of FAA Order 7400.9N, dated September 1, 2005, and effective September 16, 2005, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9N, Airspace Designations and Reporting Points, dated September 1, 2005, and effective September 16, 2005, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward from 700 feet or More Above the Surface of the Earth.

* * * * *

ASO KY E5 Nicholasville, KY [New]

Lucas Field Airport, KY
(Lat. 37°52′17″ N, long. 84°36′38″ W.)

That airspace extending upward from 700 feet above the surface within a 6.5-radius of Lucas Field Airport; excluding that airspace within the Lexington, KY, Class E airspace area.

* * * * *

Issued in College Park, Georgia, on November 22, 2005.

Mark D. Ward,

Acting Area Director, Air Traffic Division, Southern Region.

[FR Doc. 05–24000 Filed 12–13–05; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 399

Docket No. OST–2005–23194

RIN 2105–AD56

Price Advertising

AGENCY: Office of the Secretary (OST), U.S. Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The Department is considering amending its rule on price advertising, and it is seeking comment on several options. Under the existing rule, the Department considers any advertisement that states a price for air transportation that is not the total price the consumer will pay to be unfair or deceptive in violation of the statute under which this provision was adopted in 1984. Although it has not amended the codified rule, in practice the Department has long allowed an exception to it for certain taxes, fees, and other charges that are imposed by a government entity. As a matter of prosecutorial discretion, the Department does not take enforcement action against any advertisement that omits these charges from the quoted fare, provided that the charges are collected on a per-passenger basis and are not *ad valorem* in nature, and provided further that the advertisement clearly indicates the existence and amount of these charges so that consumers can easily calculate the total fare. The Department has consistently prohibited sellers of air transportation from breaking out other cost elements, such as fuel surcharges, from the advertised fare. Although the Department has denied a recent request to allow separate listing of the fuel surcharges that carriers are adopting in response to soaring fuel costs, the Department has also decided that the time is ripe after 21 years of marketing innovations for a reexamination of the fare-advertising rule and its long-time enforcement policy. Therefore, the Department is asking interested persons to comment on four alternative options: Maintain the current practice either with or without codifying all of its elements in the rule; end the exception for government-imposed charges and enforce the rule as written; revise the rule to eliminate most or all requirements for airfare advertisements but to require that consumers be apprised of the total purchase price before the purchase is made; or eliminate the full-fare advertising rule in its entirety.

DATES: Comments must be received by February 13, 2006. The Department will consider late-filed comments to the extent practicable.

ADDRESSES: You may submit comments [identified by DOT DMS Docket Number OST–2005–23194] by any of the following methods:

- *Web Site: http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.
- *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all comments received will be posted without change to *http://dms.dot.gov*, including any personal information provided. Please see the Privacy Act heading under Regulatory Notices.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Betsy L. Wolf, Senior Trial Attorney, Office of the Assistant General Counsel for Aviation Enforcement and Proceedings, U.S. Department of Transportation, 400 Seventh St., SW., Room 4116, Washington, DC 20590, tel: (202) 366–9342, fax: (202) 366–7152, e-mail: *Betsy.Wolf@DOT.GOV.*

SUPPLEMENTARY INFORMATION:

Background

The Department of Transportation requires generally that in advertisements of air transportation, the price advertised must be the full price that the consumer will pay. Our Statements of General Policy, codified in 14 CFR part 399, include a rule on price advertising adopted by our predecessor agency, the Civil Aeronautics Board, in December of 1984. The rule states that the Department considers any advertisement of passenger air transportation, a tour, or a tour component that states a price that is not the entire price the consumer must pay to be an unfair or deceptive practice. Our rules governing public charters, codified in 14 CFR part 380, contain an analogous requirement for charter air transportation.

Both rules were adopted pursuant to 49 U.S.C. section 41712 (formerly section 411 of the Federal Aviation Act), which empowers the Department to prohibit unfair and deceptive practices and unfair methods of competition in air transportation and its sale. Specifically, this provision provides among other things that the Department may investigate and decide whether an air carrier, foreign air carrier, or ticket agent is or has been engaging in an unfair or deceptive practice or an unfair method of competition in air transportation or its sale and that if, after notice and an opportunity for a hearing, the Department finds in the affirmative, it may order the offending party to stop the conduct at issue. Violations of regulations adopted pursuant to section 41712 are also violations of the statute itself and may incur civil penalties, *see* 49 U.S.C. 46301(a)(7).

Air transportation is unlike other industries in that we have the sole authority to regulate airlines' fare advertisements by prohibiting practices that are unfair or deceptive. (Two other Federal agencies enforce provisions relating to airline fare advertising, but these regulations do not bear on unfair or deceptive practices. First, under Department of Homeland Security regulations, carriers must specifically identify the Transportation Security Administration's $2.50 security service fee as the ''September 11th Security Fee'' in fare advertisements, 49 CFR 1510.7.

Second, the Internal Revenue Service enforces a tax-code provision that imposes restrictions on the display of taxes in fare advertisements, 26 U.S.C. 7275.) Congress modeled section 41712 on section 5 of the Federal Trade Commission (FTC) Act, 15 U.S.C.A. section 45, but by its own terms, that statute cannot be enforced against ''air carriers and foreign air carriers,'' 15 U.S.C. section 45(a)(2). The States are preempted from regulating in this area (49 U.S.C. 41713, *see Morales* v. *Trans World Airlines*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992)). Thus, unlike advertising in other industries, where either the States or the FTC, or both, can take action against abusive practices, if we do not exercise our authority, consumers and competitors have no governmental recourse against advertising that is unfair or deceptive. We do not believe, moreover, that 49 U.S.C. section 41712 gives rise to a private right of action, *see Love* v. *Delta Air Lines*, 310 F.3d 1347 (11th Cir. 2002), *Boswell* v. *Skywest Airlines*, Inc., 361 F.3d 1263 (10th Cir. 2004); *see also Alexander* v. *Sandoval* 532 U.S. 275, 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001).

For many years, as a matter of enforcement policy, we have allowed limited exceptions to the general rule that fare advertisements must state the entire price of the advertised air transportation or tour. Specifically, as a matter of prosecutorial discretion, the Department does not take enforcement action against any advertisement that omits government-imposed fees, taxes, and other charges from the quoted fare, provided that such charges are collected on a per-passenger basis and are not *ad valorem* in nature, and provided also that the advertisement shows the existence and amount of these charges clearly so that consumers can readily determine the total fare. *See, e.g., Notice of the Assistant General Counsel for Aviation Enforcement and Proceedings, ''Prohibition on Deceptive Practices in the Marketing of Airfare[s] to the Public Using the Internet,'' http://airconsumer.ost.dot.gov/rules/20010118.htm* (January 18, 2001); Order 2001–12–1 (December 3, 2001); Order 88–8–2 (August 2, 1988). We originally allowed the separate listing of charges that are approved by a government in addition to those that are government-imposed, but recently the Enforcement Office eliminated the exception for the former, reasoning as follows:

> The ''government approved'' surcharges [that we allowed to be listed separately] were limited to security surcharges approved in the mid-1980's [sic] that affected foreign air transportation only and were approved by both the foreign government involved and the U.S. government. Recently, tariff regulation, owing to expanded open-skies agreements and other factors, has been revised to the extent that there is no longer a consistent practice of joint approvals of surcharges, in many instances resulting in the filing of tariffs that may include surcharges that are approved by only one government. In addition, the desire of carriers to pass on the higher costs of certain expenses discretely, such as insurance and fuel, has led to such expenses being filed separately from the 'base' fare in tariffs, a situation that the Department cannot effectively monitor. [footnote omitted] In view of these developments, the Enforcement Office will no longer allow the separate listing of ''government-approved'' surcharges in fare advertising.

Notice of the Assistant General Counsel for Aviation Enforcement and Proceedings, ''Disclosure of Higher Prices for Airfares Purchased over the Telephone via Airline Telephone Reservation Centers or at Airline Ticket Counters, and Surcharges That May Be Listed Separately in Fare Advertisements,'' http://airconsumer.ost.dot.gov/rules/index.htm (November 5, 2004).

The history of our enforcement policy begins at the end of 1984, when the Civil Aeronautics Board adopted § 399.84 to address the widespread practice of advertising attractive fares and featuring ''add-on'' costs much less prominently. The Board found that this practice misled and deceived consumers and made price comparison difficult. *See Civil Aeronautics Board, 14 CFR part 380 [Special Regulations; Amendment No. 18 to Part 380; Docket 41184; Regulation SPR–195], Public Charters, Final Rule*, 49 FR 49438–49440 (December 20, 1984), and *14 CFR part 399 [Policy Statements; Amendment No. 88 to Part 399; Docket 41184-PS–113], Statements of General Policy, Final Rule*, 49 FR 49440 (December 20, 1984). Barely one year later, after this Department succeeded to the CAB's jurisdiction in this area, we granted an industry-wide exemption from § 399.84 and § 380.30 to allow exclusion of the U.S. international departure tax from the advertised price, provided that the amount of this tax was clearly stated elsewhere in the advertisement. To reach this result, we balanced the air carriers' asserted need for greater flexibility in advertising against the traveling public's need to know all charges they must pay for air services. Order 85–12–68 (December 24, 1985). We later broadened this exemption to include other per-passenger government fees by Order 88–3–25 (March 10, 1988), once again taking both the needs of the carriers and the imperative that consumers know the total cost of air transportation services into account. We clarified this amendment by Order 88–8–2 (August 2, 1988), where we recognized that consumers can benefit from knowing what portion of their fare is passed on to government entities and what portion retained by the carrier, as long as they can easily determine what the total fare will be. Although the U.S. Court of Appeals struck down the latter two decisions on procedural grounds in *Alaska* v. *Skinner*, 868 F2d. 441 (D.C. Cir. 1989), our Enforcement Office has continued to base its discretionary enforcement policy on their substance.

Recently, with fuel costs both rising significantly in the past year and surging in the wake of Hurricane Katrina, the Air Transport Association of America (ATA) informally requested relief from § 399.84 to allow its air-carrier members to list fuel surcharges separately in the manner of government-imposed charges. Our Enforcement Office has consistently taken the position, however, that while nothing in § 41712 or § 399.84 precludes carriers from stating in advertisements that fares include a fuel surcharge and specifying the amount, fuel surcharges must be included in the advertised fare in order to avoid confusing or deceiving consumers. *See, e.g., Notice of the Assistant General Counsel for Aviation Enforcement and Proceedings, ''Prohibition on Deceptive Practices in the Marketing of Airfare to the Public Using the Internet,'' http://airconsumer.ost.dot.gov/rules/20010118.htm* (January 18, 2001). (All of the Enforcement Office's notices and industry letters may be found at *http://airconsumer.ost.dot.gov/rules/guidance.htm*.) Although the Secretary has denied ATA's fuel surcharge request, with the passage of over twenty years since the adoption of § 399.84, and with the extensive and intensive changes in both marketing and consumer sophistication that the

revolution in electronic communications has fostered, we have decided that the time has come to reconsider our full-fare advertising rule in light of current conditions.

We are therefore proposing four alternative approaches to the regulation of airline price advertising and inviting interested persons to comment on these proposals and reasonable alternatives. The first option is to leave current enforcement policy unchanged, either with or without codifying it explicitly in § 399.84. The second option is to enforce the rule as written by ending the exceptions we have long allowed for government-imposed fees, taxes, and charges. Thus, any price advertised for air transportation would have to be the total fare that the consumer would pay. The third option is to amend the policy statement so as to do away with most of our existing requirements for fare advertising and mostly rely on the language of 49 U.S.C. 41712. We are proposing two alternative approaches for the third option: one, a rule that requires only that the total price of any air transportation be disclosed to the consumer before any purchase is transacted, and two, a rule that requires both this and also that any fare advertisement set forth all elements of the fare so that consumers can add them together to determine the total price. This latter option is consistent with the general approach to advertising taken by the FTC—namely, that an advertisement is deceptive if it contains a representation or omission that is likely to mislead consumers acting reasonably in the circumstances and is material to the consumer's decision to buy the advertised product or service, *see FTC Policy Statement on Deception* (October 14, 1983), *http://www.ftc.gov/bcp/policystmt/ad-decept.htm*. Under either approach of this third option, while we would no longer routinely take enforcement action against advertisers that list fuel surcharges and other cost elements not imposed by governments separately from the fare, we would retain the power under section 41712 to take enforcement action whenever advertisements constitute unfair or deceptive practices or unfair methods of competition. The fourth option is to eliminate the full fare advertising rule in its entirety, leaving any fare advertising enforcement action to be undertaken solely under section 41712.

We invite interested persons to comment on all four proposals. In addition, we invite comments on whether we should amend § 380.30, our rule on price advertising in charter solicitation materials, in light of developments over the past two decades and, if so, how. We can issue a Notice of Proposed Rulemaking to amend § 380.30 if the comments so warrant. The comments we receive on our proposals for § 399.84 should help us determine which of them now strikes the most appropriate balance between the public interest in preventing consumer deception and the public interest in allowing the market to function efficiently.

Price-Advertising Proposals

Option I: Amend § 399.84 To Codify the Enforcement Office's Long-Standing Policy or Leave § 399.84 as Written but Continue the Enforcement Policy

This proposal would maintain current enforcement practice and Department case precedent regarding full-fare advertising. One approach would be to amend the rule to incorporate all elements of this practice. Our advertising enforcement precedents under 49 U.S.C. section 41712 that relate only tangentially to full-fare advertising—*e.g.*, the requirement that a reasonable number of seats be available at advertised prices and disclosure requirements for ''percentage off'' advertisements and for when seats at an advertised fare are limited and/or not available on all flights—would not be incorporated in the amended 14 CFR 399.84. In addition, the amended rule would not incorporate our policy of allowing Internet travel agents to list their service fees separately from advertised airfares under certain limited conditions (*see Notice of the Assistant General Counsel for Aviation Enforcement and Proceedings, ''Revised Enforcement Policy on Deceptive Practices Regarding Service Fees Charged by Travel Agents in the Marketing and Sale of Airfares to the Public via the Internet,'' http://airconsumer.ost.dot.gov/rules/20011219.htm* (December 19, 2001) and Order 2001–12–7 (December 7, 2001)), because this exception is very narrow and we are not aware of its being used. Thus, the following exceptions and clarifications would be added to the existing text of the rule:

- Government-imposed taxes and fees that the carrier collects on a per-passenger basis may be excluded from the advertised fare, provided that they are not *ad valorem* in nature, and provided that the advertisement shows the existence and amount of these charges clearly so that consumers can easily determine the total fare. An indication of the existence of the taxes and fees listed separately must be situated close to the advertised fare, and the information provided must be easily readable.
- In advertisements where multiple destinations are listed and not all entail the same government-imposed charges, the advertisement may state a maximum fee, a fee for each destination, or a range of fees. Also, the word ''approximately'' or a range of amounts may be used to account for minor currency-exchange fluctuations.
- Advertising ''two-for-one'' fares is deceptive if the fare that must be purchased to take advantage of the promotion is higher than the carrier's other fares in the same market, unless this fact is prominently and clearly disclosed.
- Advertisements of each-way fares that are available only when bought for round-trip travel must disclose the round-trip purchase requirement clearly and conspicuously—*i.e.*, the disclosure must be prominent and proximate to the advertised fares. A banner or pop-up internet advertisement of an each-way fare that is only available with a round-trip purchase must disclose this fact in the advertisement itself.
- In internet fare advertisements, including not only web sites but also banner, pop-up, and e-mail advertisements, the per-person government charges that may be listed separately may be noted by a prominent hyperlink, proximate to the listed fare, that takes the viewer to a display showing the nature and amount of these charges.
- In advertisements of ''free'' air transportation in conjunction with the purchase of one or more other tickets, restrictions, fees, and other conditions that apply to the ''free'' transportation must be noted prominently and proximate to the offer, at a minimum through an asterisk or other symbol directing the reader's attention to the information elsewhere in the advertisement. The information must be presented in easily readable print. This requirement applies to advertisements in all media: the internet, billboards, television, radio, and print media.
- Advertisements of fares that are higher if purchased by telephone or in person than over the Internet must prominently disclose that the stated fares are only available over the Internet. The advertisements must also disclose that tickets cost more than the advertised price if purchased by telephone or in person, and they may disclose the price increment. If the advertisements state a price differential, they may not characterize this amount as a ''service fee.''
- In any billboard advertisement that breaks out taxes and fees, a sum of the

taxes and fees must be legible to drivers passing the billboard at the posted speed limit.

- In television advertisements, the sum of any taxes and fees that are broken out must be disclosed. It may be presented on screen in a readable manner or disclosed audially.
- Radio advertisements must include the sum of any taxes and fees that are broken out.

We invite comments on whether any of the Department's other enforcement policies on fare advertising should be included in the expanded rule.

This first approach would codify the Enforcement Office's long-standing practice. The Enforcement Office has acted aggressively to ensure that airlines and travel agents comply with 14 CFR 399.84 and the refinements set forth above. It has, for example, issued numerous formal and informal warnings in response to advertisements that did not comply with the Department's advertising requirements. Also, as a result of the Enforcement Office's investigations, the Department has issued 86 cease-and-desist orders concerning violations of 14 CFR 399.84, as enforced, and has assessed a total of $2.26 million in civil penalties in these orders.

We can identify a number of advantages in continuing this practice and codifying it. First, it enables consumers to determine the maximum fare being advertised with ease: they need only add the broken-out charges to the advertised fare. Second, breaking out government-imposed taxes and fees lets consumers know for the most part how much of their fares go to government entities and how much to the carrier. (Our enforcement policy prohibits separate listing of the 7.5 percent Federal excise tax or any other *ad valorem* tax due to the potential for consumer confusion.) Third, our practice ensures that consumers are protected from hidden surcharges, many of which are entirely under the seller's control. Fourth, while we recognize that the internet affords consumers an unprecedented level of highly detailed information on prices for air transportation, we also recognize both that not all consumers have access to the internet and that those who do not tend to travel less frequently and be less familiar with airline pricing practices than those who do. We are concerned that either allowing advertisements with additional per-person or *ad valorem* ''add-ons'' or allowing advertisements that do not include all elements of the fare could increase the risk of consumers not being able to determine the actual fares or of their buying tickets at higher prices than necessary. Fifth, our disclosure requirements promote competition in air transportation, both by facilitating price comparison by consumers and in another respect. We are concerned, for example, that a carrier that has succeeded in hedging its fuel costs might be deprived of the competitive advantage its lower costs should confer if its higher-cost competitors list fuel surcharges separately and thus advertise fares that appear to match or undercut those of their lower-cost rival. Sixth, sellers might prefer the greater certainty of a detailed codified rule to the lesser certainty of a discretionary enforcement policy that currently allows exemptions to the rule but could easily be changed. Seventh, as noted above, unlike price advertising in other industries, the States and the FTC are barred from regulating airline advertising. Curtailment of our traditional role would thus create a vacuum of regulation.

We can also identify disadvantages in continuing and codifying our long-standing practice. First, the fast pace of change in the marketing of air transportation due to evolving technologies has made it increasingly difficult for us to keep our price-advertising requirements current. Codification of all elements of our policy will make future refinements even more difficult and time-consuming. Second, even under the current practice, some sellers advertise a full price while others exclude taxes. This variation makes it more difficult for consumers to compare prices. Third, we are aware that many sellers of air transportation believe our requirements to be unnecessary or unduly restrictive or burdensome, especially given the plethora of price information available on the internet and the ease of using that source to find and compare airfares. These sellers take the position that relaxing or eliminating our full-fare advertising requirements will clear the way for better marketing innovations and increases in efficiency that may in turn mean lower prices for consumers. Fourth, our advertising requirements are not consistent with requirements applicable to other industries, as is discussed below in connection with the third option.

An alternate approach to maintaining our long-standing enforcement practice would be to do so without change to the language of § 399.84. Since enforcement is by nature discretionary, this alternate approach has the advantage of retaining our flexibility to make further refinements to our enforcement policy without the delays associated with rulemaking. Some might argue that this approach has a corresponding disadvantage in that codifying all elements of our enforcement policy in the CFR will make the policy as a whole more accessible to sellers and consumers of air transportation. Given, however, both that (1) sellers and lawyers practicing in this area are already familiar with the policy and the relevant case precedent and that (2) all of this information is readily available on-line at *http://airconsumer.ost.dot.gov/rules/guidance.htm*, as noted above, this disadvantage may be marginal at best.

We invite commenters to address both whether and to what extent consumers continue to need the level of protection that our disclosure requirements afford them and how these requirements affect competition in air transportation.

Option II: Change the Long-Standing Enforcement Policy To Discontinue Exceptions to the Strict Terms of § 399.84

This proposal would change current practice by requiring that all advertised fares include all price components. No longer could government-imposed per-passenger charges be broken out and listed separately. While we recognize that crafting an advertisement or display that includes all government-imposed charges in the listed fares may not be possible given that the applicability of some charges varies with the routing chosen, we would consider an advertisement to be in compliance with § 399.84 if it either set forth a range of prices for each city-pair—*i.e.,* the minimum and maximum—or used the word ''from'' along with the minimum price. This approach would have the virtue of simplicity, and it would ensure uniformity of fare advertisements and thus facilitate price comparison by consumers to the greatest extent. Nevertheless, unless sellers were to continue to list government-imposed charges separately despite being required to include these charges in the advertised fare, which we deem unlikely, this approach would deprive passengers of potentially useful information concerning the composition of airfares. It would also deprive sellers of flexibility that they have long enjoyed. Some Internet sellers of air transportation might incur minimal costs for reprogramming their displays to include government charges, but not all of them would: many already display total fares. We invite commenters to address the advantages and disadvantages of this approach.

Option III: Amend § 399.84 Either (1) To Require Simply That the Total Price of Air Transportation Be Disclosed Before the Consumer Makes the Purchase or (2) To Require This and Also That Price Advertisements Set Forth All Elements of the Fare So That Consumers Can Add Them Together To Determine the Total Price

This proposal would reverse over twenty years of enforcement practice and eliminate virtually all of our traditional full-fare advertising requirements. In their place we would adopt either (1) a rule requiring that in any sale of air transportation the seller must inform the consumer of the total price before the purchase is transacted or (2) a rule requiring both this and that fare advertisements contain all information necessary to enable consumers to calculate total fares. Advertisements could not feature airline-imposed security charges under either approach, because the Department of Homeland Security prohibits airlines from collecting surcharges for their own security costs, *see* 49 CFR 1510.9(d).

A rule requiring simply that sellers inform consumers of the total price before the purchase is made has a number of advantages. First, it would allow the entire content of fare advertisements to be determined by the competitive marketplace. The FTC, which has authority to prohibit unfair and deceptive practices and unfair methods of competition in other industries, does not have any express price regulations comparable to our full-fare advertising requirements. Car-rental companies, for example, are thus under no Federal obligation to inform consumers in advertisements of the total price they will have to pay, but we have nevertheless observed a trend among Web sites to give total prices for rental cars when giving quotes for dates the consumer has entered. Another feature of Internet commerce in other industries is that consumers who compare base prices among various Web sites can see that some sites show low base prices but actually charge higher total prices when shipping costs are included. This transparency can result in competition over shipping rates as well as base prices, all to consumers' benefit. When sellers have this level of flexibility, consumers must take greater care in comparing prices before hitting the ''buy'' button, but as long as consumers know the total price of air travel before they commit themselves to buying it, this approach would merely align the purchase of air transportation with the experience of purchasing most other goods and services on line. Second, this approach would eliminate the difficulties that we face in keeping our enforcement policy current in an era of constant technological flux. Third, if consumers and competitors alike no longer need the level of protection that our requirements have provided, then this approach would clear the way for innovations that could benefit either or both. The Internet now gives those consumers who use it a vast amount of information about prices for air transportation and makes comparing prices fast and easy. (According to the U.S. Department of Commerce, as of October of 2003, 54.6 percent of U.S. households had Internet connections [*See A Nation Online: Entering the Broadband Age,* U.S. Department of Commerce, Economics and Statistics Administration, National Telecommunications and Information Administration, September 2004]. Also, with the proliferation of computers in public libraries, even those who do not own computers or have internet connections at home can gain access to the Internet.) Moreover, on-line consumers can now take advantage of so-called ''meta'' search sites (*e.g.*, sidestep.com and kayak.com) that gather price information by ''scraping'' other Web sites and display a greater variation in prices than can be found elsewhere. Southwest, Delta, AirTran, and Jet Blue are now making 59 percent, 28 percent, 65 percent, and nearly 100 percent of their sales, respectively, through their own Web sites (*Airline Business,* June 2005 and November 2004), and consumers also buy air transportation through on-line travel agencies such as Expedia, Orbitz, Priceline, and Travelocity. Fourth, this approach would not preclude us from taking action under section 41712 against advertisers that engage in unfair or deceptive practices or unfair methods of competition. Advertising practices long held to be deceptive, such as ''bait and switch,'' for example, would still be subject to enforcement action. The FTC has regulations for bait advertising (16 CFR part 238), deceptive pricing (16 CFR part 233), and use of the word ''free'' and similar representations (16 CFR part 251) as well as policy statements on deception (*http://www.ftc.gov/bcp/policystmt/ad-decept.htm*) and unfairness (*http://www.ftc.gov/bcp/policystmt/ad-unfair.htm*). We anticipate that we would look to precedent under these regulations and under 15 U.S.C.A. 45 for guidance in determining whether advertisements that comply with the amended § 399.84 may nevertheless be unfair or deceptive within the meaning of section 41712.

This approach also has disadvantages. First, we are concerned that if we eliminate all requirements except that the consumer be told the total price before the purchase is transacted, some sellers of air transportation will begin publishing print advertisements that highlight absurdly low fares but disclose none of the taxes, fees, or surcharges that apply. Not all consumers have easy access to the Internet (In October of 2003, according to the Department of Commerce, 45.4 percent of U.S. households did not have Internet connections. [*See A Nation Online: Entering the Broadband Age, supra*]), and many still rely on print advertisements. These consumers would have to make telephone calls to learn the total price and might well be subject to long waits for a live agent. Moreover, some might view such advertisements as examples of ''bait and switch.'' We invite commenters to address the likelihood of this type of advertising and whether and to what extent it would harm consumers. We specifically invite those sellers that already display or otherwise advertise total fares to comment on whether and how they would change their practices if we adopt this option. Second, we recognize that the positive trends we have observed in car-rental advertisements on the Internet may reflect government initiatives taken at the State level. As noted above, the States are preempted from regulating airline advertising practices. We encourage commenters to address the extent to which a simple requirement that airlines inform customers of the total fare before selling the ticket might leave consumers uniquely vulnerable. Unlike consumers in other industries, consumers of air transportation would not be able to appeal for protection to the States, a circumstance that many believe justifies Department requirements that go beyond FTC requirements for advertising in other industries. Third, enforcement action against abusive advertising practices is likely to be considerably more costly and time-consuming for all parties than it is now. Fare advertising is commercial speech, which, the Supreme Court has held, enjoys certain protections under the First Amendment. *See Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York,* 447 U.S. 557 (1980), 100 S.Ct. 2343. The Court said in that case that ''the government may ban forms of communication more likely to deceive the public than to inform it'' (citation omitted). *Id*, at 563.

Thus, in reviewing an advertisement for compliance with § 41712, we must consider both the advertisement itself and its effect on an ordinary consumer to determine if it is unfair or deceptive. *Country Tweeds, Inc.* v. *FTC,* 326 F.2d 144, 148 (2nd Cir. 1964), Order 86–8–4. ''The important criterion is the net impression which the advertisement is likely to make upon the general populace, *Eastern Air Lines, Inc.* v. *National Airlines Enforcement Proceeding,* 33 CAB 436, 464 (1969), quoting *Charles of the Ritz Dist. Corp.* v. *FTC,* 143 F.2d 676, 679 (2nd Cir. 1944). The ''likelihood of deception or the capacity to deceive'' has been held to be the standard for judging whether an advertisement is deceptive in violation of the law. *Montgomery Ward and Co.* v. *FTC,* 379 F.2d 666, 670 (7th Cir. 1967), CAB Order 82–7–107. Under these formulations of the government's burden, enforcement of section 41712 against fare advertising would be more cumbersome without § 399.84 as it is currently construed, both because there would be more elements of proof and because issues would have to be decided on a case-by-case basis.

The first concern stated above will not arise if we amend § 399.84 to require that fare advertisements set forth all elements of the fare so that consumers can add them together to determine the total price. Under this approach, sellers could exclude any fees and surcharges from the advertised fares, but the advertisement would still have to disclose all excluded price elements as well as their amounts. This approach would most closely approximate the policy followed by the FTC, as noted above. It would still leave sellers free, however, to advertise absurdly low fares in bold, large print and relegate large carrier-imposed surcharges to the fine print, a practice some might deem unfair and misleading.

We invite commenters to address each approach of this third option and to point out any other advantages or drawbacks that they perceive. Among other things, commenters may want to address the following: (1) The implications for both consumers and competition of there being no requirement that sellers use a consistent approach to advertising fares—*i.e.,* the same base fare with the same cost elements broken out—across all media—*i.e.,* Web sites, print advertisements, and broadcast advertisements, and (2) whether carriers are likely to break out booking or service fees from the base fare in order to make their offerings appear as attractive as those of travel agents, many of which now charge such fees, and if so, whether this will harm consumers.

Option IV: Remove § 399.84

The advantages and disadvantages of removing § 399.84 are similar to those of the first approach under Option III above, except that without an explicit rule requiring sellers to inform consumers of the total price of their transportation before purchases are consummated, consumers would have less regulatory protection. We invite interested persons to comment on whether an express disclosure requirement is necessary in light of (1) the potential for enforcement action under section 41712 against sellers that engage in practices that deceive or confuse consumers and (2) consumers' ability to bring contract actions against sellers that charge them prices to which they have not agreed. We invite comments on any other advantages or disadvantages of this option.

Charter Air Transportation

As noted above, § 399.84 has a counterpart in our charter regulations, § 380.30. While we are not proposing any specific changes to the latter rule here, we do invite interested persons to comment on whether and how current conditions may warrant its revision as well. We can issue a Notice of Proposed Rulemaking to revise the rule if appropriate.

Regulatory Notices

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.) You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, Pages 19477–78) or you may visit *http://dms.dot.gov.*

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The Department has determined that any of several of the options proposed for amending the existing rule, if adopted as a final rule, would be a significant regulatory action under Executive Order 12866 and under the Department's Regulatory Policies and Procedures. None of the proposed rules would require the disclosure of any information in addition to what is required under application of the existing rule, and the Department expects that adoption of any of the proposed rules will not significantly affect the regulatory burdens or benefits associated with the current rule. Therefore, this proposal is expected to have a minimal economic effect, and further regulatory evaluation is not necessary.

Executive Order 13132 (Federalism)

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). The Department has determined that this proposal would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, that it would not impose substantial direct compliance costs on State and local governments, and that it would not preempt State law. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

Executive Order 13084

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 (''Consultation and Coordination with Indian Tribal Governments''). Because any of the proposed amendments, if adopted, would not significantly or uniquely affect the Indian tribal communities and would not impose substantial direct compliance costs, the funding and consultation requirements of the Executive Order do not apply.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities. I hereby certify that any of these proposed amendments, if adopted, would not have a significant economic impact on a substantial number of small entities. None of the proposed amendments would increase the regulatory burden on air carriers and ticket agents substantially. The Department seeks comment on whether there are small entity impacts that should be considered.

Paperwork Reduction Act

None of the proposed amendments contains information collection requirements that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 2507 *et seq.*)

Unfunded Mandates Reform Act

The Department has determined that the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply to this rulemaking.

Dated: Issued this Day of December 5, 2005, at Washington, DC, Under Authority Delegated by 49 CFR 1.56a.

Michael W. Reynolds,

Acting Assistant Secretary for Aviation and International Affairs.

List of Subjects in 14 CFR Part 399

Administrative practice and procedure, Air carriers, Air rates and fares, Air taxis, Consumer protection, Small businesses.

For the reasons set forth in the preamble, the Department proposes to amend 14 CFR part 399 as follows:

PART 399—STATEMENTS OF GENERAL POLICY

1. The authority citation for part 399 continues to read as follows: 49 U.S.C. 40101 *et seq.*

Subpart G—Policies Relating to Enforcement

Option I

2. Section 399.84 would be revised to read as follows:

§ 399.84 Price Advertising.

(a) *Total Price Requirement.* (1) Except as specified in paragraph (a)(2) of this section, the Department considers any advertising or solicitation by an air carrier, a foreign air carrier, or a ticket agent for passenger air transportation, a tour (*i.e.*, a combination of air transportation and ground accommodations), or a tour component (*i.e.*, a hotel stay) that states a price for such air transportation, tour, or tour component to be an unfair or deceptive practice, unless the price stated is the entire price to be paid by the customer to the air carrier, foreign air carrier, or ticket agent, for such air transportation, tour, or tour component.

(2) Government-imposed taxes and fees that the carrier collects on a per-person basis may be excluded from the advertised airfare, provided that they are not *ad valorem* in nature, and provided that the advertising or solicitation shows the existence and amount of these charges clearly so that consumers can easily determine the entire price to be paid. An indication of the existence of the taxes and fees listed separately must be situated close to the advertised fare, and the information provided must be easily readable.

(i) If an advertisement lists multiple destinations that do not all entail the same government-imposed taxes and fees, the advertisement may state a maximum sum of these charges, a sum for each destination, or a range of sums. Also, the word ''approximately'' or a range of sums may be used to account for minor currency-exchange fluctuations.

(ii) In Internet fare advertisements, including not only Web sites but also banner, pop-up, and e-mail advertisements, the per-person government taxes and fees that may be listed separately may be noted by a prominent hyperlink, proximate to the listed fare, that takes the viewer to a display showing the nature and amount of these charges.

(iii) In any billboard advertisement that breaks out taxes and fees, a sum of these charges must be legible to drivers passing the billboard at the posted speed limit.

(iv) In television advertisements, the sum of any taxes and fees that are broken out must be disclosed. It must either be presented on screen so that it can be read (*i.e.*, in sufficiently large print and for a sufficient amount of time) or be disclosed audially.

(v) Radio advertisements must include the sum of any taxes and fees that are broken out.

(b) Advertising ''two-for-one'' fares is an unfair or deceptive practice if the fare that must be purchased to take advantage of the promotion is higher than the carrier's other fares in the same market, unless this fact is prominently and clearly disclosed.

(c) Advertising ''each-way'' fares that are available only when bought for round-trip travel is an unfair or deceptive practice unless the round-trip purchase requirement is disclosed clearly and conspicuously. Specifically, the disclosure must be prominent and proximate to the advertised fares. A banner or pop-up Internet advertisement of an ''each-way'' fare that is only available with a round-trip purchase must disclose this fact in the advertisement itself.

(d) Advertising ''free'' air transportation in conjunction with the purchase of one or more other tickets is an unfair or deceptive practice unless restrictions, fees, and other conditions that apply to the ''free'' transportation are disclosed prominently and proximate to the offer, at a minimum through an asterisk or other symbol directing the reader's attention to the information elsewhere in the advertisement. The information must be presented in easily readable print or audially. This requirement applies to advertisements in all media: the Internet, billboards, television, radio, and print media.

(e) Advertising fares that are higher if purchased through one or more media (*e.g.*, by telephone or in person) than through another (*e.g.*, over the Internet) is an unfair or deceptive practice unless the advertisement prominently discloses that the stated fares are only available through the one medium and that tickets cost more than the advertised price if purchased through other media. The advertisement may state a price differential but may not characterize this amount as a ''service fee.''

Option II

3. Section 399.84 would be revised to read as follows:

§ 399.84 Price disclosure.

The Department considers the sale of air transportation to be an unfair or deceptive practice unless the total price of the transportation is disclosed to the consumer before the consumer makes the purchase.

Option III

4. Section 399.84 would be revised to read as follows:

§ 399.84 Price disclosure and price advertising.

(a) The Department considers the sale of air transportation to be an unfair or deceptive practice unless the total price of the transportation is disclosed to the consumer before the consumer makes the purchase.

(b) The Department considers any advertising by an air carrier, foreign air carrier, or ticket agent that states a price for air transportation to be an unfair or deceptive practice unless the advertisement sets forth all price components for such air transportation so that the consumer can determine the entire price to be paid.

Option IV

5. Section 399.84 would be removed.

[FR Doc. 05–23841 Filed 12–13–05; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 3282

[Docket No. FR–4665–N–26]

Conference Call Meeting of the Manufactured Housing Consensus Committee

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice of upcoming meeting via conference call.

SUMMARY: This notice sets forth the schedule and proposed agenda of an upcoming meeting of the Manufactured Housing Consensus Committee (the Committee) to be held via telephone conference. This meeting is open to the general public, which may participate by following the instructions below.

DATES: The conference call meeting will be held on Monday, December 19, 2005, from 11 a.m. to 3 p.m. Eastern Standard Time.

ADDRESSES: Information concerning the conference call can be obtained from the Department's Consensus Committee Administering Organization, the National Fire Protection Association (NFPA). Interested parties can log onto NFPA's Web site for instructions concerning how to participate, and for contact information for the conference call: *http://www.nfpa.org/categoryList.asp?categoryID=858&URL=Codes%20and%20Standards/Code%20development%20process/Technical%20Committees/Non-NFPA%20Technical%20Committees/HUD%20Manufactured%20Housing%20Consensus%20Committee%20(MHCC)&cookie%5Ftest=1.* Alternately, interested parties may contact Valaree Crawford of NFPA by phone at (617) 984–7507 (this is not a toll-free number) for conference call information.

FOR FURTHER INFORMATION CONTACT: William W. Matchneer III, Associate Deputy Assistant Secretary, Office of Regulatory Affairs and Manufactured Housing, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708–6409 (this is not a toll-free number). Persons who have difficulty hearing or speaking may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Notice of this meeting is provided in accordance with Sections 10(a) and (b) of the Federal Advisory Committee Act (5 U.S.C. App.2) and 41 CFR 102–3.150. The Manufactured Housing Consensus Committee was established under Section 604(a)(3) of the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended, 42 U.S.C. 5403(a)(3). The Committee is charged with providing recommendations to the Secretary to adopt, revise, and interpret manufactured home construction and safety standards and procedural and enforcement regulations, and with developing and recommending proposed model installation standards to the Secretary.

The purpose of this conference call meeting is to permit the Committee, at its request, to review and make further recommendations to the Secretary regarding proposed changes to 24 CFR 3282.401 through 3282.418 (Subpart I—Consumer Complaint Handling and Remedial Actions), and the proposed Model Manufactured Home Installation Standards. The exceptional circumstances providing less than 15 calendar days notice of the meeting are that it is necessary to have this meeting on this date, which has been proposed and agreed to by the Committee, to permit the Committee to continue its consideration and take action regarding the foregoing matters in a timely manner.

Tentative Agenda

A. Roll Call.

B. Welcome and Opening remarks.

C. Full Committee meeting and take actions on proposed changes to 24 CFR part 3282, subpart I, and the proposed Model Manufactured Home Installation Standards.

D. Adjournment.

Dated: December 8, 2005.

Brian D. Montomery,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 05–24044 Filed 12–9–05; 4:14 pm]

BILLING CODE 4210–27–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–106030–98]

RIN 1545–AW50

Source of Income From Certain Space and Ocean Activities; Source of Communications Income; Hearing Cancellation

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Cancellation of notice of public hearing on proposed rulemaking.

SUMMARY: This document provides notice of cancellation of a public hearing on proposed rulemaking relating to the governing of source of income from certain space and ocean activities under section 863 of the Internal Revenue Code.

DATES: The public hearing originally scheduled for Thursday, December 15, 2005 at 10 a.m., is cancelled.

FOR FURTHER INFORMATION CONTACT: Treena Garrett of the Publications and Regulations Branch, Associate Chief Counsel (Procedure and Administration) at (202) 622–7180 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The notice of proposed rulemaking and notice of public hearing that appeared in the **Federal Register** on Monday, September 19, 2005 (70 FR 54859), announced that a public hearing was scheduled for Thursday, December 15, 2005, at 10 a.m. in the IRS Auditorium, Internal Revenue Service Building, 1111 Constitution Avenue, NW., Washington, DC. The subject of the public hearing is proposed regulations under section 863 of the Internal Revenue Code. The public comment period for these proposed regulations expired on Wednesday, November 23, 2005. Outlines of oral comments were due on Wednesday, November 23, 2005.

The notice of proposed rulemaking and notice of public hearing, instructed those interested in testifying at the public hearing to submit outlines of the topics to be addressed. As of Wednesday, December 7, 2005, no one has requested to speak. Therefore, the public hearing scheduled for Thursday, December 15, 2005, is cancelled.

Cynthia E. Grigsby,

Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 05–24038 Filed 12–9–05; 2:32 pm]

BILLING CODE 4830–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

45 CFR Part 1180

RIN 3137–AA16

Technical Amendments To Reflect the New Authorizing Legislation of the Institute of Museum and Library Services

AGENCY: Institute of Museum and Library Services (IMLS), NFAH.

ACTION: Proposed rule.

SUMMARY: The Institute of Museum and Library Services proposes to amend grants regulations by removing outdated regulations and making certain technical amendments to reflect

Congress' reauthorization of the Institute of Museum and Library Services under The Museum and Library Services Act of 2003. The proposed amendments also reorganize certain sections to provide greater clarity for agency applicants and grantees.

DATES: Comments are invited and must be received by no later than January 13, 2006.

ADDRESSES: Send comments to Nancy E. Weiss, General Counsel, Institute of Museum and Library Services, 1800 M Street, NW., Ninth Floor, Washington, DC 20036. Submit electronic comments to *nweiss@imls.gov.* Telephone (202) 653–4787. Facsimile: (202) 653–4625.

FOR FURTHER INFORMATION CONTACT: Nancy E. Weiss, General Counsel, Institute of Museum and Library Services, 1800 M Street, NW., Ninth Floor, Washington, DC 20036. E-mail: *nweiss@imls.gov.*Telephone: (202) 653–4787. Facsimile: (202) 653–4625.

SUPPLEMENTARY INFORMATION:

I. Technical Amendments and Removal of the Institute's Outdated Regulations

The Institute of Museum and Library Services Congress proposes to remove outdated regulations and make minor technical amendments to reflect Congress' reauthorization of the Institute of Museum and Library Services with The Museum and Library Services Act of 2003, Public Law 108–81 (September 25, 2003). These revisions are meant to fulfill the Institute's responsibility to its eligible grant applicants by ensuring that all regulations, policies, and procedures are up-to-date. The regulations proposed for removal include regulations relating to programs and requirements no longer in existence at the Institute as a result of both agency practice and The Museum and Library Services Act of 2003. In the interests of economy of administration, and because all of the regulations proposed to be removed are outdated and the technical amendments are minor, they are included in one rulemaking vehicle.

II. Public Comment Procedures

Comments should be submitted in writing to the address indicated in the **ADDRESSES** section of this document. All comments received will be available upon request for public inspection at the Institute of Museum and Library Services, 1800 M Street, NW., Ninth Floor, Washington, DC 20036. All written comments received by the date included in the **DATES** section of this document and all other relevant information in the record will be carefully assessed and fully considered prior to implementation of the final rule. Any information considered to be confidential must be so identified and submitted in writing. We will not consider comments submitted anonymously. However, if you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment.

The regulatory removal in this proposed rulemaking eliminates outdated regulations and makes technical amendments to reflect Congress' reauthorization of the Institute of Museum and Library Services under The Museum and Library Services Act of 2003 Public Law 108–81 (September 25, 2003). These changes will ensure that all regulations governing provision of grants made by the Institute are consistent with current statutory guidance and agency practice. The proposed amendments also reorganize certain sections in 45 CFR Part 1180 to provide greater clarity for agency applicants and grantees. The public is invited to make substantive comment on any of the changes in the proposed rule.

III. Matters of Regulatory Procedure

Regulatory Planning and Review (E.O. 12866)

Under Executive Order 12866, the Institute must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines a ''significant regulatory action'' as one that is likely to result in a rule that may: (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 interface 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.

The proposed rule removes a number of outdated regulations and makes technical amendments to reflect Congress' reauthorization of the Institute of Museum and Library Services under The Museum and Library Services Act of 2003, Public Law 108–81 (September 25, 2003). As such, it does not impose a compliance burden on the economy genrerally or on any person or entity. Accordingly, this rule is not a ''significant regulatory action'' from an economic standpoint, and it does not otherwise create any inconsistencies or budgetary impacts to any other agency or Federal Program.

Regulatory Flexibility Act

Because this proposed rule would remove outdated regulations and make certain technical amendments, the Institute has determined in Regulatory Flexibility Act (5 U.S.C. 601 et seq.) review that this proposed rule will not have a significant economic impact on a substantial number of small entities because it simply makes technical amendments and removes outdated regulations.

Paperwork Reduction Act

This proposed rule is exempt from the requirements of the Paperwork Reduction Act, since it removes existing outdated regulations and makes only technical amendments to reflect Congress' reauthorization of the Institute of Museum and Library Services under The Museum and Library Services Act of 2003, Public Law 108–81 (September 25, 2003). An OMB form 83–1 is not required.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this proposed rule will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, or by the private sector, of 4100 million or more as adjusted for inflation) in any one year.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

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

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

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

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

Takings (E.O. 12630)

In accordance with Executive Order 12630, the proposed rule does not have

significant takings implications. No rights, property or compensation has been, or will be, taken. a takings implication assessment is not required.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, this proposed rule does not have federalism implications that warrant the preparation of a federalism assessment.

Civil Justice Reform (E.O. 12988)

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

Consultation With Indian Tribes (E.O. 13175)

In accordance with Executive Order 13175, the Institute has evaluated this proposed rule and determined that it has no potential negative effects on federally recognized Indian tribes.

National Environmental Policy Act

This proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment.

List of Subjects in 45 CFR Part 1180

Administrative practice and procedure, Government Contracts, Grant programs-education, Grant programs-Indians, Cooperative agreements. Federal aid programs, Grants administration, Libraries, Museums, Nonprofit Organizations, Colleges and universities, Report and recordkeeping requirements, and Sunshine Act.

Dated: December 8, 2005.

Nancy E. Weiss,

General Counsel, Institute of Museum and Library Services.

For the reasons stated in the preamble and under the authority of 20 U.S.C. 9101 et seq., the Institute of Museum and Library Services proposes to amend 45 CFR Part 1180 as follows:

PART 1180—GRANTS REGULATIONS

1. The authority citation for 45 CFR Part 1180 is revised to read as follows:

Authority: 20 U.S.C. 9101–9176.

Subpart A [Revised]

2. Revise Subpart A of Part 1180 to read as follows:

PART 1180—GRANTS REGULATIONS

Subpart A—Definitions and Eligibility

Sec.

1180.1 Scope of this part.
1180.2 Definition of a museum.
1180.3 Other definitions.
1180.4 Museum eligibility and burden of proof—Who may apply.
1180.5 Related institutions.
1180.6 Basic materials which an applicant must submit to be considered for funding.

Subpart A—Definitions and Eligibility

§ 1180.1 Scope of this part.

This part establishes rules for the award of grants from funds appropriated under the Museum and Library Services Act, including rules governing the eligibility of applicant institutions, the type of assistance which may be provided, requirements which applicants must meet and criteria to be used in evaluating applications.

§ 1180.2 Definition of a museum.

For the purpose of this part:

(a) *Museum* means a public or private nonprofit institution which is organized on a permanent basis for essentially educational or aesthetic purposes and which, using a professional staff:

(1) Owns or uses tangible objects, either animate or inanimate;

(2) Cares for these objects; and

(3) Exhibits them to the general public on a regular basis.

(i) An institution which exhibits objects to the general public for at least 120 days a year shall be deemed to meet this requirement.

(ii) An institution which exhibits objects by appointment may meet this requirement if it can establish, in light of the facts under all the relevant circumstances, that this method of exhibition does not unreasonably restrict the accessibility of the institution's exhibits to the general public.

(b) Museums include, but are not limited to, the following types of institutions, if they otherwise satisfy the provision of this section:

(1) Aquariums;

(2) Arboretums;

(3) Botanical gardens;

(4) Art museums;

(5) Children's museums;

(6) General museums;

(7) Historic houses and sites;

(8) History museums;

(9) Nature centers;

(10) Natural history and anthropology museums;

(11) Planetariums;

(12) Science and technology centers;

(13) Specialized museums; and

(14) Zoological parks.

(c) For the purposes of this section, an institution uses a professional staff if it employs at least one staff member, or the fulltime equivalent, whether paid or unpaid primarily engaged in the acquisition, care, or exhibition to the public of objects owned or used by the institution.

(d)(1) Except as set forth in paragraph (d)(2) of this section, an institution exhibits objects to the general public for the purposes of this section if such exhibition is a primary purpose of the institution.

(2) An institution which does not have as a primary purpose the exhibition of objects to the general public but which can demonstrate that it exhibits objects to the general public on a regular basis as a significant, separate, distinct, and continuing portion of its activities, and that it otherwise meets the requirements of this section, may be determined to be a museum under this section. In order to establish its eligibility, such as institution must provide information regarding the following:

(i) The number of staff members devoted to museum functions as described in paragraph (a) of this section.

(ii) The period of time that such museum functions have been carried out by the institution over the course of the institution's history.

(iii) Appropriate financial information for such functions presented separately from the financial information of the institution as a whole.

(iv) The percentage of the institution's total space devoted to such museum functions.

(v) Such other information as the Director requests.

(3) The Director uses the information furnished under paragraph (d)(2) of this section in making a determination regarding the eligibility of such an institution under this section.

(e) For the purpose of this section, an institution exhibits objects to the public if it exhibits the objects through facilities which it owns or operates.

§ 1180.3 Other definitions.

The following other definitions apply in this part:

Act means The Museum and Library Services Act, Pub. L. 104–208 (20 U.S.C. 9101–9176), as amended.

Board means the National Museum and Services Board established by The Museum and Library Services Act of 2003, Pub. L. 108–81 (20 U.S.C. 9105a).

Collection includes objects owned, used or loaned by a museum as well as those literary, archival and documentary resources specifically required for the study and interpretation of these objects.

Director means the Director of the Institute of Museum and Library Services.

Foundation means the National Foundation on the Arts and the Humanities.

Grantee means the recipient of a grant under the Act.

Institute or *IMLS* means the Institute of Museum and Library Services established under Section 203 of the Act.

Museum Services means services provided by a museum, primarily exhibiting objects to the general public, and including but not limited to preserving and maintaining its collections, and providing educational and other programs to the public through the use of its collections and other sources.

§ 1180.4 Museum eligibility and burden of proof—Who may apply.

(a) A museum located in any of the 50 states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau may apply for a grant under the Act.

(b) A public or private nonprofit agency which a responsible for the operation of a museum may, if necessary, apply on behalf of the museum.

(c) A museum operated by a department or agency of the Federated Government is not eligible to apply.

(d) An applicant has the burden of establishing that it is eligible for assistance under these regulations.

§ 1180.5 Related institutions.

(a) If two or more institutions are under the common control of one agency or institution or are otherwise organizationally related and apply for assistance under the Act, the Director determines under all the relevant circumstances whether they are separate museums for the purposes of establishing eligibility for assistance under these regulations, *See* § 1180.4.

(b) IMLS regards the following factors, among others, as showing that a related institution is a separate museum:

(1) The institution has its own governing body;

(2) The institution has budgetary autonomy; and

(3) The institution has administrative autonomy.

§ 1180.6 Basic materials which an applicant must submit to be considered for funding.

(a) *Application.* To apply for a grant, an applicant must submit the designated application form containing all information requested. Failure to submit information required by the application at the time of filing can subject an applicant to rejection of the application without consideration on its merits.

(b) *IRS letter.* An applicant applying as a private, nonprofit institution must submit a copy of the letter from the Internal Revenue Service indicating the applicant's eligibility for nonprofit status under the applicable provision of the Internet Revenue Code of 1954, as amended.

§ 1180.30 Publication of application notices; content of notices.

3. Amend § 1180.30 as follows:

a. Revise the section heading for § 1180.30 to read as set forth above.

b. Remove the phrase ''in the **Federal Register**''.

4. Revise § 1180.31 to read as follows:

§ 1180.31 Information in application notices.

Application notices generally include:

(a) How an applicant can get an application packet containing detailed information about the program including an application form;

(b) Where an applicant must send its application;

(c) The amount of funds for which an applicant may apply;

(d) Any priorities established by the Institute for that year; and

(e) A reference to the applicable regulations.

5. Amend § 1180.32 as follows:

a. Amend paragraph (a) introductory text by removing the phrase ''deadline'' and adding in its place the phrase ''the deadline''; and

b. Add a new paragraph (d) to read as follows:

§ 1180.32 Deadline date for applications.

* * * * *

(d) The Director of IMLS may publish, in applicable application notices and program guidelines, additional ways in which an application can be submitted to the agency electronically.

§ 1180.34 [Removed and Reserved]

6. Remove and reserve § 1180.34.

§ 1180.35 [Amended]

7. Amend § 1180.35 as follows:

a. Amend paragraph (a), (b) introductory text, and (e) introductory text by removing the phrase ''museums'' and adding in its place the phrase ''applicants''; and

b. Amend paragraph (b)(2) by removing the phrase ''museum'' and adding in its place the phrase ''applicant''.

§ 1180.38 [Removed and Reserved]

8. Remove and reserve § 1180.38.

§ 1180.44 [Amended]

9. Amended § 1180.44 as follows:

a. Remove reserved paragraph (c);

b. Redesignate paragraph (d) as paragraph (b); and

c. Amend redesignated paragraph (b) by removing the phrase ''of museums''.

§ 1180.45 [Removed and Reserved]

10. Remove and reserve § 1180.45.

11. Remove undesignated center heading ''RECORDS'' from before § 1180.56 and revise § 1180.56 to read as follows:

§ 1180.56 Allowable costs.

(a) Determination of costs allowable under a grant is made in accordance with government-wide cost principles in applicable OMB circulars.

(b) No costs shall be allowed for the purchase of any object to be included in the collection of a museum, except library, literary, or archival material specifically required for a designated activity under a grant under the Act.

12. Revise § 1180.57 to read as follows:

§ 1180.57 Use of consultants.

(a) Subject to Federal statutes and regulations, a grantee shall adhere to its general policies and practices when it hires, uses, and pays a consultant as part of the staff.

(b) The grantee may not use its grant to pay a consultant unless:

(1) There is a need in the project for the services of that consultant; and

(2) The grantee cannot meet that need through using an employee rather than a consultant.

13. Revise § 1180.58 to read as follows:

§ 1180.58 Duration of grants.

The grantee may use grant funds during the period specified in the grant document unless the grant is suspended or terminated. If the grantee needs additional time to complete the grant, the grantee may apply for an extension of the grant period without additional funds. The Director or the Director's designee may approve this extension at his or her discretion.

14. Add undesignated center heading ''RECORDS'' before § 1180.59; and revise § 1180.59 to read as follows:

§ 1180.59 Records related to grant funds.

A grantee shall, in accordance with applicable OMB circulars, keep records that show accurately and in full:

(a) The amount of funds awarded under the grant;

(b) The exact uses of the funds;

(c) The total amount expended under the grant;

(d) The amount expended under the grant during the grant period provided from non-Federal sources; and

(e) Other records necessary to facilitate an effective audit.

15. Add § 1180.60 to read as follows:

§ 1180.60 Records related to compliance.

A grantee shall, in accordance with applicable OMB circulars, keep accurate and full records to show its compliance with specific requirements set forth in the regulations and published notices, or contained in the grant award documents.

16. Add § 1180.61 to read as follows:

§ 1180.61 Records related to performance.

(a) A grantee shall keep records demonstrating the progress and results under the grant and shall provide such records to the Institute upon request.

(b) The grantee shall use the records created pursuant to paragraph (a) of this section to:

(1) Determine progress in accomplishing objectives; and

(2) Revise those objectives, if necessary and authorized under the grant.

17. Revise Subpart D to read as follows:

Subpart D—Museum Conservation Assessment Program

Sec.
1180.70 Guidelines and standards for museum conservation projects.

Subpart D—Museum Conservation Program

§ 1180.70 Guidelines and standards for museum conservation projects.

(a) *Scope.* The guidelines and standards in this subpart apply to all aspects of the IMLS conservation grant program including the submission of applications by museums for conservation grants, to the award, review and approval of such applications by IMLS, and to the carrying out of conservation grants awarded by IMLS.

(b) *Applicability of regulations.* Except as otherwise provided in these guidelines, subparts A–C of this part, as amended, apply to the IMLS conservation grant program.

(c) *Definition.* As used in these guidelines, the term *conservation* includes, but is not limited to, the following functions, as applied to art, history, natural history, science and technology, and living collections:

(1) Technical examination of materials and surveys of environmental and collection conditions;

(2) Provision, insofar as practicable, of optimum environmental conditions for housing, exhibition, monitoring, reformatting, nurturing and transportation of objects;

(3) Physical treatment of objects, specimens and organisms, for the purpose of stabilizing, conserving and preserving their condition, removal of inauthentic additions or accretions, and physical compensation for losses; species survival activities; and

(4) Research and training in conservation.

(d) *Applicants.* A museum may apply for and receive only one conservation grant under this program in a fiscal year.

(e) *Types of conservation projects funded.* IMLS considers applications to carry out conservation projects such as:

(1) Projects to develop improved or less costly methods of conservation, or to maintain or improve conservation with respect to one or more collections, including—

(i) Projects involving surveys of conservation needs and

(ii) Projects to establish or maintain optimum environmental conditions.

(2) Projects to conduct research in conservation (including developmental and basic research).

(3) Projects to conduct or obtain training in conservation (including training of persons for careers as professional conservators; training or upgrading of practicing conservators and conservation technicians in the use of new materials and techniques; and training of persons to become conservation technicians).

(4) Projects related to museum conservation needs not regularly addressed by other Federal funding agencies.

(5) Projects to meet the conservation needs of museums which are unable to maintain their own individual conservation facilities. Because grants are made only to museums, organizations which operate regional conservation centers but which are not museums are ineligible for a direct grant. However, a museum or a group of museums may use a grant to obtain services from such a center.

(6) Projects to conserve particular objects in a museums's collection (including plants and animals) or to meet the conservation needs of a particular museum (through such activities as the employment of conservators and the procurement of conservation services or equipment).

(f) *Limits for Federal funding.* (1) The normal amount of a Conservation Project Support grant will be established in the applicable program guidelines. Unless otherwise provided by law, if the Director determines that exceptional circumstances warrant, the Director may award a conservation grant which obligates an amount in Federal funds in excess of the normal maximum award. IMLS may establish a maximum award level for exceptional project grants for a particular fiscal year through information made available in guidelines or other material distributed to all applicants.

(2) IMLS makes conservation grants only on a matching basis. This means that at least 50 percent of the costs of a conservation project must be met from non-federal funds. Principles in applicable OMB circulars regarding costs sharing or matching apply.

(g) *Application requirements; priorities; survey required in certain cases.* (1) Application requirements in § 1180.6(a) and (b) apply. An application shall describe when, during the term of the grant, the applicant plans to complete each objective or phase of the project. Where appropriate, IMLS may require an applicant to submit a dissemination plan.

(2) The Director, by notice published in the **Federal Register**, may establish priorities with respect to all or part of the funds available to IMLS for conservation for a fiscal year among the types of projects specified in paragraph (c) of this section.

(3) The Director may, to the extent appropriate, require (by instructions in the application materials) that an applicant which proposes a project to conserve particular objects must show that, prior to the submission of the application, it has carried out a general survey of its conservation needs and priorities and that the project in question is consistent with such survey. In exceptional circumstances, the Director may adjust this requirement. The Director may also (through such instructions) require an applicant for a conservation project to submit additional information, material, or undertakings to carry out the purposes of this part.

(h) *Procedures for review of applications.* (1) IMLS uses the procedures stated in this paragraph to review applications for conservation projects.

(2) IMLS evaluates all eligible applications for conservation projects in accordance with applicable criteria. (See paragraph (i) of this section.) The Director expects to use panels of experts to review at least a portion of the applications for conservation grants. Depending upon the number of applications received as well as other factors, the Director may also use field reviewers to evaluate applications before submission of applications to the panels. In addition, the Director may

use technical experts to provide technical advice regarding certain applications.

(i) *Criteria.* This paragraph sets forth the general criteria which IMLS uses in evaluating and reviewing applications for conservation projects.

(1) The following programmatic criteria apply to the evaluation and review of conservation grants:

(i) What is the importance of the object or objects to be conserved? What is the significance of the object or objects to the museum's collection and/or audience?

(ii) What is the need for the project, including the relationship of the project to the conservation needs and priorities of the applicant museum as reflected in a survey of conservation needs or similar needs assessment?

(iii) What are the applicant's plans to use and maintain the anticipated results or benefits of the project after the expiration of Federal support?

(iv) Does the applicant plan to devote adequate financial and other resources to the project without inhibiting its ongoing activities?

(2) The following technical criteria apply to the evaluation and review of applications for conservation grants:

(i) What is the nature of the proposed project with respect to project design and management plan?

(ii) To what extent does the application exhibit knowledge of the technical area to which the conservation project relates and employ the most promising or appropriate methods or techniques of conservation? To what extent is the conservation project likely to use, develop or demonstrate improved, more efficient, or more economic methods of conservation?

(iii) Does the project have an adequate budget to achieve its purpose? Is the budget reasonable and adequate in relation to the objectives of the project?

(iv) What are the qualifications of the personnel the applicant plans to use on the project and the proposed time that each such person is obligated to commit to the project?

(j) *Grant condition.* An applicant which has received a grant in a prior fiscal year under the IMLS conservation grant program may not receive a grant in a subsequent fiscal year under this section until required reports have been submitted regarding the performance of the previous grant.

(k) *Allowable and unallowable costs.* (1) Section 1180.56 of this chapter, which applies to conservation grants, sets forth the rules applicable to determining the allowability of costs under IMLS grants and refers applicants and grantees to the OMB circulars containing applicable cost principles which govern Federal grants generally.

(2) In general such costs as compensation for personal services, costs of materials and supplies, rental costs, and other administrative costs specifically related to a conservation project are allowable under a conservation grant in accordance with applicable cost principles.

(3) Costs of alterations, repairs and restoration to an existing facility are allowable when they are related to a conservation project under a conservation grant in accordance with applicable cost principles.

(4) Costs of equipment are generally allowable if related to a conservation project but do require specific approval as indicated in the grant award document.

(5) A grantee may award a stipend to an individual for training in connection with a conservation project.

(6) Costs of new construction are unallowable. For example, a museum may not a use a conservation grant to construct a new building or an addition to an existing building to improve the environment in which its collections are housed.

Subpart E [Removed]

18. Remove subpart E—Assistance to Professional Museum Organizations, consisting of §§ 1180.77 through 1180.78.

Subpart F [Removed]

19. Remove reserved subpart F.

Subpart G [Removed]

20. Remove subpart G—Meetings of the National Museum Services Board, consisting of §§ 1180.80 through 1180.91.

Appendix A to Part 1180 [Removed]

21. Remove Appendix A to Part 1180.

[FR Doc. 05–24007 Filed 12–13–05; 8:45 am]

BILLING CODE 7036–01–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–3010; MB Docket No. 05–316; RM–11294]

Radio Broadcasting Services; Arnold and City of Angels, California

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rule making filed by KBYN, Inc. (''Petitioner''), licensee of Station KBYN(FM) (''KNYN''), Channel 240A, Arnold, California. Petitioner requests that the Commission reallot Channel 240A from Arnold to City of Angels, California, and modify Station KBNY's license accordingly. The coordinates for Channel 240A at City of Angels are 38–05–32 NL and 120–27–22 WL, with a site restriction of 8.6 kilometers (5.3 miles) east of City of Angels.

DATES: Comments must be filed on or before January 17, 2006, and reply comments on or before January 31, 2006.

ADDRESSES: Secretary, Federal Communications Commission, 445 12th Street, SW., Room TW–A325, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve Petitioner's counsel, as follows: Dan J. Albert, Esq., The Law Office of Dan J. Albert; 2120 N. 21st Road; Arlington, Virginia 22201.

FOR FURTHER INFORMATION CONTACT: R. Barthen Gorman, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 05–316, adopted November 23, 2005 and released November 25, 2005. The full text of this Commission decision is available for inspection and copying during regular business hours in the FCC's Reference Information Center at Portals II, 445 12th Street, SW., CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractors, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.* This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506 (C)(4). The provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in

Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under California, is amended by removing Channel 240A at Arnold and by adding City of Angels, Channel 240A.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–23804 Filed 12–13–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 05–311; FCC 05–189]

Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission seeks comment on how to implement section 621(a)(1) of the Communications Act. Because several potential competitors seeking to enter the multichannel video programming distributor (MVPD) marketplace have alleged that in many areas the current operation of the local franchising process serves as a barrier to entry, the Commission solicits comment on section 621(a)(1)'s directive that local franchising authorities (LFAs) not unreasonably refuse to award competitive franchises, and whether the franchising process unreasonably impedes the achievement of the interrelated federal goals of enhanced cable competition and accelerated broadband deployment and, if so, how the Commission should act to address that problem.

DATES: Comments for this proceeding are due on or before February 13, 2006; reply comments are due on or before March 14, 2006.

ADDRESSES: You may submit comments, identified by MB Docket No. 05–311, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Federal Communications Commission's Web Site: *http://www.fcc.gov/cgb/ecfs/*. Follow the instructions for submitting comments.
- People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact John Norton, *John.Norton@fcc.gov* or Natalie Roisman, *Natalie.Roisman@fcc.gov* of the Media Bureau, Policy Division, (202) 418–2120.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rulemaking (NPRM)*, FCC 05–189, adopted on November 3, 2005, and released on November 18, 2005. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. These documents will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Initial Paperwork Reduction Act of 1995 Analysis

This *NPRM* does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Summary of the Notice of Proposed Rulemaking

I. Introduction

1. In this Notice of Proposed Rulemaking (*NPRM*), the Commission seeks comment on how to implement section 621(a)(1) of the Communications Act of 1934, as amended (the Communications Act or the Act). Section 621(a)(1) states in relevant part that ''a franchising authority * * * may not unreasonably refuse to award an additional competitive franchise.'' While the Commission has found that, ''[t]oday, almost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers,'' greater competition in the market for the delivery of multichannel video programming is one of the primary goals of federal communications policy. Increased competition can be expected to lead to lower prices and more choices for consumers and, as marketplace competition disciplines competitors' behavior, all competing cable service providers could require less federal regulation. Moreover, for all competitors in the marketplace, the abilities to offer video to consumers and to deploy broadband networks rapidly are linked intrinsically. Specifically, the construction of modern telecommunications facilities requires substantial capital investment, and such networks, once completed, are capable of providing not only voice and data, but video as well. As a consequence, the ability to offer video offers the promise of an additional revenue stream from which deployment costs can be recovered. However, potential competitors seeking to enter the MVPD marketplace have alleged that in many areas the current operation of the local franchising process serves as a barrier to entry. Accordingly, this *NPRM* is designed to solicit comment on implementation of section 621(a)(1)'s directive that LFAs not unreasonably refuse to award competitive franchises, and whether the franchising process

unreasonably impedes the achievement of the interrelated federal goals of enhanced cable competition and accelerated broadband deployment and, if so, how the Commission should act to address that problem.

II. Background

2. The Communications Act provides new entrants four options for entry into the MVPD market. They can provide video programming to subscribers via radio communication, a cable system or an open video system, or they can provide transmission of video programming on a common carrier basis. Any new entrant opting to offer ''cable service'' as a ''cable operator'' becomes subject to the requirements of Title VI of the Communications Act (*See* 47 U.S.C. 542(6); 47 U.S.C. 542(5)). Section 621 of Title VI sets forth general cable franchise requirements. Subsection (b)(1) of section 621 prohibits a cable operator from providing cable service in a particular area without first obtaining a cable franchise, and subsection (a)(1) grants to LFAs the authority to award such franchises. Other provisions of section 621 provide that, in awarding a franchise, an LFA ''shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides'' (47 U.S.C. 541(a)(3)); ''shall allow [a] cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area'' (47 U.S.C. 541(a)(4)(A)); and ''may require adequate assurance that the cable operator will provide adequate public, educational and governmental access channel capacity, facilities, or financial support'' (47 U.S.C. 541(a)(4)(B)).

3. The initial purpose of section 621(a)(1), which was added to the Communications Act by the Cable Communications Policy Act of 1984 (the 1984 Cable Act), was to both affirm and delineate the role of LFAs in the franchising process (*See, e.g.*, H.R. Rep. No. 98–934, at 59 (1984)). A few years later, however, the Commission prepared a report to Congress on the cable industry pursuant to the requirements of the 1984 Cable Act (*See generally Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service,* 55 FR 32631, August 10, 1990) (Report). In that Report, the Commission concluded that in order ''[t]o encourage more robust competition in the local video marketplace, the Congress should * * * forbid local franchising authorities from unreasonably denying a franchise to potential competitors who are ready and able to provide service.''

4. In response, Congress revised section 621(a)(1) through the Cable Television Consumer Protection and Competition Act of 1992 (the 1992 Cable Act) to read as follows: ''A franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise.'' (47 U.S.C. 541(a)(1)). As the legislative history makes plain, the purpose of this abridgement of local government authority was to promote greater cable competition:

> Based on the evidence in the record taken as a whole, it is clear that there are benefits from competition between two cable systems. Thus, the Committee believes that local franchising authorities should be encouraged to award second franchises. Accordingly, [the 1992 Cable Act,] as reported, prohibits local franchising authorities from unreasonably refusing to grant second franchises.

Section 621(a)(1), as revised, established a clear, federal-level limitation on the authority of LFAs in the franchising process. In that regard, Congress provided that ''[a]ny applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 635. * * *'' Section 635, in turn, states that ''[a]ny cable operator adversely affected by any final determination made by a franchising authority under section 621(a)(1) * * * may commence an action within 120 days after receiving notice of such determination'' in federal court or a state court of general jurisdiction (47 U.S.C. 555).

5. As potential new entrants seek to enter the MVPD marketplace, there have been indications that in many areas the current operation of the local franchising process is serving as an unreasonable barrier to entry. For example, Verizon recently filed comments in the Commission's annual investigation into the state of video competition arguing that ''[t]he single biggest obstacle to widespread competition in the video services market is the requirement that a provider obtain an individually negotiated local franchise in each area where it intends to provide service.'' In its comments, Verizon contends that the local franchising process impedes cable competition in the following ways: (1) It ''forces a new entrant to telegraph its deployment plans to the incumbent video competitor,'' thereby ''allow[ing] the incumbent not only to take steps to prolong the franchise process and delay the onset of competition, but also to entrench its position in the market before the new entrant has the opportunity to compete;'' (2) it ''simply takes too long,'' as a result of ''factors such as inertia, arcane or lengthy application procedures, bureaucracy or, in some cases, inattentiveness or unresponsiveness at the LFA level;'' (3) it triggers so-called ''level playing field'' laws, ''which require the new entrant to build-out and serve an entire franchise area on an expedited basis or to match all of the concessions previously provided by the incumbent in order for it to gain its original monopoly position in the local area, despite the vastly different competitive situation facing the new entrant;'' and (4) it involves ''outrageous demands by some LFAs,'' which ''are in no way related to video services or to the rationales for requiring franchises.''

6. The efficient operation of the local franchising process is especially significant with respect to potential new entrants with existing facilities, for a number of reasons. First, because they seek to provide video programming to large portions of the country, they contend that the sheer number of franchises they first must obtain serves as a competitive roadblock. Verizon, for example, has stated that it would have to negotiate with more than 10,000 municipalities in order to offer service throughout its current service area. Second, because the existing service areas of potential new entrants with existing facilities do not always coincide perfectly with those covered by incumbent cable operators' franchises, they argue that build-out requirements demanded by LFAs create disincentives for them to enter the marketplace. SBC has told investors that Project Lightspeed, an ''initiative to expand its fiber-optics network deeper into neighborhoods to deliver SBC U-verseSM TV, voice and high-speed Internet access services,'' will be deployed to approximately ninety percent of its ''high-value,'' seventy percent of its ''medium-value,'' and less than five percent of its ''low-value'' customers.

7. According to the National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, and the National Association of Counties, local governments ''want and welcome real communications competition in video, telephone and broadband services,'' and they ''support a technology-neutral

approach that promotes broadband deployment and competitive service offerings.'' While acknowledging that consumers ''demand real competition to increase their options and improve the quality of services,'' local governments argue that franchising ''need not be a complex or time-consuming process.'' They argue that the current framework ''[s]afeguards [a]gainst [a]buse and [p]rotects [c]ompetition.'' Furthermore, local governments maintain that local franchisors take their fiduciary responsibilities seriously and strive to ''manage and facilitate in an orderly and timely fashion the use of [local] property.''

8. Anecdotal evidence suggests that new entrants have been able to obtain cable franchises. SNET and Ameritech both obtained cable franchises before being acquired by SBC. BellSouth and Qwest have obtained franchises, as have many cable overbuilders—RCN has acquired over 100. Verizon has stated that it ''has obtained nine local cable franchises for FiOS TV from various local franchising authorities (LFAs) in California, Florida, Virginia, and Texas'' and ''is negotiating franchises with more than 200 municipalities.'' According to a survey of 161 National Telecommunications Cooperative Association (NTCA) members, ''[f]orty-two percent of survey respondents offer video service to their customers. Ninety-four percent of those offer video under a cable franchise, while six percent offer video as an Open Video System (OVS) * * *.''

9. In addition, there have been recent efforts at the state level to facilitate entry by competitive cable providers. For example, legislation was passed in Texas in September 2005 enabling new entrants in the video programming distribution marketplace to provide service pursuant to state-issued certificates of franchising authority. Upon the submission of a completed affidavit by an applicant, Texas regulators now are required to issue a certificate of franchising authority within seventeen business days. Similar bills have been introduced in Virginia and New Jersey although they are yet to be enacted.

10. With this *NPRM*, the Commission seeks to determine whether, in awarding franchises, LFAs are carrying out legitimate policy objectives allowed by the Communications Act or are hindering the federal communications policy objectives of increased competition in the delivery of video programming and accelerated broadband deployment and, if that is the case, whether and how to remedy the problem.

III. Discussion

11. Potential competitive cable providers have alleged that the local franchising process serves as a barrier to entry, and that state and local franchise requirements serve to unreasonably delay competitive entry. Given the interrelated federal goals of enhanced cable competition and rapid broadband deployment, below we seek comment on a number of issues relating to the cable franchising process generally, and, in particular, the process by which competitive cable franchises are awarded.

A. Potential Competitors' Current Ability To Obtain Franchises

12. The Commission requests comment on the current environment in which would-be new entrants attempt to obtain competitive cable franchises. How many franchising authorities are there nationally? How many franchises are needed to reach sixty or eighty percent of cable subscribers? In how many of these franchise areas do new entrants provide or intend to provide competitive video services? Are cable systems generally equivalent to franchise areas? To what extent does the regulatory process involved in obtaining franchises—particularly multiple franchises covering broad territories, such as those today served by facilities-based providers of telephone and/or broadband services—impede the realization of the Commission's policy goals? Are potential competitors obtaining from LFAs the authority needed to offer video programming to consumers in a timely manner? What is the impact of state-wide franchise authority on the ability of the competitive provider to access the market? Is there evidence that such state-wide franchises are causing delay? What impact has state-level legislative or regulatory activity had on the franchising process? Are competitors taking advantage of new opportunities provided by state legislatures and regulators? How many competitive franchises have been awarded to date? How many competitive franchises have potential new entrants requested to date? How much time, on average, has elapsed between the date of application and the date of grant, and during that time period, how much time, on average, was spent in active negotiations? How many applications have been denied?

13. How many negotiations currently are ongoing? Are the terms being proffered consistent with the requirements of Title VI? How has the cable marketplace changed since the passage of the 1992 Cable Act, and what effect have those changes had on the process of obtaining a competitive cable franchise? Are current procedures or requirements appropriate for any cable operator, including existing cable operators? What problems have cable incumbents encountered with LFAs? Should cable service requirements vary greatly from jurisdiction to jurisdiction? Are certain cable service requirements no longer needed in light of competition in the MVPD marketplace? To what extent are LFAs demanding concessions that are not relevant to providing cable services? Commenters arguing that such abuses are occurring are asked to provide specific examples of such demands. Parties should submit empirical data on the extent to which LFAs unreasonably refuse to award competitive franchises. The Commission seeks record evidence of both concrete examples and broader information that demonstrate the extent to which any problems exist.

14. The Commission also asks commenters to address the impact that state laws have on the ability of new entrants to obtain competitive franchises. Some parties state that so-called ''level-playing-field'' statutes, which typically impose upon new entrants terms and conditions that are neither ''more favorable'' nor ''less burdensome'' that those to which existing franchises are subject, create unreasonable regulatory barriers to entry. Others state that they create comparability among all providers. The Commission seeks comment on these issues. The Commission also seeks comment on the impact of state laws establishing a multi-step franchising process. Do such laws create unreasonable delays in the franchising process?

B. The Commission's Authority To Adopt Rules Implementing Section 621(a)(1)

15. The Commission tentatively concludes that it has authority to implement section 621(a)(1)'s directive that LFAs not unreasonably refuse to award competitive franchises. As an initial matter, the Commission is charged by Congress with the administration of Title VI, which, as courts have held, necessarily includes the authority to interpret and implement section 621. Moreover, the Commission believes that the 1992 Cable Act's revisions to section 621(a)(1) indicate that Congress considered the goal of greater cable competition to be sufficiently important to justify the Commission's adoption of rules. Under the Supremacy Clause, the enforcement

of a state law or regulation may be preempted by federal law when it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The Supreme Court has held that federal regulations properly adopted in accordance with an agency's statutory authorization have no less preemptive effect than federal statutes and, applying this principle, the Court has approved the preemptive authority that the Commission has asserted over the regulation of cable television systems. In addition, section 636(c) of the Act states that ''any provision of law of any State, political subdivision, or agency thereof, or franchising authority or any provision of any franchise granted by such authority, which is inconsistent with [the Communications] Act shall be deemed to be preempted and superseded.'' Thus, the Commission tentatively concludes that, pursuant to the authority granted under sections 621(a) and 636(c) of the Act, and under the Supremacy Clause, the Commission may deem to be preempted and superceded any law or regulation of a State or LFA that causes an unreasonable refusal to award a competitive franchise in contravention of section 621(a). At the same time, however, the Commission recognize that section 636(a) states that ''[n]othing in this title shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this title.'' Finally, the Commission notes that it is empowered by section 1 of the Act ''to execute and enforce the provisions of this Act'' and by section 4(i) ''to perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.'' The Commission seeks input from commenters on the tentative conclusion that the Commission is authorized to implement section 621(a)(1) as amended. The Commission also seeks comment on the manner in which the Commission should proceed. Do the Commission have the authority to adopt rules or is it limited to providing guidance?

16. The first sentence of section 621(a)(1) states that a franchising authority may award ''1 or more franchises'' and may not unreasonably refuse to award ''an additional competitive franchise.'' The Commission tentatively concludes that section 621(a)(1) empowers it to ensure that the local franchising process does not unreasonably interfere with the ability of any potential new entrant to provide video programming to consumers. The Commission seeks comment on this tentative conclusion.

17. Section 621(a)(1) states in relevant part that ''[a]ny applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 635 for failure to comply with this subsection.'' Section 635, in turn, sets forth the specific procedures for such judicial proceedings. Apart from those remedies available to aggrieved cable operators under section 635, the Commission tentatively concludes that section 621(a)(1) authorizes the Commission to take actions, consistent with section 636(a), to ensure that the local franchising process does not undermine the well-established policy goal of increased MVPD competition and, in particular, greater cable competition within a given franchise territory. The Commission seeks comment on this tentative conclusion as well. How might the Commission best assure that the local franchising process is not inhibiting the ability of incumbent cable operators to invest in broadband services?

18. Finally, the Commission seeks comment on possible sources of Commission authority, other than section 621(a)(1), to address problems caused by the local franchising process. For example, given the relationship between the ability to offer video programming and the willingness to invest in broadband facilities identified above, could the Commission take action to address franchise-related concerns pursuant to section 706?

C. Steps the Commission Should Take To Ensure That the Local Franchising Process Does Not Unreasonably Interfere With Competitive Cable Entry and Rapid Broadband Deployment

19. The Commission seeks comment on how to should define what constitutes an unreasonable refusal to award an additional competitive franchise under section 621(a)(1). While that section refers to the ''unreasonable refus[al] to award an additional competitive franchise,'' the Commission tentatively concludes that section 621(a)(1) prohibits not only the ultimate refusal to *award* a competitive franchise, but also the establishment of procedures and other requirements that have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a competitive franchise, either by (1) creating unreasonable delays in the process, or (2) imposing unreasonable regulatory roadblocks, such that they effectively constitute a *de facto* ''unreasonable refusal to award an additional competitive franchise'' within the meaning of section 621(a)(1). The Commission tentatively finds that this interpretation is consistent with the language in the statute and appropriate because it captures more appropriately the range of behavior that would constitute an ''unreasonable refusal to award an additional competitive franchise.'' The Commission seeks comment on this tentative conclusion.

20. Further, the Commission tentatively concludes that it is not unreasonable for an LFA, in awarding a franchise, to ''assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides;'' ''allow [a] cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area;'' and ''require adequate assurance that the cable operator will provide adequate public, educational and governmental access channel capacity, facilities, or financial support.'' These powers and limitations on franchising authorities promote important public policy goals.

21. The Commission solicits comment on what, if any, specific rules, guidance or best practices should be adopted to ensure that the local cable franchising process does not unreasonably impede competitive cable entry. What would the appropriate remedy or remedies be for violations of such rules, guidance or best practices? Should the Commission establish specific rules to which LFAs must adhere or specific guidelines for LFAs? For example, should the Commission address maximum timeframes for considering an application for a competitive franchise? Are there certain practices that should be found unreasonable through rules or guidelines? If so, what are these practices?

22. In addition, it is not clear how the primary justification for a cable franchise—*i.e.*, the locality's need to regulate and receive compensation for the use of public rights of way—applies to entities that already have franchises that authorize their use of those rights of way. Does section 621(a)(1) provide the Commission with the authority to establish different—specifically, higher—standards for ''reasonableness'' with respect to such entities? In that context, the Commission seeks comment on whether section 621(a)(1) permits the imposition of greater restrictions on the

authority of LFAs with respect to those entities (*e.g.*, facilities-based providers of telephone and/or broadband services) that already have permission to access public rights of way.

23. The Commission also seeks comment on whether build-out requirements are creating unreasonable barriers to entry for facilities-based providers of telephone and/or broadband services. The areas served by such entities frequently do not coincide perfectly with the areas under the jurisdiction of the relevant LFAs. Section 621(a)(4)(A) states that, ''[i]n awarding a franchise, the franchising authority shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area.'' (For purposes of this discussion, there is a distinction between (1) requirements that may function as barriers to competitive entry for providers of telephone and/or broadband services with existing facilities, and (2) prohibitions against discriminatory deployment of cable services based upon economic considerations.) The Commission seeks comment on the FCC's authority in this area. Given the language of section 621(a)(4)(A), does the Commission have authority under section 621(a)(1) to direct LFAs to allow such new entrants a specific, minimum amount of time to expand their networks beyond their current footprints? If so, and in light of the fact that a new entrant generally faces competition from at least one incumbent cable operator and two direct broadcast satellite (''DBS'') providers, what would constitute a reasonable amount of time to do so?

24. Finally, section 602 of the Act defines ''franchising authority'' as ''any governmental entity empowered by Federal, State, or local law to grant a franchise.'' In some cases it may be the state itself, rather than the LFA, that has taken steps which unreasonably interfere with new entrants' ability to obtain a competitive franchise. Commenters should address whether it may be appropriate to preempt such state-level legislation to the extent that the Commission finds it serves as an unreasonable barrier to the grant of competitive franchises.

IV. Procedural Matters

A. Initial Regulatory Flexibility Analysis

25. As required by the Regulatory Flexibility Act of 1980, as amended (the RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact of the policies and rules proposed in this *NPRM* on a substantial number of small entities. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM* provided in paragraph 28 of the item. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA) (*See* 5 U.S.C. 603(a)).

a. Need for, and Objectives of, the Proposed Rules

26. The *NPRM* initiates a process to implement section 621(a)(1) of the Communications Act in order to further the interrelated goals of enhanced cable competition and accelerated broadband deployment. Specifically, the *NPRM* solicits comment on how to best ensure that LFAs, which are the governmental entities responsible for regulating cable providers at the local level, do not ''unreasonably refuse to award * * * additional competitive franchise[s].'' The *NPRM* also seeks comment on the specific approach the Commission should take in order to implement section 621(a)(1). Specifically, it asks whether the Commission should establish (1) specific guidelines and/or model terms for competitive cable franchises, or (2) general principles that are designed to provide LFAs with the guidance necessary to ensure that competitive franchises are awarded in a timely fashion.

b. Legal Basis

27. The *NPRM* tentatively concludes that the Commission has authority to implement section 621(a)(1)'s mandate that LFAs do not ''unreasonably refuse to award * * * additional competitive franchises.'' The item notes that the Commission is empowered by section 1 of the Communications Act ''to execute and enforce [its] provisions'' and by section 4(i) ''to perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.'' Finally, the *NPRM* finds that section 636(c) makes plain that ''any provision of law of any State, political subdivision, or agency thereof, or franchising authority or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superceded.'' The *NPRM* is adopted pursuant to sections 1, 4(i), 621(a)(1), and 636(c) of the Communications Act of 1934, as amended.

c. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

28. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

29. *Small Businesses.* Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.

30. *Small Organizations.* Nationwide, there are approximately 1.6 million small organizations.

31. The Commission has determined that the group of small entities possibly directly affected by the proposed rules herein, if adopted, consists of small governmental entities (which, in some cases, may be represented in the local franchising process by not-for-profit enterprises). A description of these entities is provided below. In addition the Commission voluntarily provides descriptions of a number of entities that may be merely indirectly affected by any rules that result from the *NPRM*.

1. Small Governmental Jurisdictions

32. The term ''small governmental jurisdiction'' is defined as ''governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' As of 1997, there were approximately 87,453 governmental jurisdictions in the United States. This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2 percent) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer.

2. Miscellaneous Entities

33. The entities described in this section are affected merely indirectly by the *NPRM*, and therefore are not formally a part of this RFA analysis. They are included, however, to broaden

the record in this proceeding and to alert them to the Commission's tentative conclusions.

aa. Cable Operators

34. The ''Cable and Other Program Distribution'' census category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed small business size standard for this census category, which includes all such companies generating $12.5 million or less in revenue annually. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

35. *Cable System Operators (Rate Regulation Standard).* The Commission has developed its own small-business-size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a ''small cable company'' is one serving fewer than 400,000 subscribers nationwide. The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995. Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

36. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' The Commission has determined that there are 67,700,000 subscribers in the United States. Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, and therefore is unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

37. *Open Video Services.* Open Video Service (OVS) systems provide subscription services. As noted above, the SBA has created a small business size standard for Cable and Other Program Distribution. This standard provides that a small entity is one with $12.5 million or less in annual receipts. The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of these are currently providing service. Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, DC, and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 24 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

bb. Telecommunications Service Entities

38. As noted above, a ''small business'' under the RFA is one that, inter alia, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.'' The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not ''national'' in scope.

39. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.

40. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), ''Shared-Tenant Service Providers,'' and ''Other Local Service Providers.''* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 769 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 769 carriers, an estimated 676 have 1,500 or fewer employees and 93 have more than 1,500 employees. In addition, 12 carriers have reported that they are ''Shared-Tenant Service Providers,'' and all 12 are estimated to have 1,500 or fewer employees. In addition, 39 carriers have reported that they are ''Other Local Service Providers.'' Of the 39, an estimated 38 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, ''Shared-Tenant Service Providers,'' and ''Other Local Service Providers'' are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.

d. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

41. The Commission anticipates that any rules implementing section 621(a)(1) that result from this action would have at most a *de minimis* impact

on small governmental jurisdictions (*e.g.*, one-time proceedings to amend existing procedures regarding the method of granting competitive franchises). LFAs today must review and decide upon competitive cable franchise applications, and will continue to perform that role upon the conclusion of this proceeding; any rules that might be adopted pursuant to this *NPRM* likely would require at most only modifications to that process.

e. Steps Taken To Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

42. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.''

43. As discussed in the *NPRM*, section 621(a)(1) states that LFAs must not unreasonably refuse to award competitive franchises. Should the Commission conclude ultimately that the procedures by which LFAs currently award competitive franchises conflict with the mandate of section 621(a)(1), it may adopt rules designed to ensure that the local franchising process does not create unreasonable barriers to competitive entry. Such rules may consist of specific guidelines (*e.g.*, maximum timeframes for considering a competitive franchise application) or general principles designed to provide LFAs with the guidance necessary to conform their behavior to the directive of section 621(a)(1). As noted above, these rules likely would have at most a *de minimis* impact on small governmental jurisdictions. Even if that were not the case, however, the interrelated, high-priority federal communications policy goals of enhanced cable competition and accelerated broadband deployment would necessitate the establishment of specific guidelines and/or general principles for LFAs with respect to the process by which they grant competitive cable franchises. The alternative (*i.e.*, continuing to allow LFAs to follow procedures that do not ensure that competitive cable franchises are not unreasonably refused) would be unacceptable, as it would be flatly inconsistent with section 621(a)(1). The Commission seeks comment on the impact that such rules might have on small entities, and on what effect alternative rules would have on those entities. The Commission also invites comment on ways in which the Commission might implement section 621(a)(1) while at the same time impose lesser burdens on small entities.

f. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

44. None.

B. Initial Paperwork Reduction Act of 1995 Analysis

45. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4).

C. Ex Parte Rules

46. *Permit-But-Disclose*. This proceeding will be treated as a ''permit-but-disclose'' proceeding subject to the ''permit-but-disclose'' requirements under § 1.1206(b) of the Commission's rules. *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one-or two-sentence description of the views and arguments presented is generally required. Additional rules pertaining to oral and written presentations are set forth in § 1.1206(b).

D. Filing Requirements

47. *Comments and Replies.* Pursuant to §§ 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.

48. *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/* or the Federal eRulemaking Portal: *http://www.regulations.gov*. Filers should follow the instructions provided on the Web site for submitting comments. For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to *ecfs@fcc.gov*, and include the following words in the body of the message, ''get form.'' A sample form and directions will be sent in response.

49. *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington, DC 20554.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–24029 Filed 12–13–05; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 051202320–5320–01; I.D. 040605D]

Atlantic Highly Migratory Species; Commercial Shark Management Measures

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

ACTION: Petition for rulemaking; decision.

SUMMARY: NMFS has decided not to initiate the rulemaking requested by the North Carolina Department of Environment and Natural Resources, Division of Marine Fisheries (Petitioner), to amend the current time/area closure for Atlantic sharks off the Mid-Atlantic region. NMFS does not have any new information to support the Petitioner's proposal of a closure inside of 15 fathoms along the North Carolina coast nor the assertion that such a closure would still attain the management goal of protecting juvenile sandbar and prohibited dusky sharks.

NMFS will consider new information concerning the impacts of the current time/area closure (which has been in place for one time period from January 1 to July 31, 2005) and the results of upcoming large coastal shark (LCS) and dusky shark stock assessments to determine whether changes to the time/area closure are appropriate. In addition, NMFS will monitor any changes to shark regulations by coastal states and will continue to work with the Atlantic States Marine Fisheries Commission (ASMFC) in terms of development of an interstate shark plan, which may warrant a review of existing Federal regulations and consideration of further changes to the time/area closure.

ADDRESSES: Copies of NMFS' decision on the North Carolina Department of Environment and Natural Resources, Division of Marine Fisheries' petition are available from Karyl Brewster-Geisz, Highly Migratory Species Management Division, NMFS, 1315 East-West Highway, Silver Spring, MD 20910; telephone 301–713–2347. Copies of NMFS' decision regarding the petition are also available on the internet at *http://www.nmfs.noaa.gov/sfa/hms*.

FOR FURTHER INFORMATION CONTACT: Karyl Brewster-Geisz or Margo Schulze-Haugen by phone: 301–713–2347 or by fax: 301–713–1917.

SUPPLEMENTARY INFORMATION:

Background

In 2002, NMFS conducted an LCS stock assessment that was peer-reviewed by three independent reviewers (67 FR 64098, October 17, 2002). While the peer reviews indicated areas that could be improved, they concluded that the stock assessment constituted the best available science. Based on the results of this stock assessment and the status determination criteria in the 1999 Fishery Management Plan (FMP) for Atlantic Tunas, Swordfish, and Sharks, NMFS determined that the LCS complex was overfished and overfishing was occurring. NMFS also determined that sandbar sharks were not overfished and overfishing was occurring, and that blacktip sharks were fully rebuilt. In addition to providing information regarding the status of the stocks, the stock assessment noted, among other things, that a reduction in catches of LCS may be necessary to recover the complex as a whole to the biomass expected to yield maximum sustainable yield (BMSY); that reductions in catch of species other than sandbar and blacktip sharks appeared to be the most appropriate; that individual species are responding differently to exploitation; and that juvenile survival is the vital rate that most affects overall population growth rates, thus supporting the need to protect reproductive females and juveniles.

The 2002 LCS stock assessment did not individually assess the status of dusky sharks. However, in the 1999 FMP, NMFS noted that dusky sharks are highly susceptible and vulnerable to overfishing. This vulnerability is due to several factors including: (1) their age of maturity is approximately 19 years (approximately 12 ft or 3.7 m FL); (2) they have few pups per litter (6 to 14 per litter); (3) they have a long gestation period (approximately 16 months); and (4) approximately 82 percent of those caught in commercial fisheries are brought to the vessel dead, making dusky sharks highly susceptible to dying on longline gear. This vulnerability has resulted in this species being listed as a species of concern under the Endangered Species Act (ESA) since 1997, and in 1999, being placed on the prohibited species list (due to litigation, the dusky shark prohibition did not go into effect until mid–2000). NMFS continues to be concerned about all life stages for dusky sharks and is expecting a final dusky shark assessment to be released later this year.

Shortly after the 2002 LCS stock assessment was released, NMFS began the process of amending the FMP for Atlantic Tunas, Swordfish, and Sharks (67 FR 69180, November 17, 2002). Consistent with the 1999 FMP and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the objectives of Amendment 1 were, among other things, to implement management measures to rebuild the LCS complex that were based on the best available science, to amend the rebuilding timeframe based on the best available science given that the 1998 stock assessment, on which the previous rebuilding timeframe was based, was found to be faulty, and to review shark management measures, in general.

During the Amendment 1 process, NMFS held seven scoping meetings in February and March 2003 (68 FR 3853, January 27, 2003), held six public hearings on draft Amendment 1 and the proposed rule (68 FR 45196, August 1, 2003, and 68 FR 54885, September 19, 2003), held one Advisory Panel meeting specific to draft Amendment 1 and the proposed rule (68 FR 51560, August 27, 2003), attended four Regional Fishery Management Council meetings (New England, Mid-Atlantic, and two for the Gulf of Mexico), and attended one ASFMC meeting. In addition to the comments at the public hearings and Council meetings, NMFS received over 30 written comments on draft Amendment 1 and the proposed rule. The final rule published on December 24, 2003 (68 FR 74746). Among other things, final Amendment 1 and its final rule revised the LCS rebuilding timeframe to 26 years, adjusted the LCS commercial quota, established trimester seasons and regional subquotas, removed the commercial minimum size, changed the recreational bag limit and minimum size, established a time/area closure off North Carolina, required line cutters and dipnets on bottom longline vessels, required vessel monitoring systems (VMS) on gillnet and bottom longline vessels during part of the year, and established criteria to use to modify the prohibited species list. Major changes from the proposed rule as a result of public comment included: delaying the effective date for the implementation of trimester seasons; a change in the reduction of the LCS

quota from 40 to 45 percent; a decision to maintain existing regulations for the gillnet fishery; and a reduction in the proposed time/area closure from approximately 38,200 to 4,490 nm^2.

As part of adjusting the commercial LCS quota in Amendment 1, NMFS also established a procedure to calculate the base commercial quota based on information from the stock assessment. Under this procedure, NMFS establishes the base commercial quota dependent on estimates of maximum sustainable yield (MSY) and what is needed to reach MSY, commercial landings (including landings from states), dead discards, and recreational harvest. This base quota is then split between the three different regions and three seasons. Before each season, NMFS adjusts the Federal shark quotas for each region based on the total landings reported by Federal dealers. These dealer reports include landings from both state and Federal waters.

The time/area closure was implemented to reduce discards of prohibited dusky and juvenile sandbar sharks under the rebuilding plan for LCS. The location of the time/area closure is in an area off North Carolina that has also been identified as essential fish habitat (EFH) for both sandbar and dusky sharks and as a habitat area of particular concern (HAPC) for sandbar sharks. The HAPC serves as important nursery and pupping grounds in areas adjacent to Hatteras and Ocracoke Islands and offshore of those islands. Other areas identified as HAPCs for similar reasons, such as the mouth of Great Bay, NJ, lower and middle Delaware Bay, and lower Chesapeake Bay, MD, were not included as time/area closures because they are predominantly in state waters and fishing effort is low in those areas. The HAPC off North Carolina is one of only four areas identified as an HAPC and is the only area that extends significantly into Federal waters (the HAPC in the Chesapeake Bay has a slight overlap with Federal waters near the mouth of the Bay).

During the public comment period for draft Amendment 1, commenters stated, among other things, that most nursery grounds are in nearshore waters, that closing inshore of 20 fathoms should be enough to protect neonate and juvenile sharks, that only state waters should be closed to protect juvenile sharks, that using dusky shark data when fishermen targeted them for the area closure was unfair, and that the time period for the closure was too long. As a result of these comments, NMFS re-analyzed the data in regard to the time/area closure including looking at the impacts of closing only waters inshore of 20 fathoms, reducing the time period, and considering dusky shark data only after they became prohibited. NMFS found that fishermen caught both dusky sharks and juvenile sandbar sharks at depths of up to 50 fathoms and that limiting the closure to depths inshore of 20 fathoms would greatly reduce the benefits of a time/area closure. NMFS also found that, of all the sharks observed in the fishery, the majority of juvenile sandbar sharks, all of the neonate sandbar sharks, and the majority of dusky sharks (all life stages) were caught in the time/area closure that was finalized. This time/area closure was first effective from January 1, 2005, to July 31, 2005.

The Petition

On March 7, 2005, NMFS received a request from the North Carolina Department of Environment and Natural Resources, Division of Marine Fisheries (Petitioner), to initiate rulemaking for a regulatory amendment to 50 CFR 635.2 regarding the definition of the ''Mid-Atlantic shark closed area.'' The Petitioner seeks rulemaking to reduce the current closed area by changing the boundary from 55 fathoms from January to July in the middle part of the state to only include waters out to 15 fathoms coastwide for North Carolina by January 1, 2006. The Petitioner stated that this action would allow North Carolina fishermen access to the larger sharks in deeper waters from 15 to 55 fathoms and minimize discards of juvenile and protected sharks to a reasonable extent. The Petitioner stated that the available data suggest that juvenile sharks occur predominately near shore. Thus, the Petitioner proposed that closing out to 15 fathoms year-round along the entire North Carolina coastline instead of out to 55 fathoms for the middle part of North Carolina would still attain the management goal of protecting juvenile sandbar and prohibited dusky sharks. The Petitioner believes that the offshore extent of the current closed area encompasses the primary shark fishing grounds off North Carolina and severely restricts access to the shark quota off North Carolina, particularly during the first trimester.

The Petitioner also asserted that the current time/area closure off North Carolina is not justified based on available data and has been implemented in violation of at least three National Standards (e.g., #4, 8, and 10) of the Magnuson-Stevens Act. The Petitioner noted that the proposed change could address the above concerns and have positive significant economic benefits to fishermen, dealers, and fishing communities in the South Atlantic.

NMFS published a notice of receipt of the petition for rulemaking in the **Federal Register** (May 10, 2005, 70 FR 24494) and invited public comments for 60 days ending on July 11, 2005. NMFS received 18 letters, including letters from one Council, the state of North Carolina, commercial fishermen, commercial fisheries organizations, and other interested individuals. Summaries of and responses to comments are provided under the Public Comments section below.

Agency Decision

After carefully considering the petition and all public comments, NMFS has decided not to initiate the requested rulemaking. Currently, NMFS does not have any new information to support the request by the Petitioner for a closure inside of 15 fathoms along the coast of North Carolina. The Petitioner has not submitted analyses to support their request. NMFS has already analyzed and rejected a closure out to 20 fathoms in response to comment during the Amendment 1 process because many juvenile sandbar sharks and dusky sharks were caught out to the 55 fathom line (see response to Comment 7). Without new information, NMFS has no basis to modify the existing time/area closure in the manner suggested by the Petitioner.

There are a number of items that could warrant modification of the time/area closure within a few years. First, NMFS will be conducting a stock assessment for LCS starting this year (September 15, 2005, 70 FR 54537). The results of this stock assessment are expected to be final in mid–2006. Second, NMFS expects a final dusky shark stock assessment to be released in early 2006. Third, because the time/area closure has now been in effect for one time period, NMFS can begin to examine the data and analyze the actual impacts of the closure, ecologically and economically. Pertinent, complete logbook data for the 2005 closure will be available in the summer of 2006. In addition, NMFS will analyze new, applicable data as it becomes available. Fourth, NMFS is working with the ASMFC to start work on an interstate coast-wide shark plan. If other states become more consistent with the Federal regulations, either through a coast-wide plan or on their own initiative, it is possible that the ecological benefits could warrant a review of existing Federal regulations, including the time/area closure. To note, the state of Florida is currently reviewing and the Commonwealth of

Virginia has currently modified their state regulations regarding sharks. Fifth, NMFS recently released a proposed rule that, among other things, would establish criteria to be considered when implementing or modifying time/area closures (70 FR 48804, August 19, 2005). This proposed rule should be final in 2006.

Given the nature of the issues raised by the Petitioner and the lack of additional information supporting the petition, NMFS believes that the results of the first three items above will provide valuable information when considering a modification to the existing time/area closure. Additionally, NMFS will continue to work with the ASMFC and/or individual states regarding consistent shark regulations and management measures. NMFS also encourages the Petitioner to work with NMFS scientists and industry in pursuing cooperative research on reducing bycatch of juvenile and sub-adult sandbar and dusky sharks. Results from such studies have been critical to providing alternate fishing practices in other areas that maintain target catch while also reducing bycatch.

Response to Comments

During the public comment period, individuals and groups provided comments on NMFS' notice in the **Federal Register** on the receipt of a petition for rulemaking by the Petitioner. Comments were sent via letter, FAX, and E-mail. The comments are summarized below, together with NMFS' responses. The comments and responses are categorized by major subject headings.

1. Observer Program

Comment 1: Commenters indicated that while the information during the mid and late 1990s provides excellent coverage of the fishery, the observer program has operated sporadically since 2000. In addition, commenters noted that the **Federal Register** notice stated that the time/area closure was based on observer data. The commenters felt that this statement was misleading, and that NMFS selectively examined a shorter time period of observer data from 2001 to 2002, which is less extensive than the earlier data in terms of geography and sample size. The commenters felt the Agency would have drawn a different conclusion and made more acceptable recommendations if it had used all available observer data.

Response: The observer program began in 1994, as a voluntary research program under which observers went to the docks and went on vessels that were willing to take them. Vessels cooperated with this program for the first few years; however, this type of program did not necessarily result in coverage that was representative of all vessels fishing. By the late 1990s, because of changing management measures based in part on observer data, the number of vessels willing to take an observer declined, and NMFS had concerns regarding the quality of the observer data and how representative the data was becoming. In January 2002, in order to obtain high-quality representative data, NMFS made participation in the observer program mandatory, and vessels which recorded past landings were selected to carry observers on a random basis. Thus, NMFS believes that the quality of information obtained from the observer program has improved over time.

In examining the current time/area closure, NMFS did not selectively examine observer data from 2001 to 2002, but rather, examined the entire observer timeframe through 2002. During the public comment period for draft Amendment 1, fishermen commented that NMFS should not use dusky shark data before dusky sharks became a prohibited species in 2000. Fishermen stated that they used to target dusky sharks and that they should not be penalized for targeting them before they were prohibited. In response to their comments, NMFS examined the shorter, as well as the longer, timeframes in final Amendment 1.

For sandbar sharks, the final Amendment examined only the longer timeframe (1994 to 2002) because sandbar sharks have been an allowed species since 1994. According to observer data from 1994 to 2002, 12,445 sandbar sharks were observed in the fishery as a whole and 6,755 were caught in the final time/area closure. Of those caught in the final time/area closure, 4,149 (61 percent) were neonates and juveniles. All neonate sandbar sharks and 81 percent of all juvenile sandbar sharks observed for the entire fishery (i.e., all of the Atlantic and Gulf of Mexico) were encompassed by the final time/area closure.

For dusky sharks, using the shorter timeframe (2001 to 2002), only 68 sharks were observed in the final time/area closure. However, this observed catch of dusky sharks remained high (62 percent) in comparison to the rest of the Atlantic and Gulf of Mexico. Using the longer timeframe (1994 to 2002), 1,392 dusky sharks were observed caught in the final time/area closure (79 percent), of which 92 percent were neonates or juveniles. Only 292 were observed caught in the Atlantic outside the time/area closure. These numbers reflect catches of dusky sharks in Federal waters only.

Comment 2: The observer program was biased because North Carolina was one of the few states helping with data prior to the mandatory observer program. Therefore, most of the data were collected from this area, skewing the data.

Response: When the observer program first started in 1994, the observers focused on states known to land a lot of sharks. These states included North Carolina and Florida. Over time, the observers included other states; however, as reflected in landing reports and permit holders, North Carolina and Florida continued to be major centers of shark fishing. Since the observer program became mandatory in 2002, the number of vessels selected from each state has been based on prior year's landings. This allows coverage to be representative of fishing effort.

Comment 3: North Carolina fishermen are forced to float gear for LCS during the summer season when 85 to 90 percent of all catches in this season are adult or, at the very minimum, sub-adults. Juvenile sharks migrate north during the summer; they are not in the time/area closure during the summer. In addition, by making fishermen fish outside of 50 fathoms to 85 fathoms, NMFS is forcing them to kill more dusky sharks since they are predominately in 50 to 85 fathoms.

Response: The observer data used in Amendment 1 indicate that dusky and sandbar sharks are caught on bottom longline gear in the time/area closure from January through July. The number of sharks caught in the closed area after July are relatively low; thus, NMFS did not extend the time/area closure past July. During Amendment 1, NMFS did not examine pelagic longline data since LCS are generally not caught in large numbers on pelagic longline gear compared with bottom longline gear. However, now that the time/area closure has been in effect from January through July 2005, NMFS can examine the impacts of the time/area closure on fishermen who use bottom longline gear as well as on fishermen who use pelagic longline gear, including their discard rates of dusky sharks.

2. Stock Assessments

Comment 4: Commenters stated that the status of the dusky sharks is unknown because there has been no stock assessment on that species. Commenters also noted that the peer-reviewed stock assessment of the sandbar shark population indicated that the status has improved and that no reduction in instantaneous fishing

mortality (F) appears necessary for sandbar sharks to achieve BMSY. Commenters indicated that, after reviewing the 2002 stock assessment, they found no definitive evidence that supports the NMFS' assertion that the LCS complex is overfished or that overfishing is occurring. In addition, commenters noted that peer reviewers of the 2002 LCS stock assessment were concerned about applying the results to the LCS complex as a whole. Given these results, commenters stated that while taking a precautionary approach in the face of uncertainty is prudent, NMFS took the precautionary approach to the extreme.

Response: As noted above, NMFS is concerned about the status of dusky sharks for a number of reasons, including its life history and susceptibility to fishing gear. A stock assessment for dusky sharks is anticipated for early 2006.

As for sandbar sharks, while the 2002 stock assessment indicates that sandbar sharks are no longer overfished, overfishing is occurring and, per the 1999 FMP, their status has not yet reached a stage where they can be called ''rebuilt.'' With regard to the complex as a whole, results of the 2002 LCS stock assessment met the overfishing and overfished criteria in the 1999 FMP. These results indicate that, while the stock status had improved since the 1998 stock assessment, the fishing mortality level was not sustainable. The details and point estimates of the different models used in the 2002 LCS stock assessment are given in Table 3.1 and Table 3.2 of the 2002 Emergency Rule to Implement Management Measures in the Atlantic Shark Fisheries Consistent with the 2002 Stock Assessments. As described in that document, the majority of the models indicated that the resource (the LCS complex) is overfished. Even in the models where the resource is not overfished, the models indicate that the rebuilding target biomass has not been met.

In addition, the LCS assessment was peer reviewed pursuant to a settlement agreement in shark litigation pending at that time. The overall conclusions of these reviews were that the stock assessment was state-of-the-art and a scientifically rigorous body of work that used the best scientific information available. The peer reviewers generally agreed that, while management measures taken as of 2002 may have halted the decline in these stocks, current exploitation rates (based on the stock assessment) would not stabilize them at, or allow them to rebuild to, MSY levels. The peer reviewers noted that ''inference by subtraction'' needs to be examined and NMFS intends to examine options to address this concern at the upcoming LCS assessment. While there was concern over this inference, one peer reviewer also noted that ''Whether the conclusions from the LCS complex assessment provide sufficient information on which to take management action depends on the level of risk one is willing to accept. It should be noted that many shark species have low productivity and are long-lived, so that failure to take action could result in long-term depletion of some species.'' Another peer reviewer indicated that for the LCS group, reductions in the total allowable catch for species other than sandbar and blacktip should be considered, and that for sandbar and other sharks, further reductions in fishing related mortalities should be achieved through the decrease of bycatch mortality. This, along with the rest of that review, the comments of the other reviewers, the stock assessment itself, and the status determination criteria outlined in the 1999 FMP, led NMFS to determine that the LCS complex has been exploited beyond sustainable rates, with populations at or below levels required to sustain MSY. NMFS does not believe the suite of measures in Amendment 1, including the existing time/area closure, are extreme.

In order to reduce bycatch of dusky and sandbar sharks, NMFS opted to close a specific area to protect a known nursery ground of these species. This is also in accordance with the 2002 stock assessment which recommends protections of reproductive females and juveniles. As noted above, the closure area should reduce dusky shark catch by 79 percent, and neonate and juvenile sandbar shark catch by 61 percent. In addition, the area off North Carolina is the only area where a large portion of a designated HAPC enters Federal waters. Thus, NMFS believed that closing an area that included a HAPC to protect juvenile sandbar sharks was warranted to reduce fishing mortality without increasing bycatch.

Comment 5: Commenters stated that one peer reviewer indicated that the 2002 shark evaluation workshop (SEW) report could not be judged in terms of scientific findings and management recommendations.

Response: NMFS believes that this remark was taken out of context; it was made in regard to the description of the way the 2002 stock assessment was completed and the statement of work for the review. The 2002 stock assessment was conducted in two parts. The first part included a meeting to discuss the data, possible models, and underlying assumptions. This was summarized and published as the ''Final Meeting Report of the 2002 Shark Evaluation Workshop.'' The second part was the actual assessment where the data and models were run, titled the ''Stock Assessment of Large Coastal Sharks in the U.S. Atlantic and Gulf of Mexico.'' Pursuant to a settlement agreement in litigation pending at that time, the statement of work asked the reviewers to review the SEW report in terms of scientific findings and management recommendations. There were no such findings or recommendations in the 2002 SEW Final meeting report; rather, all findings and recommendations were in the 2002 stock assessment. Thus, the peer reviewer was clarifying the documents that he was reviewing for the purposes of the peer review. NMFS believes that this particular remark was not a comment on the scientific merits of the 2002 stock assessment results.

Comment 6: Blacktip and sandbar sharks are the dominant species taken in the fishery. Managing by the least common denominator is problematic. The stock assessment recommends managing on a more species-specific basis.

Response: As stated in Amendment 1, NMFS does not have the information necessary yet to manage sharks on a species-specific basis. Until fishermen and dealers report on a species-specific basis more consistently (currently about 20 percent of LCS landings are unclassified despite regulations requiring LCS species-specific reporting) and until NMFS has reliable scientific evidence that fishermen can target certain species of sharks without substantial bycatch or bycatch mortality of other shark species, NMFS believes that establishing and enforcing species-specific quotas is not feasible. If the fishermen do not identify sharks correctly (and some fishermen have commented that they cannot identify all species of sharks), then having species-specific quotas would not be effective at preventing overfishing on depleted species while allowing increased fishing on healthy or rebuilt species. Furthermore, if fishermen cannot reliably target sandbar or blacktip sharks without catching and discarding a significant number of other sharks (e.g., dusky sharks), then having species-specific quotas may still result in fishery closures when one of the quotas is reached.

3. Amending Time/area Closure to the 15–fathom Line

Comment 7: Commenters indicated that a 1996 observer report concluded

that the area inshore of 15 fathoms should be closed to protect juvenile sharks and prohibited dusky sharks that occur in the region.

Response: The 1996 observer report referenced is the final report of the Marine Fisheries Initiative (MARFIN) study (NA57FF0286) published by Branstetter, 1997. The commenters also refer, through the 1996 observer report, to Musick *et al.*, 1993. The 1996 observer report notes that small sandbar sharks are less than 120 cm fork length (FL). However, the 1996 observer report also notes that male sandbar sharks reach maturity around 142 cm FL (170 cm total length [TL]) and females at < 150 cm FL (180 cm TL). Therefore, the 1996 study's recommendations relative to 120 cm FL would not have protected a substantial number of juveniles and sub-adults. Many of the figures in the 1996 observer report (e.g., Figures 9, 10, 11, 12, and 17) indicate that large numbers of juvenile sandbar sharks were caught off North Carolina in depths greater than 10 fathoms. While these figures describe the data in terms of less than or equal to 10 fathoms or greater than 10 fathoms, the 1996 observer report recommends in the text that 15 fathoms be used rather than 10 fathoms. This recommendation is due to one year (1996) where numerous small sandbar sharks (less than 120 cm FL) and small dusky sharks (less than 140 cm FL) were caught between 10 and 15 fathoms and few sharks were taken inshore of 10 fathoms.

The 1996 observer report also notes that dusky sharks comprised about ten percent of the catch in North Carolina waters, and consisted of two general size classes: young juveniles and sub-adults/adults. Figure 17 indicated that many of these dusky sharks are caught in waters greater than 10 fathoms. This and the text regarding small dusky sharks being caught out to 15 fathoms indicate that a 15–fathom boundary could allow many juveniles and sub-adults to be caught. Additionally, in the case of dusky sharks, NMFS is trying to reduce fishing mortality on all life stages (neonates, juvenile, and adults), not just juveniles.

Furthermore, as a result of public comment received on Amendment 1, NMFS examined the data to assess the ecological benefit of a closure out to only 20 fathoms. NMFS found that numerous juvenile sandbar sharks and dusky sharks were caught outside the 20 fathom line; many were caught at the 55 fathom line. As outlined in the response to Comment 15 under ''Time/Area Closure Comments'' in Amendment 1, NMFS included a buffer of approximately two miles to the seaward boundary of the time/area closure so that it extended to 60 to 80 fathoms. NMFS made this same data available to the state of North Carolina to analyze. No new interpretations of this data or analyses by the state of North Carolina have been presented to NMFS to date. Based on NMFS' previous analysis of a closure out to 20 fathoms, as requested by public comment on Amendment 1, NMFS believes that a large number of juvenile sandbar and dusky sharks would be caught outside of 15 fathoms.

Comment 8: One commenter questions why all dusky shark life stages were included when selecting the seaward boundary of the time/area closure.

Response: NMFS is concerned about all life stages of dusky shark, not just juvenile stages, because this species is highly susceptible and vulnerable to overfishing because of its life history traits. The dusky shark is currently listed as a species of concern under the ESA. A dusky shark stock assessment is currently underway. The area closed off North Carolina has most of the observed dusky shark catches for the entire bottom longline fishery.

Comment 9: A commenter asked if a quota reduction would have given the same result without having to establish the time/area closure off North Carolina.

Response: The 2002 stock assessment indicates that reductions in fishing effort and mortality are needed for the biomass to reach MSY. In Amendment 1, NMFS determined that it would need to reduce the catch by greater than 50 percent in order to rebuild LCS. In addition, the stock assessment recommended the protection of reproductive females and juveniles.

However, because Amendment 1 was implementing a number of regulations that could reduce fishing mortality including the time/area closure and gear restrictions, NMFS felt that reducing the catch by 45 percent, and improving compliance with the regulations including the recreational regulations would be sufficient to rebuild the stock within the rebuilding timeframe. In addition, because the time/area closure off North Carolina is an important nursery area for dusky and sandbar sharks, protection of these species in this area would only be accomplished through a closure rather than an overall reduction in LCS quota.

Comment 10: One commenter stated that to be excluded inside of 15 fathoms in the summer serves no purpose other than to put more pressure on everything but blacktip sharks; a closure out to the 15 fathom line would make sense during the winter months when more juveniles occur around the 15 fathom depth contour, but would not work during the summer months. The commenter claimed that blacktip sharks predominate inside 15 fathoms, yet NMFS insists that fishermen fish outside of it.

Response: The Petitioner requested changing the current time/area boundary to 15 fathoms, year-round. However, the current time/area boundary of 55 fathoms was chosen because the available data indicate that juvenile dusky and sandbar sharks occur in the current time/area closure during the months of January through July. Thus, the time/area closure location and timeframe was selected based on the distribution of these age classes. NMFS may consider changing the boundaries and timeframe of the closure if new information warrants any changes. NMFS did not examine the availability of blacktip sharks within or without the time/area closure since blacktip sharks are considered rebuilt and were not the species of concern.

4. National Standards

Comment 11: Commenters indicated that using only the 2001 to 2002 observer data constitutes a violation of National Standard 2.

Response: National Standard 2 states that conservation and management measures shall be based upon the best scientific information available. As described above, in developing Amendment 1, NMFS used all observer data when examining the time/area closure. As noted in the response to Comment 1 above, NMFS considered the longer and shorter timeframes for dusky sharks in response to comments from fishermen on draft Amendment 1. NMFS believes that using all available data, and taking into consideration public comment, is consistent with National Standard 2.

Comment 12: Commenters indicated that the closure off North Carolina discriminates against the fishermen in North Carolina in violation of National Standard 4.

Response: National Standard 4 states that conservation and management measures shall not discriminate between residents of different states, and if it becomes necessary to allocate or assign fishing privileges among fishermen, that such allocation be fair and equitable to all fishermen, be reasonably calculated to promote conservation, and be carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges. While the time/area closure may affect fishermen differently, as discussed in Amendment 1, it applies equally to all

fishermen in any state (and affects fishermen who travel from other states to fish in waters off North Carolina), and is needed as a conservation measure to reduce bycatch of juvenile sandbars and prohibited dusky sharks.

Comment 13: One commenter questioned how the time/area closure off North Carolina was consistent with National Standard 6.

Response: National Standard 6 requires NMFS to take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches. While other states also catch juvenile sharks, as described above, the waters off North Carolina are a known pupping and nursery ground for several species of sharks, particularly sandbar and dusky sharks. This is shown in the data with most of the juvenile sandbar sharks and prohibited dusky sharks for the entire fishery being caught in the existing time/area closure. While different states may have different impacts on shark stocks and life stages due to different trip limits and associated landings, NMFS accounts for all sources of mortality during the stock assessment process to develop Federal conservation and management measures consistent with the Agency's obligations under the National Standards and other provisions of the Magnuson-Stevens Act. As the fishery and stock status changes over time, NMFS will consider amending existing management measures to take into account this variability, consistent with National Standard 6. Additionally, in the proposed rule for the draft HMS FMP (August 19, 2005, 70 FR 48804), NMFS is proposing criteria to be considered when modifying time/area closures.

Comment 14: NMFS counts landings of sharks caught in state waters against the appropriate Federal shark quotas. However, different states have widely varying trip limits. Therefore, states with higher trip limits will have a larger impact (i.e., greater reduction) on the available Federal shark quota than states with lower trip limits in place to reduce the harvest of juveniles sharks. One commenter questioned how these measures are consistent with National Standards 4, 5 (efficiency in terms of harvesting adult fish), 6 (in terms of adult and juvenile harvest in HAPCs and the Economic Exclusive Zone [EEZ] off other states versus no harvest of adult or juveniles from January through July off North Carolina), and 8 (in terms of providing for sustained participation of the North Carolina shark fishing community).

Response: While NMFS is concerned about landings occurring in state waters, without taking preemptive action, NMFS does not have jurisdiction over state fishermen who fish exclusively in state waters. All fishermen with Federal shark permits are required to abide by Federal regulations, even in state waters, unless the state has more restrictive regulations. NMFS is working through the ASFMC to initiate an interstate coast-wide shark plan and has requested states that are not consistent with the Federal regulations to reconsider their regulations.

Consistency with National Standards 4 and 6 are addressed in the responses above. National Standard 5 states that conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose. The time/area closure combined with VMS requirements allow fishermen to travel through the closed area and allow the shark fishery to operate at the lowest possible cost (e.g., fishing effort, administration, and enforcement), while furthering conservation and management objectives and maintaining consistency with National Standard 5.

National Standard 8 states that conservation and management measures shall, consistent with the conservation requirements of the Magnuson-Stevens Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to provide for the sustained participation of such communities and, to the extent practicable, minimize economic impacts on such communities. Consistent with National Standard 8, NMFS considered the impacts of the time/area closure on fishing communities in Amendment 1 and minimized adverse impacts to the extent practicable. Amendment 1 recognized that the time/area closure may impact particular communities; however, the measure was needed in order to ensure that overfished LCS are rebuilt and to prevent overfishing on LCS, as mandated by National Standard 1. NMFS initially proposed and took public comment on a much larger time/area closure (approximately 32,800 nm2 from VA to SC) than the current time/area closure. Based on comments from the public, NMFS conducted additional analyses and adjusted the final rule so that the time/area closure's seaward boundary followed the 55 fathom contour (4,490 nm2). This area was selected to include all observed catches of dusky and sandbar sharks while mitigating social and economic impacts on fishing communities in North Carolina to the extent practicable, consistent with National Standard 8. Finally, in the final rule, NMFS also delayed implementation of the time/area closure for a year to allow fishermen time to adjust to the new regulations (December 24, 2003, 68 FR 74746).

Comment 15: The time/area closure off North Carolina is in violation of National Standard 10.

Response: As stated in Amendment 1, the time/area closure does not cause fishermen to fish in an unsafe manner. NMFS urges fishermen to use caution, but cannot control what individual fishermen do in response to the time/area closure. VMS also adds safety by allowing fishermen to traverse the closed area and provide yet another method of locating a vessel in case of an emergency.

5. General Comments

Comment 16: The **Federal Register** notice indicated that the ''Advisory Panel (AP) members noted that the LCS stock assessments determined that sandbar and dusky sharks have been overfished and are not currently rebuilt.'' The Petitioner requested that NMFS re-issue the **Federal Register** notice removing the AP reference so that it would not solicit negative comments on the petition.

Response: NMFS did not re-issue the **Federal Register** notice for the petition for rulemaking. The selected reference was an accurate statement made by AP members during the AP meeting in March of 2005. In addition, it is an accurate representation of the stock assessment for the LCS complex.

Comment 17: The state of North Carolina has petitioned NMFS to modify the closure line from the current 55 fathom contour to the 15 contour. With VMS already required on shark vessels, this should not present an enforcement difficulty.

Response: The 15–fathom line is a zig-zag line that approaches the existing closure line in some places. As such, the 15–fathom line would open only parts of the existing closure, and despite VMS, would be difficult to enforce.

Comment 18: NMFS calculates maturity based on length, but maturity can also be based on size of shark fin size or pounds to fin weight.

Response: An accepted and relatively easy measure to determine maturity, based on scientific data, is fish length. Thus, NMFS uses fish length to assess maturity. Shark fin size or pounds to fin weight is not used by the scientific community as a measure of maturity. Additionally, such measurements would likely be more variable or hard to

measure at sea. Thus, in order to ensure reliable data collection on stages of maturity, NMFS is unlikely to change to a method that would introduce more variability in the data and potential error in determining maturity.

Comment 19: Commenters noted that there has been adoption of careful handling and release technologies for bycatch by shark bottom longline fishermen, which should help release bycatch alive. In addition, shark bottom longline fishermen may be required to attend workshops to familiarize themselves with these techniques starting in 2006.

Response: Dusky sharks have low survival on longline gear under current fishing practices (e.g., only approximately 18 percent of dusky sharks survive after being caught on longline gear). Thus, bycatch reduction methods must include the reduction of dusky sharks caught with longline gear, not just handling and releasing techniques. This warrants a time/area closure rather than other management measures, such as safe handling and releasing techniques or minimum size limits. Should alternative fishing practices be developed that improve the survival of dusky or other sharks, NMFS would review the necessity for the time/area closure and other management measures, as appropriate. As mentioned above, NMFS encourages the Petitioner to work with NMFS scientists and industry in pursuing cooperative research on reducing bycatch of juvenile and sub-adult sandbar and dusky sharks.

Comment 20: NMFS should consider how to develop economic relief for the directed shark vessel operators who have been marginalized financially by Amendment 1 that led to this time/area closure. The time/area closure encompasses the primary fishing grounds off North Carolina and severely restricts access to the shark fishing quota off North Carolina.

Response: NMFS delayed implementation of the time/area closure for a year to allow fishermen time to adjust to the new regulations (December 24, 2003, 68 FR 74746). In addition, during the proposed rule stage of Amendment 1, NMFS took comment on a much larger time/area closure (31,387 nm2 from VA to SC) than the current time/area closure. Based on comments from the public, NMFS conducted additional analyses and implemented a much smaller time/area closure. NMFS also provided, in section 8.5.9 of Amendment 1, a list of other options for economic relief for fishermen.

Comment 21: Proper and logical management dictates that NMFS should set aside an adequate incidental quota to reduce or eliminate regulatory discards by covering the inevitable incidental catches in the fisheries prior to allocating directed quotas.

Response: NMFS has considered this type of option and most recently accepted comments during the scoping process for the draft HMS FMP in 2004. NMFS may consider this type of option in the future.

Comment 22: North Carolina has been a willing and responsible partner with NMFS with regards to shark conservation. Measures to help conserve sharks were first implemented by North Carolina in February 1993, before NMFS enacted the Shark FMP in April 1993. Those measures remained in effect until July 1997 when North Carolina closed its state waters to shark fishing for species within the pelagic group. North Carolina was the only state to act upon a request from NMFS to close their waters to shark fishing. These measures were implemented to protect immature sharks and as mentioned, have remained in effect for nine years. North Carolina fishermen have fully cooperated with voluntary Federal observer programs to help managers collect accurate information on sharks.

Response: NMFS appreciates all the efforts that the state of North Carolina and its fishermen have taken to protect juvenile sharks. While NMFS has decided not to initiate rulemaking at this time, NMFS is committed to reviewing all shark management measures, including time/area closures, when new stock assessment and/or new information becomes available. NMFS would like to work with North Carolina to review new information as partners in shark management.

Comment 23: Any closure considered for conservation reasons should be imposed on all commercial and recreational gear that interacts with the species of concern. There is no justification for NMFS' continued use of closed areas to one gear type to be essentially used to reallocate the catches of species of concern to another similar gear type or user group.

Response: The current time/area closure is based on available data on bycatch and bycatch mortality by bottom longline gear in a known pupping and nursery area including and surrounding an identified HAPC. Mortality by other gear types (such as pelagic longline or handgear) may be considered in the future, as appropriate. Additionally, if finalized, the criteria proposed in the draft HMS FMP would provide a basis on which NMFS could consider modifying the existing time/area closure to include other gears.

Comment 24: Commenters requested that NMFS needs to leave the closure in place for species preservation and stock rebuilding. Sharks need to be protected since certain species are endangered, and they are all part of the ecological harmony that used to exist before commercial fishing.

Response: NMFS agrees that the current time/area closure is warranted and has decided not to initiate rulemaking until new data are available from the stock assessments of both dusky and sandbar sharks, the two species most affected by the time/area closure. Based on the status of those stock assessments, other information regarding the effectiveness of the closure, and actions of other states in an interstate coast-wide shark management plan, NMFS may consider revising the size, scope, and/or duration of the closure as well as potentially eliminating the closure, as appropriate.

Comment 25: Shark fishing off North Carolina needs to be completely banned. The commercial interests have gained control of our government agencies, which now allow excess killing of marine life. The time/area closure should be enlarged to ban shark fishing along the entire coast of the United States (and out to its deepest waters) with a complete moratorium on shark fishing for a five-year period. Fishermen can find other areas to deplete. Sharks are a part of our children's heritage, and NMFS has allowed fishermen, who profit from killing them, to take just about every last one of them. There should be fines of $15,000.00 for a first offense for killing sharks with a fine of $100,000.00 for a second offense.

Response: NMFS disagrees that a complete ban on shark fishing is necessary. NMFS has actively managed both LCS and small coastal sharks since the first FMP for sharks in 1993, and with additional measures thereafter in the 1999 FMP and Amendment 1 in 2003. Such measures include recreational and commercial limits and/or quotas, limited access permits, and enhanced reporting requirements, and other conservation and management measures that are expected to rebuild shark stocks.

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

Dated: December 8, 2005.

James W. Balsiger,

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

[FR Doc. 05–24028 Filed 12–13–05; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register

Vol. 70, No. 239

Wednesday, December 14, 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

Submission for OMB Review; Comment Request

December 8, 2005.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (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 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 should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Pamela_Beverly_OIRA_Submission@OMB.EOP.GOV* or fax (202) 593–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comment regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OBM control number.

Cooperative State Research, Education, and Extension Service

Title: Application for Authorization to Use the 4–H Name and/or Emblem.

OMB Control Number: 0524–0034.

Summary of Collection: Use of the 4–H Name and/or Emblem is authorized by an Act of Congress, (Pub. L. 772, 80th Congress, 645, 2nd Session). Use of the 4–H Club Name and/or Emblem by anyone other than the 4–H Clubs and those duly authorized by them, representatives of the Department of Agriculture, the Land-Grant colleges and universities, and person authorized by the Secretary of Agriculture is prohibited by the provisions of 18 U.S.C. 707. The Secretary has delegated authority to the Administrator of the Cooperative State Research, Education, and Extension Service (CSREES) to authorize others to use the 4–H Name and Emblem. Therefore, anyone requesting, authorization from the Administrator to use the 4–H Name and Emblem is asked to describe the proposed use in a formal application. CSREES will collect information using form CSREES–01 ''Application for Authorization to use the 4–H Club Name or Emblem.''

Need and Use of the Information: CSREES will collect information on the name of individual, partnership, corporation, or association; organizational address, name of authorized representative; telephone number; proposed use of the 4–H Name or Emblem, and plan for sale or distribution of product. The information collected by CSREES will be used to determine if those applying to use the 4–H name and emblem are meeting the requirements and quality of materials, products and/or services provided to the public. If the information were not collected, it would not be possible to ensure that the products, services, and materials meet the high standards of 4–H, its educational goals and objectives.

Description of Respondents: Not-for-profit institutions; Individuals or households; Business or other for-profit.

Number of Respondents: 60.

Frequency of Responses: Reporting: Other (every 3 years).

Total Burden Hours: 45.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 05–24006 Filed 12–13–05; 8:45 am]

BILLING CODE 3410–09–M

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

Information Collection: Bioenergy Program

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Notice; request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Commodity Credit Corporation (CCC) is seeking comments from all interested individuals and organizations on the extension of an approved information collection with revision associated with the forms used under the Bioenergy Program. This information collection is needed to administer the Bioenergy Program.

DATES: Comments on this notice must be received on or before February 13, 2006 to be assured consideration.

ADDRESSES: Comments should be addressed to Farm Service Agency, USDA, Commodity Operations, Attn: James Goff, Special Programs Manager, STOP–0553, 1400 Independence Avenue, SW., Washington, DC 20250–0553. Comments also may be submitted by e-mail to: *James.Goff@wdc.usda.gov*. The comments should be also sent to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503. Comments should include the OMB number and title of the information collection.

FOR FURTHER INFORMATION CONTACT: James Goff, Special Programs Manager, (202) 720–5396 and *James.Goff@wdc.usda.gov*.

SUPPLEMENTARY INFORMATION:

Description of Information Collection

Title: Report of Acreage for the Bioenergy Program.

OMB Number: 0560–0207.

Expiration Date: May 31, 2006.

Type of Request: Extension with revision.

Abstract: USDA collects information from bioenergy producers that request payments under the Bioenergy Program as the Secretary may require to ensure the benefits are paid only to eligible bioenergy producers for eligible commodities. Bioenergy producers seeking program payments have to meet minimum requirements by providing information concerning the production of bioenergy. Applicants must certify that they will abide by the Bioenergy Program Agreement's provisions.

Respondents: U.S. bioenergy producers who use eligible agricultural commodities to make bioenergy and have been accepted to participate in the Bioenergy Program.

Estimated Annual Number of Respondents: 300.

Estimated Annual Number of Forms per person: 11.

Estimated Average Time to Respond: 1 hour.

Estimated Total Annual Burden Hours: 3,300.

Comments are invited regarding (1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden, including the validity of the methodology and assumption used: (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on 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.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission for OMB approval.

Signed in Washington, DC on December 7, 2005.

Teresa C. Lasseter,

Executive Vice-President, Commodity Credit Corporation.

[FR Doc. E5–7279 Filed 12–13–05; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Information Collection Activity; Comment Request

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended), the Rural Utilities Service (RUS) invites comments on this information collection for which RUS intends to request approval from the Office of Management and Budget (OMB).

DATES: Comments on this notice must be received by February 13, 2006.

FOR FURTHER INFORMATION CONTACT: Richard C. Annan, Program Development & Regulatory Analysis, Rural Utilities Service, USDA, 1400 Independence Ave., SW., STOP 1522, Room 5818 South Building, Washington, DC 20250–1522. Telephone: (202) 720–0784. FAX: (202) 720–4120.

SUPPLEMENTARY INFORMATION:

Title: 7 CFR part 1753, Telecommunications System Construction Policies and Procedures.

OMB Control Number: 0572–0059.

Type of Request: Extension of a previously approved collection.

Abstract: In order to facilitate the programmatic interest of the RE Act, and, in order to assure that loans made or guaranteed by RUS are adequately secured, RUS, as a secured lender, has established certain forms for materials, equipment and construction of electric and telecommunications systems. The use of standard forms, construction contracts, and procurement procedures helps assure RUS that appropriate standards and specifications are maintained, RUS' loan security is not adversely affected; and the loan and loan guarantee funds are used effectively and for the intended purposes.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 1 hour per response.

Respondents: Business or other for-profit and non-profit institutions.

Estimated Number of Respondents: 238.

Estimated Number of Responses per Respondent: 1.

Estimate Total Annual Burden on Respondents: 3,123 hours.

Copies of this information collection can be obtained from MaryPat Daskal, Program Development and Regulatory Analysis, Rural Utilities Service at (202) 720–7852.

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 will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumption 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 on other forms of information technology.

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.

James M. Andrew,

Administrator, Rural Utilities Service.

[FR Doc. E5–7331 Filed 12–13–05; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–821–817]

Notice of Decision of the Court of International Trade; Silicon Metal From the Russian Federation

ACTION: Notice of Decision of the Court of International Trade.

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: December 14, 2005.

SUMMARY: On November 28, 2005, the United States Court of International Trade (''CIT'') issued an order sustaining the Department of Commerce's (''the Department'') *Second Remand Results. See Final Results of Redetermination Pursuant to Court Remand*, *Globe Metallurgical, Inc. vs. United States*, Consol. Ct. No. 03–00202 (October 21, 2005) (available at *http://www.ia.ita.doc.gov*) (''*Second Remand Results*''); *see also*, *Globe Metallurgical, Inc. v. United States*, Slip Op. 05–150 (CIT November 28, 2005) (''Globe Metallurgical III''). In the *First Remand Results*, the Department recalculated the antidumping margins for Bratsk Aluminum Smelter and Rual Trade Limited (collectively, ''Bratsk'') and ZAO Kremny and SUAL–Kremny-Ural Ltd. (collectively, ''Kremny'') to value the respondents' usage of recycled silicon metal sized zero to five millimeters. *See Final Results of Redetermination Pursuant to Court Remand, Globe Metallurgical, Inc. v. United States*, Consol. Ct. No. 03–00202 (January 5, 2005) (available at *http://www.ia.ita.doc.gov*) (''*First Remand Results*''). In the *Second Remand Results*, the Department recalculated the adverse facts available (''AFA'') portion

of Kremny's antidumping duty margin using the revised antidumping duty margin for Bratsk calculated in the *First Remand Results*. Consistent with the decision of the United States Court of Appeals for the Federal Circuit (''Federal Circuit'') in *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990) (''Timken''), the Department is notifying the public that the *Globe Metallurgical III* decision is ''not in harmony'' with the Department's final determination.

FOR FURTHER INFORMATION CONTACT: Carrie Blozy at (202) 482–5403; AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On February 11, 2003, the Department published its *Amended Final Determination*, covering the period of investigation (''POI'') from July 1, 2001, through December 31, 2001. *See Notice of Final Determination of Sales at Less Than Fair Value: Silicon Metal From the Russian Federation*, 68 FR 6885 (February 11, 2003) (''*Final Determination*''), as amended by *Notice of Amended Final Determination of Sales at Less Than Fair Value: Silicon Metal From the Russian Federation*, 68 FR 12037 (March 13, 2003) (''*Amended Final Determination*''). Petitioners and Bratsk contested various aspects of the *Amended Final Determination*.

The Court remanded to the Department two aspects of its *Amended Final Determination* for reconsideration: (1) with respect to the Department's decision not to use Russian values to value the factors of production and other expenses, the Court ordered the Department to either use Russian post–non-market economy (''NME'') values or explain why the market economy Russian values are not the best available information; and (2) with respect to the Department's treatment of silicon metal fines, the Court granted the Department's request to explain its exclusion of recycled silicon metal fines from the factor of production cost analysis. *See Globe Metallurgical, Inc. v. United States*, 350 F.Supp. 2d 1148 (CIT September 24, 2004) (''*Globe Metallurgical I*''). Subsequent to the Court's remand, Bratsk voluntarily dismissed its challenge of the Department's rejection of Russian post–NME values. Therefore this issue became moot.

In the Department's *First Remand Results*, the Department recalculated Bratsk's and Kremny's margins to value the usage of recycled silicon metal sized zero to five millimeters.

On July 27, 2005, the CIT issued its opinion on the Department's *First Remand Results*. *See Globe Metallurgical, Inc. v. United States*, Slip Op. 05–90 (CIT July 27, 2005) (''*Globe Metallurgical II*''). The CIT affirmed the Department's determination to include recycled silicon metal fines sized zero to five millimeters in each producer's factors of production cost analysis and affirmed the calculation of Bratsk's antidumping duty margin. However, the Court further remanded the case back to the Department and ordered the Department to either recalculate the AFA portion of Kremny's antidumping duty margin using the revised antidumping duty margin for Bratsk calculated in the *Final Remand Results* or explain the use of the Bratsk margin from the *Amended Final Determination*. The Department recalculated Kremny's antidumping duty margin using the antidumping duty margin for Bratsk calculated in the *First Remand Results*. On October 25, 2005, the Department filed its *Second Remand Results*. On November 28, 2005, the CIT sustained the Department's *Second Remand Results* in all respects. *See Globe Metallurgical III*.

Timken Notice

In its decision in Timken, the Federal Circuit held that, pursuant to 19 U.S.C. 1516a(e), the Department must publish notice of a decision of the CIT which is ''not in harmony'' with the Department's results. The CIT's decision in *Globe Metallurgical III* was not in harmony with the Department's final determination. Therefore, publication of this notice fulfills the obligation. The Department will issue revised cash deposit instructions effective the date of publication of this notice in the **Federal Register** if the CIT's decision is not appealed, or if it is affirmed on appeal.

Dated: December 7, 2005.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. E5–7343 Filed 12–13–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

Georgia Institute of Technology, et al. Notice of Consolidated Decision on Applications for Duty-Free Entry of Electron Microscopes

This is a decision consolidated pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in Suite 4100W, Franklin Court Building, U.S. Department of Commerce, 1099 14th Street, NW., Washington, DC.

Docket Number: 05–041. *Applicant:* Georgia Institute of Technology, Atlanta, GA 30332. *Instrument:* Dual Beam Electron Microscope, Model Quanta 200 3D Nanolab. *Manufacturer:* FEI Company, Czech Republic. *Intended Use:* See notice at 70 FR 67450, November 7, 2005. *Order Date:* April 4, 2004.

Docket Number: 05–042. *Applicant:* Georgia Institute of Technology, Atlanta, GA 30332. *Instrument:* Electron Microscope, Model NOVA 200 3D Nanolab. *Manufacturer:* FEI Company, Czech Republic. *Intended Use:* See notice at 70 FR 67451, November 7, 2005. *Order Date:* April 4, 2004.

Docket Number: 05–043. *Applicant:* Massachusetts General Hospital, Boston, MA 02114. *Instrument:* Electron Microscope, Model JEM–1011. *Manufacturer:* JEOL, Ltd., Japan *Intended Use:* See notice at 70 FR 67451. *Order Date:* January 13, 2005.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as these instruments are intended to be used, was being manufactured in the United States at the time the instruments were ordered. *Reasons:* Each foreign instrument is an electron microscope and is intended for research or scientific educational uses requiring an electron microscope. We know of no electron microscope, or any other instrument suited to these purposes, which was being manufactured in the United States either at the time of order of each instrument OR at the time of receipt of application by U.S. Customs and Border Protection.

Gerald A. Zerdy,

Program Manager, Statutory Import Programs Staff.

[FR Doc. E5–7345 Filed 12–13–05; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Application for Duty-Free Entry of Scientific Instrument

Pursuant to section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether an instrument of equivalent scientific value, for the purposes for which the instrument shown below is intended to be used, is being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be filed within 20 days with the Statutory Import Programs Staff, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 a.m. and 5 p.m. in Suite 4100W, U.S. Department of Commerce, Franklin Court Building, 1099 14th Street, NW., Washington, DC.

Docket Number: 05–046. *Applicant:* Massachusetts Institute of Technology. *Instrument:* High-Resolution Superconducting Magnet. *Manufacturer:* Jastec, Japan. *Intended Use:* The instrument is intended to be used for a 500 MHz, 200 mm room-temperature bore MRI System to be assembled at MIT. This MRI System will be employed to study intact organisms, including small animals, various human and animal tissue samples, as well as other biological materials and phenomena including the activity of neural networks involved in vision and functional neuroimaging of the human brain through detection of changes in cerebral blood flow and energy metabolism, vascular potency and tissue perfusion in cerebral as well as in peripheral and coronary circulation.

Application accepted by Commissioner of Customs: November 28, 2005.

Gerald A. Zerdy,

Program Manager, Statutory Import Programs Staff.

[FR Doc. E5–7344 Filed 12–13–05; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 120605A]

U.S. Climate Change Science Program Synthesis and Assessment Product Prospectuses

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Notice of availability and request for public comments.

SUMMARY: The National Oceanic and Atmospheric Administration publishes this notice to announce the availability of draft Prospectuses for four of the U.S. Climate Change Science Program (CCSP) Synthesis and Assessment Products (Products) for public comment. These draft Prospectuses address the following CCSP Topics:

Product 1.3 Reanalysis of Historical Climate Data for Key Atmospheric Features:

Implications for Attribution of Causes of Observed Change;

Product 4.1 Coastal Elevation and Sensitivity to Sea-Level Rise;

Product 5.1 Uses and Limitations of Observations, Data, Forecasts, and other Projections in Decision Support for Selected Sectors and Regions; and

Product 5.3 Decision Support Experiments and Evaluations Using Seasonal to Interannual Forecasts and Observational Data.

After consideration of comments received on the draft Prospectuses, the final Prospectuses along with the comments received will be published on the CCSP Web site.

DATES: Comments must be received by January 30, 2006.

ADDRESSES: The draft Prospectuses are posted on the CCSP Program Office Web site. The Web addresses to access the draft Prospectuses are:

Product 1.3 (Reanalysis):
http://www.climatescience.gov/Library/sap/sap1–3/default.htm

Product 4.1 (Sea Level):
http://www.climatescience.gov/Library /sap/sap4–1/default.htm

Product 5.1 (Observations):
http://www.climatescience.gov/Library/sap/sap5–1/default.htm

Product 5.3 (Seasonal):
http://www.climatescience.gov/Library /sap/sap5–3/default.htm

Detailed instructions for making comments on the draft Prospectuses are provided with each Prospectus. Comments should be prepared in accordance with these instructions.

FOR FURTHER INFORMATION CONTACT: Richard H. Moss, Ph.D., Director, Climate Change Science Program Office, 1717 Pennsylvania Avenue NW., Suite 250, Washington, DC 20006, Telephone: (202) 419–3476.

SUPPLEMENTARY INFORMATION: The CCSP was established by the President in 2002 to coordinate and integrate scientific research on global change and climate change sponsored by 13 participating departments and agencies of the U.S. Government. The CCSP is charged with preparing information resources that support climate-related discussions and decisions, including scientific synthesis and assessment analyses that support evaluation of important policy issues. The Prospectuses addressed by this notice provide a topical overview and describe plans for scoping, drafting, reviewing, producing, and disseminating three of 21 final synthesis and assessment Products that will be produced by the CCSP.

Dated: December 7, 2005.

James R. Mahoney,

Assistant Secretary of Commerce for Oceans andAtmosphere, Director, U.S. Climate Change Science Program.

[FR Doc. 05–24027 Filed 12–13–05; 8:45 am]

BILLING CODE 3510–KB–S

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Proposed Information Collection; Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter the ''Corporation''), has submitted an information collection request (ICR) entitled AmeriCorps State and National Information Collections Related to Disaster Relief Efforts to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, (PRA 95) (44 U.S.C. Chapter 35). A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the Corporation for National and Community Service, AmeriCorps State and National, Amy Borgstrom, Associate Director for Policy, (202) 606–6930, or by e-mail at *Aborgstrom@cns.gov.* Individuals who use a telecommunications device for the deaf (TTY/TDD) may call (202) 606–3472 between the hours of 9 a.m. and 4:30 p.m. eastern time, Monday through Friday.

Copies of the information collection request can be obtained by contacting the office listed in the address section of this notice.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by February 13, 2006.

ADDRESSES: You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) By mail sent to: Corporation for National and Community Service, AmeriCorps State and National, Amy Borgstrom, Associate Director for Policy, 1201 New York Ave., NW., Washington, DC 20525.

(2) By hand delivery or by courier to the Corporation's mailroom at Room 8100 at the mail address given in paragraph (1) above, between 9 a.m. and 4 p.m. Monday through Friday, except Federal holidays.

(3) By fax to: (202) 606–3476, Attention Amy Borgstrom, Associate Director for Policy.

(4) Electronically through the Corporation's e-mail address system: *aborgstrom@cns.gov.*

FOR FURTHER INFORMATION CONTACT: Amy Borgstrom, (202) 606–6930 or e-mail to *Aborgstrom@cns.gov.*

SUPPLEMENTARY INFORMATION: The Corporation is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are expected to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.*, permitting electronic submissions of responses).

Current Action

Description: This submission includes one set of instructions for current grantees to submit requests for budget amendment in order to carry out disaster relief efforts.

Type of Review: Renewal.

Agency: Corporation for National and Community Service.

Title: AmeriCorps State and National Award Programs Application Instructions.

OMB Number: 3045–0113.

Agency Number: None.

Affected Public: States and nonprofit organizations.

Total Respondents: 75 for Budget Amendment Requests.

Frequency: One-time only for Budget Amendment Requests.

Average Time Per Response: Budget Amendment Request: 2 hours.

Estimated Total Burden Hours: 150 hours for Budget Amendment Requests.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Dated: December 9, 2005.

Rosie Mauk,

Director, AmeriCorps.

[FR Doc. E5–7324 Filed 12–13–05; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Availability of Government-Owned Inventions; Available for Licensing

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The inventions listed below are assigned to the United States Government as represented by the Secretary of the Navy and are made available for licensing by the Department of the Navy.

U.S. Patent Number 6,546,798, entitled ''Micro-Electro-Mechanical Systems Resonant Optical Gyroscope,'' issue date April 4, 2003. U.S. Patent Number 6,550,330, entitled ''Differential Amplification for Micro-Electro-Mechanical Ultra-Sensitive Accelerometer,'' issued April 22, 2003. U.S. Patent Number 6,581,465, entitled ''Micro-electro-mechanical systems ultra sensitive accelerometer,'' issued June 24, 2003. U.S. Patent Number 6,763,718, entitled ''Micro-Electro-Mechanical Ultra-Sensitive Accelerometer with Independent Sensitivity Adjustment,'' issued July 20, 2004. U.S. Patent Pending, entitled ''Integrated Circuit Porphyrin-Based Optical Chemical Sensor,'' Navy Case Number 84715. U.S. Patent Pending, entitled ''Wireless Remote Sensor and Method for Making Same,'' Navy Case Number 84769. U.S. Patent Pending, entitled ''Micro-Electro-Mechanical Systems Magnetic Vibration Power Generator,'' Navy Case Number 84774.

ADDRESSES: Requests for copies of the patents cited should be directed to the Space and Naval Warfare Center, San Diego, Office of Research and Technology Applications, Code 2112, 83570 Silvergate Ave., San Diego, CA 92152–5048.

FOR FURTHER INFORMATION CONTACT: Dr. Stephen H. Lieberman, Office of Research and Technology Applications, Space and Naval Warfare Systems Center, San Diego, Code 2112, 83570 Silvergate Ave., Room 2302, San Diego, CA 92152–5048. Telephone 619–553–2778, E-Mail: *stephen.lieberman@navy.mil.*

Authority: 35 U.S.C. 207, 37 CFR part 404.

Dated: December 5, 2005.

Eric McDonald,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E5–7292 Filed 12–13–05; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Meetings of the Naval Research Advisory Committee

AGENCY: Department of the Navy, DoD.

ACTION: Notice of closed meetings.

SUMMARY: The Naval Research Advisory Committee (NRAC) will meet to hold briefs of classified information. All sessions of the meetings will be devoted to briefings, discussions and technical examination of information related to the assessment of the role of Naval Forces in the Global War on Terror.

DATES: The meetings will be held on Tuesday, December 6, 2005, from 12:30 p.m. to 5:30 p.m., and Wednesday, December 7, 2005, from 8:30 a.m. to 5:30 p.m.

ADDRESSES: The meetings will be held at the Office of Naval Research, One Liberty Center, 875 North Randolph Street, Room 1203, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Dr. Sujata Millick, Program Director, Naval Research Advisory Committee, 875 North Randolph Street, Arlington, VA 22203, 703–696–6769.

SUPPLEMENTARY INFORMATION: This notice is provided in accordance with the provisions of the Federal Advisory Committee Act (5 U.S.C. App. 2). All sessions of the meetings will be devoted to executive sessions that will include discussions and technical examination of information related to the role of Naval Forces in the Global War on

Terror. These briefings and discussions will contain classified information that is specifically authorized under criteria established by Executive Order to be kept secret in the interest of national defense and are in fact properly classified pursuant to such Executive Order. Classified and non-classified matters to be discussed are so inextricably intertwined as to preclude opening any portions of the meetings. In accordance with 5 U.S.C. App. 2, section 10(d), the Secretary of the Navy has determined in writing that the public interest requires that all sessions of the meetings be closed to the public because they will be concerned with matters listed in 5 U.S.C. section 552b(c)(1) and (4).

Due to unavoidable delay in administrative processing, the normal 15 days notice could not be provided.

Eric McDonald,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E5–7291 Filed 12–13–05; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–132–000]

ANR Storage Company; Notice of Tariff Filing

December 8, 2005.

Take notice that on December 2, 2005, ANR Storage Company (ANR Storage) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, Second Revised Sheet No. 142, to become effective on January 2, 2006.

ANR Storage states that the purpose of this filing is to change the existing billing and payment provisions currently reflected in the general terms and conditions of its tariff.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E5–7313 Filed 12–13–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–133–000]

Blue Lake Gas Storage Company; Notice of Tariff Filing

December 8, 2005.

Take notice that on December 2, 2005, Blue Lake Gas Storage Company (Blue Lake) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, Second Revised Sheet No. 142, to become effective on January 2, 2006.

Blue Lake states that the purpose of this filing is to change the existing billing and payment provisions currently reflected in the general terms and conditions of its tariff.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive 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.

Magalie R. Salas,

Secretary.

[FR Doc. E5–7314 Filed 12–13–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR06–6–000]

Dow Pipeline Company; Notice of Petition for Rate Approval

December 8, 2005.

Take notice that on November 30, 2005, Dow Pipeline Company (Dow Pipeline) filed a petition for rate approval pursuant to section 284.123(b)(2) of the Commission's regulations. Dow Pipeline states that it proposes a new system-wide maximum interruptible transportation rate of $0.0349 per Dth, plus a 0.4 percent in-kind fuel reimbursement.

Any person desiring to participate in this rate proceeding must file a motion 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 date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. eastern time December 30, 2005.

Magalie R. Salas,

Secretary.

[FR Doc. E5–7312 Filed 12–13–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–137–000]

Enbridge Pipelines (Midla) L.L.C.; Notice of Proposed Changes in FERC Gas Tariff

December 8, 2005.

Take notice that on December 2, 2005, Enbridge Pipelines (Midla) L.L.C. tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, the following tariff sheets to become effective on January 2, 2006:

First Revised Sheet No. 152.
Original Sheet No. 152A.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E5–7318 Filed 12–13–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–15–002]

Garden Banks Gas Pipeline, LLC; Notice of Compliance Filing

December 8, 2005.

Take notice that on December 5, 2005, Garden Banks Gas Pipeline, LLC (Garden Banks) submitted a compliance filing pursuant to the Commission's November 4, 2005 order, 113 FERC ¶ 61,132 (2005), issued in this proceeding.

Garden Banks states that copies of its filing have been mailed to all customers, interested state regulatory commissions, and any parties on the Commission's official service list.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E5–7320 Filed 12–13–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–220–021]

Great Lakes Gas Transmission Limited Partnership; Notice of Negotiated Rate Agreement

December 8, 2005.

Take notice that on December 2, 2005, Great Lakes Gas Transmission Limited Partnership (Great Lakes) filed for disclosure, a transportation service agreement pursuant to Great Lakes' Rate Schedule FT entered into by Great Lakes and WPS Energy Services, Inc. (WPS) (FT Service Agreement). Great Lakes states that the FT Service Agreement being filed reflects a negotiated rate arrangement between Great Lakes and WPS commencing December 1, 2005.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E5–7308 Filed 12–13–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–220–020]

Great Lakes Gas Transmission Limited Partnership; Notice of Negotiated Rate Agreement

December 8, 2005.

Take notice that on December 2, 2005, Great Lakes Gas Transmission Limited Partnership (Great Lakes) filed for disclosure, a transportation service agreement pursuant to Great Lakes' Rate Schedule FT entered into by Great Lakes and NJR Energy Services Company (NJR) (FT Service Agreement). Great Lakes states that the FT Service Agreement being filed reflects a negotiated rate arrangement between Great Lakes and NJR commencing December 1, 2005.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E5–7321 Filed 12–13–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–138–000]

Gulf States Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

December 8, 2005.

Take notice that on December 6, 2005, Gulf States Transmission Corporation (Gulf States) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the tariff Sheets listed on Appendix A to the filing, to become effective December 26, 2005.

Gulf States states that copies of this filing are being served on all customers of Gulf States and applicable state regulatory agencies.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.*

Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E5–7319 Filed 12–13–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–135–000]

National Fuel Gas Supply Corporation; Notice of Proposed Changes in FERC Gas Tariff

December 8, 2005.

Take notice that on December 1, 2005, National Fuel Gas Supply Corporation (National Fuel) tendered for filing as part of its FERC Gas Tariff, Fourth Revised Volume No. 1, Sixth Revised Sheet No. 12 and Eighth Revised Sheet No. 478, to be effective January 1, 2006.

National Fuel states that copies of this filing were served upon its customers and interested state commissions.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E5–7316 Filed 12–13–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. EC03–131–003; EC03–131–004]

Oklahoma Gas and Electric Company; Notice of Request for Comments

December 8, 2005.

On July 2, 2004, the Commission approved Oklahoma Gas and Electric Company's (OG&E) Offer of Settlement in this proceeding subject to certain modifications. In the Offer of Settlement, OG&E offered a number of permanent and interim mitigation measures. Among these mitigation measures was a commitment to construct a 600 MW Bridge between InterGen's Redbud Energy Project and OG&E's control area that would create an additional 600 MWs of available transmission capacity. *See Oklahoma Gas and Electric and NRG McClain LLC,* 105 FERC ¶61,297 (2003), *order approving settlement,* 108 FERC ¶61,004 (2004). On May 31, 2005, OG&E filed a letter informing the Commission that, as of May 19, 2005, all of the facilities that OG&E committed to construct under the Offer of Settlement were placed into commercial operation.

A technical conference in this proceeding was held on December 1, 2005 at the Commission's Headquarters, 888 First Street, NE., Washington, DC 20426. The technical conference participants discussed whether the upgrades completed by OG&E resulted in an additional 600 MWs of available transmission capacity, as required in the July 2004 Order. At the conclusion of the conference, the parties agreed to answer the following questions:

1. Is an additional 600 MWs of Available Transfer Capability, achieved by upgrading the transmission system, created when: (a) The McClain generating units are not running; (b) the McClain generating units are running to serve OG&E load; or (c) the McClain generating units are running under operating conditions other than those described in (a) and (b)? In other words, should the base case be McClain running with no transmission upgrades or McClain not running with no transmission upgrades. Provide complete explanatory rationale and support for how the 600 MWs of Available Transfer Capability is created.

2. Explain if there are discrepancies in Available Transfer Capability, as calculated by OG&E and as calculated by SPP, including whether the difference (if any) is the result of the use of different models (planning models vs. operational models) containing different generation dispatch pattern, different transmission system configuration, different firm reservations, and different generation and transmission outages.

3. Were there any firm reservations, posted on the SPP OASIS after the July 2004 Order and prior to Redbud's transmission request in June 2005, by Redbud or any other party that would have reduced the Available Transfer Capability from Redbud to OG&E's transmission system?

4. In addition to the previously disclosed non-firm reservation that was not removed from the SPP study in response to Redbud's June 2005 request, were there any other non-firm reservations which were not removed from the ATC studies performed by OG&E and SPP.

5. Assuming the transmission upgrades created an additional 600 MWs of Available Transfer Capability, explain what happened to the Available Transfer Capability from the time OG&E placed it into service and when SPP made it available for transmission use.

Comments in response to these questions are due on or before December 16, 2005, and reply comments are due on or before January 20, 2006. Comments must refer to Docket Nos. EC03–131–003 and EC03–131–004, and

must include the commenters' name, the organization they represent, if applicable, and their address. Commenters should limit their answers to the five specific questions identified above. Commentors may include any additional pertinent information that will aid the Commission in evaluating their responses to these five questions. Commentors may not raise any new issues. The commentors should double space their comments.

Comments may be filed on paper or electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov*. The Commission accepts most standard word processing formats and commenters may attach additional files with supporting information in certain other file formats. Commenters filing electronically do not need to make a paper filing. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE., Washington, DC 20426.

All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described below. Commenters must serve copies of their comments on the other commenters.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's home page *http://www.ferc.gov* and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2–A, Washington, DC 20426.

From the Commission's home page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number (excluding the last three digits) in the docket number field.

User assistance is available for eLibrary and the Commission's web site during normal business hours. For assistance, please contact the Commission's Online Support at 1–866–208–3676 (toll free) or 202–502–6652 (e-mail at *FERCOnlineSupport@ferc.gov*) or the Public Reference Room at 202–502–8371, TTY 202–502–8659, e-mail at *public.referenceroom@ferc.gov*. Questions should be directed to: David Hunger, *david.hunger@ferc.gov*, Office of Markets Tariffs and Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. (202) 502–8148.

Magalie R. Salas,

Secretary.

[FR Doc. E5–7309 Filed 12–13–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP05–407–001]

Texas Gas Transmission, LLC; Notice of Compliance Filing

December 8, 2005.

Take notice that on November 30, 2005, Texas Gas Transmission, LLC (Texas Gas), submitted a compliance filing pursuant to ''Order Granting Abandonment and Issuing Certificate'' issued November 21, 2005, in Docket No. CP05–407–000, *et al.*

Texas Gas states that copies of the filing were served on parties on the official service list in the above-captioned proceeding.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed on or before the date as indicated below. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. eastern time December 23, 2005.

Magalie R. Salas,

Secretary.

[FR Doc. E5–7322 Filed 12–13–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–134–000]

Transcontinental Gas Pipe Line Corporation; Notice of Proposed Changes in FERC Gas Tariff

December 8, 2005.

Take notice that on December 2, 2005, Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, Thirty-Second Revised Sheet No. 28, to become effective December 1, 2005.

Transco states that copies of the filing are being mailed to affected customers and interested state commissions.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC.

There is an ''eSubscription'' link on the Web site that enables subscribers to receive 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.

Magalie R. Salas,

Secretary.

[FR Doc. E5–7315 Filed 12–13–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–136–000]

Transcontinental Gas Pipe Line Corporation; Notice of Proposed Changes in FERC Gas Tariff

December 8, 2005.

Take notice that on December 2, 2005, Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, Second Revised Fifty-Ninth Revised Sheet No. 50 and Second Substitute Sixtieth Revised Sheet No. 50, to become effective November 1, 2005 and November 15, 2005, respectively.

Transco states that copies of the filing are being mailed to each of its FT–NT customers and interested state commissions.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E5–7317 Filed 12–13–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

December 7, 2005.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: *ER03–1003–002.*

Applicants: Michigan Electric Transmission Company, LLC.

Description: *Michigan Public Power, Michigan South Central Power Agency and Michigan Electric Transmission Co, LLC submit a joint response to address the questions presented by the Commission's 10/20/05 Order.*

Filed Date: 11/21/2005.

Accession Number: *20051128–0511.*

Comment Date: 5 p.m. eastern time on Monday, December 12, 2005.

Docket Numbers: *ER05–1285–002.*

Applicants: Southwest Power Pool, Inc.

Description: *Southwest Pool Power, Inc submits compliance filing providing for revisions & clarifications to its Open Access Transmission Tariff.*

Filed Date: 11/29/2005.

Accession Number: *20051205–0067.*

Comment Date: 5 p.m. eastern time on Tuesday, December 20, 2005.

Docket Numbers: *ER05–1523–001.*

Applicants: Xcel Energy Services Inc.

Description: *Xcel Energy Services Inc, on behalf of Northern States Power Co, submits the Refund Report required by FERC 11/23/05 Letter Order accepting an executed Interconnection Agreement.*

Filed Date: 11/30/2005.

Accession Number: *20051202–0066.*

Comment Date: 5 p.m. eastern time on Wednesday, December 21, 2005.

Docket Numbers: *ER06–30–001.*

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: *Midwest Independent Transmission System Operator, Inc submits supplemental informational filing to its Executed Large Generator Interconnection Agreement with Union Electric Co dba AmerenUE.*

Filed Date: 11/29/2005.

Accession Number: *20051206–0192.*

Comment Date: 5 p.m. eastern time on Tuesday, December 20, 2005.

Docket Numbers: *ER06–63–001.*

Applicants: Take Two, LLC.

Description: *Take Two, LLC's petition for acceptance of initial rate schedule (FERC Electric Rate Schedule No.1), waivers and blanket authority.*

Filed Date: 11/30/2005.

Accession Number: *20051202–0059.*

Comment Date: 5 p.m. eastern time on Wednesday, December 21, 2005.

Docket Numbers: *ER06–253–000.*

Applicants: American Electric Power Service Corporation.

Description: *American Electric Power Service Corp, as agent for Ohio Power Co, submits a Facilities Agreement with the City of Shelby, Ohio and 11/30/05 filing of cover page inadvertently left of original filing.*

Filed Date: 11/29/2005.

Accession Number: *20051201–0021.*

Comment Date: 5 p.m. eastern time on Tuesday, December 20, 2005.

Docket Numbers: *ER06–254–000.*

Applicants: Avista Corporation.

Description: *Avista Corp submits a non-conforming Long Term Service Agreement designated as FERC Rate Schedule No. 323 providing for the sale of Dynamic Capacity and Energy Service to NorthWestern Corp.*

Filed Date: 11/29/2005.

Accession Number: *20051201–0020.*

Comment Date: 5 p.m. eastern time on Tuesday, December 20, 2005.

Docket Numbers: *ER06–255–000.*

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: *Midwest Independent Transmission System Operator Inc submits an unexecuted Large Generator Interconnection Agreement among FirstEnergy Generation Corp and American Transmission System, Inc.*

Filed Date: 11/29/2005.

Accession Number: *20051201–0019.*

Comment Date: 5 p.m. eastern time on Tuesday, December 20, 2005.

Docket Numbers: *ER06–256–000.*

Applicants: Old Dominion Electric Cooperative.

Description: *Old Dominion Electric Cooperative submits an application for providing cost-based Reactive Power and Voltage Control and Generation Sources Service from its natural gas-fired generating facility.*

Filed Date: 11/29/2005.

Accession Number: *20051201–0024.*

Comment Date: 5 p.m. eastern time on Tuesday, December 20, 2005.

Docket Numbers: *ER06–257–000.*

Applicants: Southwest Power Pool, Inc.

Description: *Southwest Power Pool, Inc submits an unexecuted service agreement for Network Integration Transmission Service with Associated Electric Cooperative, Inc.*

Filed Date: 11/30/2005.

Accession Number: *20051201–0184.*

Comment Date: 5 p.m. eastern time on Wednesday, December 21, 2005.

Docket Numbers: *ER06–258–000.*

Applicants: Wisconsin Public Service Corporation.

Description: *Wisconsin Public Service Corp submits its Second Revised Service Agreement No. 11 with the Village of Stratford Water & Electric Utility effective 11/1/05.*

Filed Date: 11/30/2005.

Accession Number: *20051202–0060.*

Comment Date: 5 p.m. eastern time on Wednesday, December 21, 2005.

Docket Numbers: *ER06–260–000.*

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: *Midwest Independent Transmission System Operator Inc submits a Revised and Restated Generator Interconnection and Operating Agreement among FirstEnergy Generation Corp and American Transmission Systems, Inc.*

Filed Date: 11/30/2005.

Accession Number: *20051202–0062.*

Comment Date: 5 p.m. eastern time on Wednesday, December 21, 2005.

Docket Numbers: *ER06–261–000.*

Applicants: Delta Energy Center, LLC.

Description: *Delta Energy Center LLC submits Appendix A, revisions to certain Rate Schedules of its Reliability Must-Run Agreement with the California Independent System Operator Corp.*

Filed Date: 11/30/2005.

Accession Number: *20051202–0063.*

Comment Date: 5 p.m. eastern time on Wednesday, December 21, 2005.

Docket Numbers: *ER06–262–000.*

Applicants: Pittsfield Generating Company, L.P.

Description: *Pittsfield Generating Co LP, submits an unexecuted Reliability Must Run Agreement among itself, Sempra Energy Trading Corp, and ISO New England.*

Filed Date: 11/30/2005.

Accession Number: *20051202–0064.*

Comment Date: 5 p.m. eastern time on Wednesday, December 21, 2005.

Docket Numbers: *ER06–263–000.*

Applicants: Cleco Power LLC.

Description: *Cleco Power LLC submits an amendment to Appendix B of the Electric Service Interconnection Agreement with the Louisiana Energy and Power Authority.*

Filed Date: 11/30/2005.

Accession Number: *20051202–0065.*

Comment Date: 5 p.m. eastern time on Wednesday, December 21, 2005.

Docket Numbers: *ER06–265–000.*

Applicants: Doswell Limited Partnership.

Description: *Doswell Limited Partnership submits Rate Schedule under which its sets forth charges and its revenue requirement for providing cost-based Reactive Support and Voltage Control from Generation Source Services.*

Filed Date: 11/30/2005.

Accession Number: *20051202–0067.*

Comment Date: 5 p.m. eastern time on Wednesday, December 21, 2005.

Docket Numbers: *ER06–266–000.*

Applicants: Duke Energy Oakland, LLC.

Description: *Duke Energy Oakland, LLC submits revisions to certain reliability Must-Run Rate Schedules of its Reliability Must Run Agreement with California Independent System Operator Corp for contract year 2006.*

Filed Date: 11/30/2005.

Accession Number: *20051202–0061.*

Comment Date: 5 p.m. eastern time on Wednesday, December 21, 2005.

Docket Numbers: *ER06–268–000.*

Applicants: Los Esteros Critical Energy Facility, LLC.

Description: *Los Esteros Critical Energy Facility, LLC submits revisions to its tariff and certain Rate Schedules of its Reliability Must-Run Agreement with California Independent System Operator Corp.*

Filed Date: 11/30/2005.

Accession Number: *20051202–0055.*

Comment Date: 5 p.m. eastern time on Wednesday, December 21, 2005.

Docket Numbers: *ER06–269–000.*

Applicants: ISO New England Power Company.

Description: *ISO New England, Inc and New England Power Co submit an unexecuted service agreement for a large generator interconnection under Schedule 22 of their Open Access Transmission Tariff.*

Filed Date: 11/30/2005.

Accession Number: *20051202–0056.*

Comment Date: 5 p.m. eastern time on Wednesday, December 21, 2005.

Docket Numbers: *ER06–270–000.*

Applicants: Solios Asset Management LLC.

Description: *Solios Asset Management LLC petition Commision for Order Accepting Market-Based Rate Schedule for filing and granting waivers and blanket approvals.*

Filed Date: 11/30/2005.

Accession Number: *20051202–0082.*

Comment Date: 5 p.m. eastern time on Wednesday, December 21, 2005.

Docket Numbers: *ER06–271–000;* EL06–21–000.

Applicants: Solios Power LLC.

Description: *Solios Power LLC submits a petition for issuance of declaratory orders, petition for order accepting market-based rate schedule for filing.*

Filed Date: 11/30/2005.

Accession Number: *20051202–0087.*

Comment Date: 5 p.m. eastern time on Wednesday, December 21, 2005.

Docket Numbers: *ER06–272–000.*

Applicants: Oregon Trail Electric Consumers Cooperative, Inc.

Description: *Oregon Trail Electric Consumers Coop, Inc advise FERC that due to amendments of section 201(f) of the Federal Power Act, it is not longer a public utility.*

Filed Date: 11/30/2005.

Accession Number: *20051205–0066.*

Comment Date: 5 p.m. eastern time on Wednesday, December 21, 2005.

Docket Numbers: *ER96–1145–016; EL05–111–000.*

Applicants: Alternate Power Source, Inc.

Description: *Alternate Power Source, Inc submits its corrected Market Behavior Rules and the addition of the change in status reporting requirement for their FERC Electric Tariff Rate Schedule 1.*

Filed Date: 11/29/2005.

Accession Number: *20051202–0058.*

Comment Date: 5 p.m. eastern time on Tuesday, December 20, 2005.

Any person desiring to intervene or to protest in any of the above proceedings 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) on or before 5 p.m. eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding,

interventions or protests submitted on or before the comment deadline need not be served on persons other and the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also 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 dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*. or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E5–7289 Filed 12–13–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

December 8, 2005.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Extension of Time to Commence and Complete Construction.

b. *Project No.:* 12379–006.

c. *Date Filed:* August 25, 2005.

d. *Applicant:* Lake Dorothy Hydro, Inc., Alaska.

e. *Name of Project:* Lake Dorothy Hydroelectric Project.

f. *Location:* The project is located on the Dorothy Creek, near Juneau, Alaska.

g. *Filed Pursuant to:* Section 13 of the Federal Power Act, 16 U.S.C. 806.

h. *Applicant Contact:* Corry V. Hildebrand, Lake Dorothy Hydro Inc., 5601 Tonsgard Court, Juneau, AK 99801–7201.

i. *FERC Contact:* Any questions on this notice should be addressed to Mrs. Anumzziatta Purchiaroni at (202) 502–6191, or e-mail address: *anumzziatta.purchiaroni@ferc.gov.*

j. *Deadline for filing comments and or motions:* December 22, 2005.

k. *Description of Request:* The Applicant is requesting a two year extension of the deadline for commencement of construction until December 24, 2007, and that the deadline for completion of construction also to be extended to December 24, 2009. The licensee is requesting additional time to accommodate unanticipated delays that prevented it from commencing construction work prior to the license deadline.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. Information about this filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*, for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. *Agency Comments:* Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. E5–7311 Filed 12–13–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER05–1410–000 and EL05–148–000]

PJM Interconnection, LLC; Notice of Commission Technical Conference

December 8, 2005.

Take notice that the Commission will hold a technical conference on February 3, 2006, from 10 a.m. to 5 p.m. (EST) on the matters raised by the Reliability Pricing Model (RPM) filed on August 31, 2005, by PJM Interconnection, LLC (PJM). The technical conference will be held in a room to be designated at the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Members of the Commission will attend and participate in the conference. The conference will be open for the public to attend.

The conference will consist of panels addressing, but not limited to, the following issues of interest to the Commissioners:

1. Whether the current capacity obligation construct within PJM's market design provides for just and reasonable wholesale power prices in the PJM footprint, at levels that provide adequate assurance that necessary resources will be provided to assure reliability, or whether changes must be made to that capacity obligation construct;

2. Whether PJM's RPM proposal would provide for just and reasonable wholesale power prices in the PJM footprint, at levels that provide adequate assurance that necessary resources will be provided to assure reliability, or whether changes must be made to the proposal to meet those goals; and

3. Whether an alternative approach to RPM is necessary to ensure just and reasonable wholesale power prices in the PJM footprint.

The technical conference is intended to provide a forum through which the Commission will obtain information and develop a record on these topics. The Commission will issue a supplemental notice with information identifying panel participants and a detailed agenda prior to the conference. There will be an opportunity for parties to file comments following the technical conference.

The conference will be transcribed. A transcript of the conference will be immediately available from Ace Reporting Company (202) 347–3700 or (800) 336–6646 for a fee. It will be available for the public on the Commission's eLibrary system seven calendar days after FERC receives the transcript.

A free Webcast of this event is available through *http://www.ferc.gov*. Anyone with Internet access who wishes to view this event may do so by navigating to *http://www.ferc.gov's* Calendar of Events and locating this event in the Calendar. The event will contain a link to its Webcast. The Capitol Connection provides technical support for the Webcasts. It also offers access to this event via television in the Washington, DC area and via phone bridge for a fee. Visit *http://www.CapitolConnection.org* or contact Danelle Perkowski or David Reininger at the Capitol Connection (703) 993–3100 for information about this service.

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an e-mail to *accessibility@ferc.gov* or call toll free (866) 208–3372 (voice) or (202) 208–1659 (TTY), or send a FAX to (202) 208–2106 with the required accommodations.

For further information on this conference, contact John McPherson at *John.McPherson@ferc.gov*, or Katherine Waldbauer at *Katherine.Waldbauer@ferc.gov*.

Magalie R. Salas,

Secretary.

[FR Doc. E5–7310 Filed 12–13–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Sunshine Act; Meetings

December 8, 2005.

The following notice of meeting is published pursuant to section 3(a) of the government in the Sunshine Act (Pub. L. No. 94–409), 5 U.S.C. 552b:

AGENCY HOLDING MEETING: Federal Energy Regulatory Commission.

DATE AND TIME: December 15, 2005, 10 a.m.

PLACE: Room 2C, 888 First Street, NE., Washington, DC 20426.

STATUS: Open.

MATTERS TO BE CONSIDERED: Agenda.

* Note—Items listed on the agenda may be deleted without further notice.

FOR FURTHER INFORMATION CONTACT: Magalie R. Salas, Secretary, Telephone (202) 502–8400.

For a recorded listing item stricken from or added to the meeting, call (202) 502–8627.

This is a list of matters to be considered by the Commission. It does not include a listing of all papers relevant to the items on the agenda; however, all public documents may be examined in the Public Reference Room.

898TH—MEETING, REGULAR MEETING

[December 15, 2005, 10 a.m.]

Item No.	Docket No.	Company
	Administrative Agenda	
A–1	AD02–1–000	Agency Administrative Matters
A–2	AD02–7–000	Customer Matters, Reliability, Security and Market Operations
A–3	AD06–3–000	Market Update
	Markets, Tariffs, and Rates—Electric	
E–1	RM04–12–000	Accounting and Financial Reporting for Public Utilities including RTOs
E–2	OMITTED.	
E–3	ER05–1236–000	Duke Power
E–4	EC05–103–000	Duke Energy Corporation Cinergy Corp.
E–5	ER05–1235–000	MidAmerican Energy Company
E–6	EC05–110–000	MidAmerican Energy Holdings Company Scottish Power plc PacifiCorp Holdings, Inc. PacifiCorp
E–7	ER06–78–000 ER06–78–001	PJM Interconnection, L.L.C.
E–8	ER06–43–000	Commonwealth Edison Company and Exelon Generation Company
E–9	ER06–58–000	California Independent System Operator Corporation
E–10	ER06–61–000	California Independent System Operator Corporation
E–11	ER05–1249–000	Granite State Electric Company
	ER05–1249–001	Massachusetts Electric Company The Narragansett Electric Company

898TH—MEETING, REGULAR MEETING—Continued

[December 15, 2005, 10 a.m.]

Item No.	Docket No.	Company
		Niagara Mohawk Power Corporation
		New England Power Company
E–12	OMITTED.	
E–13	OMITTED.	
E–14	ER93–465–034	Florida Power & Light Company
	ER96–417–003.	
	ER96–1375–004.	
	OA96–39–011.	
	OA97–245–004.	
E–15	OMITTED.	
E–16	ER05–1085–001	Midwest Independent Transmission System Operator
	ER04–458–008.	
E–17	ER93–465–035	Florida Power & Light Company
	ER96–417–004.	
	ER96–1375–005.	
	OA96–39–012.	
	OA97–245–005.	
E–18	ER05–1168–000	Attala Transmission, L.L.C.
E–19	ER05–1056–001	Chehalis Power Generating, L.P.
E–20	OMITTED.	
E–21	EC05–43–000	Exelon Corporation and Public Service Enterprise
	EC05–43–001	Group, Inc.
E–22	ER05–666–003	Southwest Power Pool, Inc.
E–23	OMITTED.	
E–24	OMITTED.	
E–25	OMITTED.	
E–26	EC05–132–000	Nevada Power Company
		GenWest LLC
Markets, Tariffs, and Rates—Miscellaneous		
M–1	RM05–35–000	Standard of Review for Modifications to Jurisdictional Agreements
Markets, Tariffs, and Rates—Gas		
G–1	PR05–19–000	Unocal Keystone Gas Storage, LLC
G–2	OR92–8–024	SFPP, L.P.
	OR93–5–015.	
	OR94–3–014.	
	OR94–4–016.	
	OR95–5–013	Mobil Oil Corporation v. SFPP, L.P.
	OR95–34–012	Tosco Corporation v. SFPP, L.P.
	OR96–2–010	ARCO Products Co. a Division of Atlantic Richfield
	OR96–2–011	Company, Texaco Refining and Marketing Inc., and
	OR96–10–007	Mobil Oil Corporation v. SFPP, L.P.
	OR96–10–009.	
	OR98–1–009.	
	OR98–1–011.	
	OR00–4–002.	
	OR96–2–003	Ultramar Diamond Shamrock Corporation and
	OR96–2–010	Ultramar, Inc. v. SFPP, L.P.
	OR96–10–008.	
	OR96–10–009.	
	OR96–17–004.	
	OR96–17–006.	
	OR97–2–004.	
	OR97–2–005.	
	OR98–2–005.	
	OR98–2–007.	
	OR00–8–005.	
	OR00–8–007.	
	OR98–13–005	Tosco Corporation v. SFPP, L.P.
	OR98–13–007.	
	OR00–9–005.	
	OR00–9–007.	
	OR00–7–005	Navajo Refining Corporation v. SFPP, L.P.
	OR00–7–006.	
	OR00–10–005	Refinery Holding Company
	OR00–10–006.	
	S98–1–001	SFPP, L.P.
	IS98–1–002.	

898TH—MEETING, REGULAR MEETING—Continued

[December 15, 2005, 10 a.m.]

Item No.	Docket No.	Company
	IS04–323–002.	
	Energy Projects—Hydro	
H–1	P–9401–064	Mt. Hope Waterpower Project, LLP
H–2	P–487–041	PPL Holtwood, LLC
H–3	P–12597–001	Birch Power Company
	P–12598–001.	
	P–12599–001	Wade Jacobsen
H–4	P–2064–012	Flambeau Hydro, LLC
H–5	P–10395–031	Electric Plant Board of the City of Augusta, Kentucky
	Energy Projects—Certificates	
C–1	RM05–23–000	Rate Regulation of Certain Underground Storage
	AD04–11–000	Facilities
C–2	CP05–416–000	Tennessee Gas Pipeline Company

Magalie R. Sales,

Secretary.

A free Webcast of this event is available through *http://www.ferc.gov.* Anyone with Internet access who desires to view this event can do so by navigating to *http://www.ferc.gov's* Calendar of Events and locating this event in the Calendar. The event will contain a link to its Webcast. The Capitol Connection provides technical support for the free Webcasts. It also offers access to this event via television in the DC area and via phone bridge for a fee. If you have any questions, visit *http://www.CapitolConnection.org* or contact Danelle Perkowski or David Reininger at 703–993–3100.

Immediately following the conclusion of the Commission Meeting, a press briefing will be held in Hearing Room 2. Members of the public may view this briefing in the Commission Meeting overflow room. This statement is intended to notify the public that the press briefings that follow Commission meetings may now be viewed remotely at Commission headquarters, but will not be telecast through the Capitol Connection service.

[FR Doc. 05–24048 Filed 12–9–05; 5:23 pm]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP–2005–0298; FRL–7747–4]

Notice of Filing of a Pesticide Petition for the Establishment of Regulations for Residues of the Insecticide Clothianidin in or on Food Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for residues of the insecticide clothianidin in or on cotton, undelinted seed and cotton, gin byproducts.

DATES: Comments must be received on or before January 13, 2006.

ADDRESSES: Comments, identified by docket identification (ID) number EPA-HQ-OPP–2005–0298 and pesticide petition (PP) number 5F6908, may be submitted electronically, by mail, or through hand delivery or courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Kable Davis, Registration Division (7505C), Office of Pesticide Programs, U. S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460–0001; phone number: 703–306–0415, e-mail address: *davis.kable@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

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

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

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. 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. EPA has established an official public docket for this action under docket ID number EPA-HQ-OPP–2005–0298. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information

whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. You may access this document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

Agency Web site. EDOCKET, EPA's electronic public docket and comment system was replaced on November 25, 2005, by an enhanced federal-wide electronic docket management and comment system located at *http://www.regulations.gov*. Follow the online instructions.

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, to access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit 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 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. 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. 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 EPA-HQ-OPP–2005–0298. The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail*. Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number EPA-HQ-OPP–2005–0298. In contrast to EPA's electronic public docket, EPA's e-mail system is not an ''anonymous access'' system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM*. You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail*. Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number EPA-HQ-OPP–2005–0298.

3. *By hand delivery or courier*. Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA, Attention: Docket ID Number EPA-HQ-OPP–2005–0298. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Provide specific examples to illustrate your concerns.
6. Make sure to submit your comments by the deadline in this notice.
7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action and the pesticide petition number of the summary in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comment.

II. What Action Is the Agency Taking?

EPA is printing the summary of the pesticide petition received under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the establishment of regulations in 40 CFR part 180 for residues of the insecticide clothianidin in or on cotton, undelinted seed and cotton, gin byproducts. EPA has determined that this pesticide petition contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petition. Additional data may be needed before EPA rules on this pesticide petition.

Pursuant to 40 CFR 180.7(f), a summary of the petition, prepared by the petitioner along with a description of the analytical methods available for the detection and measurement of the pesticide chemical residues is available on EPA's Electronic Docket at *http://www.epa.gov/edocket*. To locate this information, on the home page of EPA's Electronic Docket select ''Quick Search'' and type the OPP docket ID number for the pesticide petition (as specified in Unit I.B.1.) in the search field. Once the search has located the docket, clicking on the ''Docket ID'' will bring up a list of all documents in the docket for the pesticide including the petition summary.

New Tolerance

PP 5F6908. Bayer CropScience, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709, proposes to establish a tolerance for residues of the insecticide clothianidin in or on raw agricultural commodities cotton, undelinted seed at 0.01 parts per million (ppm); and cotton, gin byproducts at 0.01 ppm. In plants and plant products, the residue of concern, parent clothianidin, can be determined using High Performance Liquid Chromatography (HPLC) with Electrospray Mass Spectrometry/Mass Spectrometry Detection (MS/MS detection). In an extraction efficiency testing, the plant residues method has also demonstrated the ability to extract aged clothianidin residue. Although the plant residues Liquid Chromatography (LC)-MS/MS method is highly suitable for enforcement method, an LC-Ultraviolet (UV) method has also been developed which is suitable for enforcement (monitoring) purposes in all relevant matrices.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 1, 2005.

Donald R. Stubbs,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 05–23975 Filed 12–13–05; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority

November 29, 2005.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Persons wishing to comment on this information collection should submit comments February 13, 2006. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: You may submit your Paperwork Reduction Act (PRA) comments by e-mail or U.S. postal mail. To submit you comments by e-mail send them to: *PRA@fcc.gov*. To submit your comments by U.S. mail, mark it to the attention of Judith B. Herman, Federal

Communications Commission, 445 12th Street, SW., Room 1–C804, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s) send an e-mail to *PRA@fcc.gov* or contact Judith B. Herman at 202–418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0202.

Title: Section 87.37, Developmental License.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Individuals or households, business or other for-profit, not-for-profit institutions, and state, local or tribal government.

Number of Respondents: 12.

Estimated Time Per Response: 8 hours.

Frequency of Response: Annual reporting requirement.

Total Annual Burden: 96 hours.

Annual Cost Burden: N/A.

Privacy Act Impact Assessment: N/A.

Needs and Uses: The requirement in § 87.37 is necessary to enable the Commission to gather data on the results of developmental programs conducted in the Aviation Service for which developmental authorizations have been issued. The data is required to determine whether such developmental authorizations should be renewed and/or whether rulemaking proceeding should be initiated to provide generally for such operations in the Aviation Service. The information is used by Commission staff to determine the merits of the program for which a developmental authorization was granted. If such information were not collected, the value of developmental programs in the Aviation Service would be severely limited. The Commission would have little, if any, information available regarding the advantages and disadvantages of the subject developmental operations.

OMB Control No.: 3060–0222.

Title: Section 97.213, Remote Control of a Station.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Individuals or households and business or other for profit.

Number of Respondents: 500.

Estimated Time Per Response: .2 hours (12 minutes).

Frequency of Response: Recordkeeping requirement.

Total Annual Burden: 100 hours.

Annual Cost Burden: N/A.

Privacy Act Impact Assessment: N/A.

Needs and Uses: The recordkeeping requirement contained in § 97.213 consists of posting a photocopy of the amateur station license, a label with the name, address, and telephone number of the station licensee, and the name of at least one authorized control operator. This requirement is necessary so that quick resolution of any harmful interference problems can be identified and to ensure that the station is operating in accordance with the Communications Act of 1934, as amended. The information is used by FCC staff during inspections and investigations to assure that remotely controlled amateur radio stations are licensed in accordance with applicable rules, statutes and treaties. In the absence of this recordkeeping requirement, field inspections and investigations related to harmful interference could be severely hampered and needlessly prolonged due to inability to quickly obtain vital information about a remotely controlled station.

OMB Control No.: 3060–0259.

Title: Section 90.263, Substitution of Frequencies Below 25 MHz.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for profit and state, local or tribal government.

Number of Respondents: 60.

Estimated Time Per Response: .5 hours.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 30 hours.

Annual Cost Burden: N/A.

Privacy Act Impact Assessment: N/A.

Needs and Uses: Section 90.263 requires applicants proposing operations in certain frequency bands below 25 MHz to submit supplemental information showing such frequencies are necessary from a safety of life standpoint, and information regarding minimum necessary hours of operation. This requirement will be used by Commission staff in evaluating the applicant's need for such frequencies and the interference potential to other stations operating on the proposed frequencies.

OMB Control No.: 3060–0264.

Title: Section 80.413, On-Board Station Equipment Records.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Individuals or households, business or other for profit, not-for-profit institutions, and state, local or tribal government.

Number of Respondents: 1,000.

Estimated Time Per Response: 2 hours.

Frequency of Response: Recordkeeping requirement.

Total Annual Burden: 2,000 hours.

Annual Cost Burden: N/A.

Privacy Act Impact Assessment: N/A.

Needs and Uses: The recordkeeping requirement contained in § 80.413 is necessary to document the number and type of transmitters operating under an on-board station license. The information is used by FCC staff during inspections and investigations to determine what mobile units and repeaters are associated with on-board stations aboard a particular vessel. If this information were not collected, no means would be available to determine if this type of radio equipment is authorized or who is responsible for its operation. Enforcement and frequency management programs would be negatively affected.

OMB Control No.: 3060–0297.

Title: Section 80.503, Cooperative Use of Facilities.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Individuals or households, business or other for profit, not-for-profit institutions, and state, local or tribal government.

Number of Respondents: 100.

Estimated Time Per Response: 16 hours.

Frequency of Response: Recordkeeping requirement.

Total Annual Burden: 1,600 hours.

Annual Cost Burden: N/A.

Privacy Act Impact Assessment: N/A.

Needs and Uses: The recordkeeping requirements contained in § 80.503 are necessary to ensure licensees which share private facilities operate within the specified scope of service, on a non-profit basis, and do not function as communications common carriers providing ship-shore public correspondence services. The information is used by FCC staff during inspections and investigations to insure compliance with applicable rules. If this information was not available, enforcement efforts could be hindered, frequency congestion in certain bands could increase, and the financial viability of some public coast radiotelephone stations could be threatened.

OMB Control No.: 3060–0931.

Title: Maritime Mobile Service Identity (MMSI).

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Individuals or households, business or other for profit and Federal Government.

Number of Respondents: 2,000.

Estimated Time Per Response: .5 hours.

Frequency of Response: On occasion reporting requirement and third party disclosure requirement.

Total Annual Burden: 1,000 hours.

Annual Cost Burden: N/A.

Privacy Act Impact Assessment: N/A.

Needs and Uses: This information collection is necessary to require owners of marine VHF radios with Digital Selective Calling (DSC) capability to register information such as name, address, type of vessel with a private entity issuing marine mobile service identities (MMSI). The information would be used by search and rescue personnel to identify vessels in distress and to select the proper rescue units and search methods. The information is used by the private entities to maintain a database used to provide information about the vessel owner in distress using marine VHF radios with DSC capability. If the collection were not conducted, the U.S. Coast Guard would not have access to this information which would increase the time needed to complete a search and rescue operation.

OMB Control No.: 3060–0936.

Title: Section 95.1215, Disclosure Policies and Section 95.1217, Labeling Requirements.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for profit and not-for-profit institutions.

Number of Respondents: 20.

Estimated Time Per Response: 1 hour.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 20 hours.

Annual Cost Burden: N/A.

Privacy Act Impact Assessment: N/A.

Needs and Uses: The information collection requires manufacturers of transmitters for the Medical Implant Communications Service (MICS) to include with each transmitting device a statement regarding harmful interference and to label the device in a conspicuous location on the device. The requirements will allow use of potential life-saving medical technology without causing interference to other users of the 402–405 MHz band.

OMB Control No.: 3060–1004.

Title: Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for profit, not-for-profit institutions, and state, local or tribal government.

Number of Respondents: 50 respondents; 213 responses.

Estimated Time Per Response: 5 hours.

Frequency of Response: Quarterly, semi-annual and one-time reporting requirements, third party disclosure requirement and recordkeeping requirement.

Total Annual Burden: 1,202 hours.

Annual Cost Burden: N/A.

Privacy Act Impact Assessment: N/A.

Needs and Uses: The Commission sought and received emergency OMB approval for this collection. However, since OMB only grants emergency OMB approval for six months, the Commission is seeking extension of this information collection (no change in requirements) in order to obtain the full three year clearance from OMB.

The Commission released an order (FCC 05–181) finding that certain Tier III carriers did not sufficiently support their requests for waiver of the E911 rules, but providing the carriers with additional time, until July 21, 2006, to augment the record to show a clear path to full compliance with the E911 requirements. The Commission also imposed conditions and required Tier III carriers to file separate status reports by November 21, 2005, and commencing February 1, 2006, additional status reports on a quarterly basis, for a two year period.

In addition, on October 28, 2005 (FCC 05–182) and on November 3, 2005 (FCC 05–188), in response to requests for relief submitted by certain Tier III carriers, the Commission released orders that granted, in part, limited extensions of the December 31, 2005 requirement, subject to conditions, and required Tier III carriers to file status reports on a quarterly basis, for a two year period beginning on February 1, 2006. Further FCC 05–188 required one Tier III carrier, in addition to the quarterly reporting requirements, to submit a compliance plan by November 3, 2006.

The Commission will use the information submitted by Tier III carriers subject to reporting requirements to ensure that they comply with the Commission's E911 requirements and the terms of the underlying orders addressing their requests for waiver relief.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–23858 Filed 12–13–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

November 28, 2005.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before February 13, 2006. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: You may submit your Paperwork Reduction Act (PRA) comments by e-mail or U.S. postal mail. To submit your comments by e-mail send them to: *PRA@fcc.gov.* To submit your comments by U.S. mail, mark it to the attention of Judith B. Herman, Federal Communications Commission, 445 12th Street, SW., Room 1–C804, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s) send an e-mail to *PRA@fcc.gov* or contact Judith B. Herman at 202–418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0690.

Title: Amendment of the Commission's Rules Regarding the 37.0–38.6 GHz and 38.6–40.0 GHz Bands, Third Notice of Proposed Rulemaking.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions, and state, local, or tribal government.

Number of Respondents: 700 (approximately 4 applicants for each of the 175 license areas).

Estimated Time Per Response: 300 hours per auction bidder.

Frequency of Response: Every 10 year reporting requirement.

Total Annual Burden: 2,100 hours.

Total Annual Cost: $315,000.

Privacy Act Impact Assessment: N/A.

Needs and Uses: The Commission proposes to issue geographic area licenses for the 37.0–38.6 GHz band, or in the alternative, seeks comment on the possibility of using a first-come, first-served link-by-link registration approach comparable to the *70/80/90 GHz Report and Order*. In that proceeding, the Commission decided to issue non-exclusive nationwide licenses conditioned upon site and path-specific coordination wherein many service providers would engineer their systems to operate in close proximity, without causing mutual interference. In order to facilitate such coordination, the Commission adopted non-interference requirements and required all licensees to register their facilities in a database accessible to other licensees on a first-come, first-served basis. Although the Commission determined not to impose a limit to the number of non-exclusive nationwide licenses, licensees would be required to construct individual links within 12 months after registering them. Our goal is to establish a flexible regulatory framework that would promote seamless deployment of a host of services and technologies in the 73 GHz and 42 GHz bands. We seek to enhance opportunities for deployment of broadband wireless services, foster effective competition, promote innovation and further our efforts for consistent rule application regarding broadband wireless services.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–23859 Filed 12–13–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority

December 1, 2005.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before February 13, 2006. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: You may submit your all Paperwork Reduction Act (PRA) comments by e-mail or U.S. postal mail. To submit your comments by e-mail send them to *PRA@fcc.gov.* To submit your comments by U.S. mail, mark them to the attention of Cathy Williams, Federal Communications Commission, Room 1–C823, 445 122th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s) send an e-mail to *PRA@fcc.gov* or contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0176.

Title: Section 73.1510, Experimental Authorizations.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 250.

Estimated Time per Response: 0.25 hours.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 1,087 hours.

Total Annual Cost: $179,000.

Privacy Impact Assessment: No impact(s).

Needs and Uses: 47 CFR 73.1510 requires that a licensee of an AM, FM, and TV broadcast station to file an informal application with the FCC to request an experimental authorization to conduct technical experimentation directed toward improvement of the technical phases of operation and service. This request shall describe the nature and purpose of experimentation to be conducted, the nature of the experimental signal transmission, and the proposed hours and duration of the experimentation. The data is used by FCC staff to maintain complete technical information about a broadcast station and to ensure that such experimentation does not cause interference to other broadcast stations.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–23860 Filed 12–13–05; 8:45 am]

BILLING CODE 6712–10–M

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

November 30, 2005.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a)

whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before February 13, 2006. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: You may submit your all Paperwork Reduction (PRA) comments by e-mail or U.S. postal mail. To submit your comments by e-mail send them to *PRA@fcc.gov*. To submit your comments by U.S. mail, mark them to the attention of Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s) send an e-mail to *PRA@fcc.gov* or contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0685.

Title: Updating Maximum Permitted Rates for Regulated Services and Equipment, FCC Form 1210; Annual Updating of Maximum Permitted Rates for Regulated Cable Services, FCC Form 1240.

Form Number: FCC Form 1210 and FCC Form 1240.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; State, Local or Tribal Government.

Number of Respondents: 3,400.

Estimated Time per Response: 1 hour to 15 hours.

Frequency of Response: Annual reporting requirements; Quarterly reporting requirement; Third party disclosure requirement.

Total Annual Burden: 44,800 hours.

Total Annual Cost: $642,500.

Privacy Impact Assessment: No impact(s).

Needs and Uses: Cable operators use FCC Form 1210 to file for adjustments in maximum permitted rates for regulated services to reflect external costs. Regulated cable operators submit this form to local franchising authorities (''LFAs''). FCC Form 1240 is filed by cable operators seeking to adjust maximum permitted rates for regulated cable services to reflect changes in external costs. Cable operators submit FCC Form 1240 to their respective local franchising authorities to justify rates for the basis service tier and related equipment or with the Commission (in situations where the Commission has assumed jurisdiction).

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–23861 Filed 12–13–05; 8:45 am]

BILLING CODE 6712–10–M

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget

November 25, 2005.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before January 13, 2006. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., DC 20554 or via the Internet to *Judith-B.Herman@fcc.gov*. If you would like to obtain or view a copy of this information collection, you may do so by visiting the FCC PRA Web page at: *http://www.fcc.gov/omd/pra*.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov*.

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0686.

Title: Streamlining the International Section 214 Authorization Process and Tariff Requirements.

Form No.: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 1,650 respondents; 3,603 responses.

Estimated Time Per Response: 1 hour–6,056 hours.

Frequency of Response: On occasion, annual, quarterly reporting requirements, third party disclosure requirement, and recordkeeping requirement.

Total Annual Burden: 148,053 hours.

Total Annual Cost: $16,162,000.

Privacy Act Impact Assessment: N/A.

Needs and Uses: The Commission is submitting this revised information collection to OMB because we plan to develop four new Section 214 applications. They are: (1) International Telecommunications Certificate (ITC) Agreement; (2) ITC Modification; (3) ITC Other Filings; and (4) Foreign Carrier Notification. The Commission is also requesting continued OMB approval of the existing information collections previously approved by OMB.

After the new applications have been developed, they will be filed in the International Bureau Filing System (IBFS). We do not know the specific time frame for the development of each application. However, we estimate that the projected completion date for all Section 214 license applications is December 31, 2008. The development of the applications is contingent upon the availability of budget funds, human resources and other factors. The annual burden hours and costs are unknown at this time because the forms have not been developed by the Commission. Therefore, this submission to OMB does

not reflect any changes in estimated burden to the public.

OMB Control No.: 3060–0704.

Title: Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended, CC Docket No. 96–61.

Form No.: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 519.

Estimated Time Per Response: .5 hours–120 hours.

Frequency of Response: On occasion and annual reporting requirements, recordkeeping requirement, and third party disclosure requirement.

Total Annual Burden: 84,337 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Needs and Uses: The Commission is submitting this information collection to OMB for revision. The Commission revised this collection by eliminating a one-time Tariff Cancellation Requirement in which nondominant interexchange carriers were forborne from filing tariffs except as stipulated in the Order on Reconsideration. Elimination of this one time requirement reduced the total annual burden by 74,598 hours.

The information collected under the information disclosure requirement and the Internet posting requirement must be disclosed to the public to ensure that consumers have access to the information they need to select a telecommunications carrier and bring to the Commission's attention any possible violations of the Communications Act without a specific public disclosure requirement. The information collected under the recordkeeping and other requirements will be used by the Commission to ensure that affected interexchange carrier fulfill their obligations under the Communications Act, as amended.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–23878 Filed 12–13–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority

December 5, 2005.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before February 13, 2006. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: You may submit your all Paperwork Reduction Act (PRA) comments by e-mail or U.S. postal mail. To submit your comments by e-mail send them to *PRA@fcc.gov*. To submit your comments by U.S. mail, mark them to the attention of Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s) send an e-mail to *PRA@fcc.gov* or contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION: OMB Control Number: 3060–0288.

Title: Section 78.33, Special Temporary Authority (Cable Television Relay Stations).

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 35.

Estimated Time per Response: 4 hours.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 140 hours.

Total Annual Cost: $5,250.

Privacy Impact Assessment: No impact(s).

Needs and Uses: 47 CFR 78.33 permits cable television relay stations (CARS) operators to file informal requests for special temporary authority (STA) to install and operate equipment in a manner different than the way normally authorized in the station license. The special temporary authority also may be used by cable operators to conduct field surveys to determine necessary data in connection with a formal application for installation of a radio system, or to conduct equipment, program, service, and path tests.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–23978 Filed 12–13–05; 8:45 am]

BILLING CODE 6712–10–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted to OMB for Review and Approval

December 7, 2005.

SUMMARY: The Federal Communications Commissions, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility;

(b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be submitted on or before January 13, 2006.

If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: You may submit your comments by email or U.S. mail. To submit your comments by email send them to *PRA@fcc.gov.* To submit your comments by U.S. mail send them to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554 and Kristy L. LaLonde, Office of Management and Budget (OMB), Room 10236 NEOB, Washington, DC 20503, (202) 395–3087 or via the Internet at *Kristy_L._LaLonde@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s) send an email to *PRA@fcc.gov* or contact Cathy Williams at (202) 418–2918. If you would like to obtain a copy of this revised information collection, you may do so by visiting the FCC PRA Web page at: *http://www.fcc.gov/omd/pra.*

SUPPLMENTARY INFORMATION:

OMB Control Number: 3060–0647.

Title: Annual Survey of Cable Industry Prices.

Form Number: Not applicable.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; State, Local or Tribal Government.

Number of Respondents: 758.

Estimated Time per Response: 7 hours per response.

Frequency of Response: Annual reporting requirement.

Total Annual Burden: 5,306 hours.

Total Annual Cost: None.

Privacy Impact Assessment: No impact(s).

Needs and Uses: Section 623(k) of the Cable Television Consumer Protection and Competition Act of 1992 requires the Commission to publish an annual statistical report on average rates for basic cable service, cable programming service, and equipment. The report must compare the prices charged by cable operators subject to effective competition and those not subject to effective competition. The data needed to prepare this report is collected using the Annual Survey of Cable Industry Prices.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–24025 Filed 12–13–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 05–3126]

Licensees of Broadband Radio Service Channels 1 and/or 2/2A; Must File Site and Technical Data by December 27, 2005

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: By this document, the Office of Engineering and Technology (OET) and the Wireless Telecommunications Bureau (WTB) set forth the specific data that Broadband Radio Service (BRS) [1] licensees in the 2150–2160/62 MHz band must file along with the deadline date and procedures for filing this data on the Commission's Universal Licensing System (ULS). The data will assist in determining future AWS licensees' relocation obligations.

DATES: Filing deadline is December 27, 2005.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Mary Shultz, WTB, at (717) 338–2656 (for questions about the data collection) or Priya Shrinivasan, OET, at (202) 418–7005 (for questions about the underlying Commission *Order*). For additional ULS information or assistance, go to *http://esupport.fcc.gov.* You may also call the FCC Support Center at (877) 480–3201 (TTY 202–414–1255) and select Option #2, Forms or Licensing Assistance.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Public Notice, released November 30, 2005. The full text of this Public Notice is available for inspection and copying during normal business hours in the FCC Reference Center, Room CY–A–257, 445 12th Street, SW., Washington, DC 20554. The complete text may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCP), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC. The complete item is also available on the Commission's Web site at *http://www.fcc.gov/wtb.*

Background. The 2150–2160/62 MHz band is allocated for fixed and mobile services and designated for Advanced Wireless Services (AWS).[2] In the *BRS/EBS R&O and FNPRM*, the Commission designated spectrum in the new 2.5 GHz BRS band plan for BRS Channels No. 1 and No. 2—2496–2502 MHz for BRS Channel No. 1 and 2618–2624 MHz for BRS Channel No. 2.[3] The Commission also stated that the Transition Plan must include plans for relocating the BRS incumbents from spectrum that has been redesignated for BRS Channel No. 1 and BRS Channel No. 2.[4] Future AWS licensees will be obligated to relocate incumbent BRS operations in the 2150–2160/62 MHz band to comparable facilities, most likely within the newly restructured 2495–2690 MHz band. (The Commission is currently seeking comment on the details of this relocation process in ET Docket No. 00–258.[5])

Commission Order. Recently, the Commission concluded that reliable, public data on each incumbent BRS system that will be subject to relocation is essential well in advance of the planned auction of the 2150–2155 MHz band next year.[6] The Commission also

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[1] The Multipoint Distribution Service (MDS) was renamed the Broadband Radio Service (BRS) in 2004. *See* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150–2162 MHz and 2500–2690 MHz Bands, WT Docket No. 03–66, *Report and Order and Further Notice of Proposed Rulemaking,* 19 FCC Rcd 14165 (2004) (*''BRS/EBS R&O and FNPRM''*), *recon. pending.* Therefore, all former MDS licensees are now referred to as BRS licensees.

[2] *See* Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems, ET Docket No. 00–258, *Second Report and Order,* 17 FCC Rcd 23193 (2002), *Eighth Report and Order and Fifth Notice of Proposed Rulemaking and Order*, FCC 05–172 (rel. Sept. 29, 2005) (*AWS Allocation Eighth Report and Order, Fifth NPRM, and Order. See also* Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, WT Docket No. 02–353, *Report and Order,* 18 FCC Rcd 25162 (2003) (*recon. pending*), *modified by Order on Reconsideration,* 20 FCC Rcd 14058 (2005).

[3] *BRS/EBS R&O and FNPRM,* 19 FCC Rcd 14165, 14184 paragraph 38.

[4] *Id.* at 14203 paragraph 88. Except in this background paragraph, references to Channels 1 and/or 2/2A in this Public Notice refer to channel numbers under the pre-transition frequency assignments. *See* 47 CFR 27.5(i)(1).

[5] *AWS Allocation Eighth Report and Order, Fifth NPRM, and Order,* paragraph 13. Comments in response to the *Fifth NPRM* were due on or before November 25, 2005, and reply comments must be filed on or before December 12, 2005. *See* 70 Fed. Reg. 61752 (Oct. 26, 2005).

[6] *AWS Allocation Eighth Report and Order,* Fifth NPRM, and Order, paragraph 53 (citing 47 U.S.C.

Continued

concluded that, because the BRS service is currently licensed on the basis of geographic licensing areas, neither the Commission nor the public has reliable, up-to-date information on the construction status and/or operational parameters of each BRS system in the 2150–2160/62 MHz band that will be subject to relocation.[7] Accordingly, the Commission ordered BRS licensees to submit information on:

> the locations and operating characteristics of BRS systems (*e.g.*, the location of base or fixed stations by coordinates, tower heights, power levels, etc.) in the 2150–2160/62 MHz band, on other system characteristics of BRS incumbents (*e.g.*, subscriber numbers and types of equipment used), and on categories of services provided (*e.g.*, one-way or two-way service, point-to-point or point-to-multipoint operations, data or analog video service). We also will require BRS licensees to provide this information even if the spectrum is leased to third parties. Further, * * * we will require that BRS licensees, as part of the information on system design in the band, provide the number of links (including the connection between a base station and subscriber premises equipment) within the system for both point-to-point and point-to-multipoint systems. To the extent that a system uses both BRS channels 1 and 2 as part of the same service (*e.g.*, as a link to a two-way data service), we will require that BRS licensees make special note of this when providing their system information.[8]

The Commission noted that the list above was not inclusive and that the information required would ultimately be necessary in the context of relocation negotiations. To assist in determining the scope of the new AWS entrants' relocation obligations, the Commission ordered BRS licensees in the 2150–2160/62 MHz band to provide the required data within 60 days and 120 days of the effective date of its *Order.*[9] The Commission directed and authorized OET and WTB to issue public notices with the specific data that BRS licensees in the 2150–2162 MHz band must file along with the deadline dates and procedures for filing this data electronically on the Commission's Universal Licensing System (ULS), where it will be available to the public.

The Commission also noted that the 60-day and 120-day filing dates will correspond to information collection requirements for the ULS.[10] Accordingly, the collection of information has two parts: (1) The collection of data on FCC Form 601 (Main Form and Schedules D & E) and (2) the collection of supplemental data not currently collected on the FCC Form 601 for this service. The first data collection, on FCC Form 601, must be filed on or before December 27, 2005. A second information collection is proposed and is pending approval from the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (see section III below). Hence, there is currently no deadline for filing the data covered by the proposed information collection request awaiting OMB approval. If OMB approves the second information collection, the FCC will release a separate public notice that announces the deadline for filing the second data collection. The instant Public Notice nonetheless describes the second information collection so licensees are aware of it as they gather information for the first data collection.

BRS Channel 1 and/or 2/2A licensees are advised that:

- Any data or certifications previously filed regarding the construction status and/or operational parameters of a BRS system in the 2150–2160/62 MHz band is considered out-of-date and is therefore deemed unreliable.
- If a licensee has no constructed and operational facilities, then no filing is required.
- Failure to timely file data regarding the construction status and/or operational parameters of a BRS system (to assist in determining future AWS licensees' relocation obligations) risks prejudicing any right to seek relocation or reimbursement for such constructed and operational facilities.

I. First Data Collection (Mandatory on or Before December 27, 2005)

A. Report Construction and Operational Status of System(s) by Filing License-Modification Application(s) on ULS

Licensees operating on channels within the 2150–2160/62 MHz bands are required to submit their information electronically by filing an application on the Universal Licensing System (ULS) to modify their BRS license(s). These applications will be treated as minor modifications that do not require payment of a fee if the requested information is submitted without making additional changes to the license.[11]

Facilities that require individual licenses. Licensees are cautioned that adding a facility that requires an individual license or changing the technical parameters of a facility that is already individually licensed[12] may cause the filing to be treated as a major modification and require payment of a fee.

Licensees should take the following steps to initiate the electronic filing of a modification application on ULS:

(1) Access the ULS homepage at *http://wireless.fcc.gov/uls* and click on **Online Filing**.

(2) Enter the FRN and CORES password of the licensee and click **Submit**.

(3) If the licensee has saved applications, it will be taken to a page titled ''My Applications.'' From this page it should click on **My Licenses**. If the licensee does not have any saved applications, it will go directly to ''My Licenses,'' a page listing the licensee's call signs.

(4) Select the call sign of the license to be modified.

(5) Select **Update** from the right side of the ''License At a Glance'' screen.

(6) Select **Modify License**.

At this point, the licensee begins entering information onto the application. ULS will take the licensee through a series of screens that collect FCC Form 601 information.

On ULS, you must select the newly created Attachment Type: *''BRS Channel 1, 2, 2A Notification'' and* file such an attachment.

To ensure that ULS correctly identifies and processes your application(s)—filed to provide the information detailed in the instant *Public Notice*—you must:

- On the Application Information screen, select ''Yes'' in response to the

154(i)). On December 29, 2004, the Commission formally notified the National Telecommunications and Information Administration (NTIA) of the U.S. Department of Commerce that the Commission intends to auction licenses for AWS in the 1710–1755 MHz and 2110–2155 MHz bands as early as June 2006. *See* FCC to Commence Spectrum Auction that will Provide American Consumers New Wireless Broadband Services, *News Release,* (rel. Dec. 29, 2004).

[7] *AWS Allocation Eighth Report and Order, Fifth NPRM, and Order,* paragraph 53. *See also* 70 Fed. Reg. 61747 (Oct. 26, 2005).

[8] *AWS Allocation Eighth Report and Order, Fifth NPRM, and Order,* paragraph 53 (notes omitted). The Commission also noted that the information submitted need not be signed under oath; however, willful false statements made therein are punishable by fine and imprisonment, and by appropriate administrative sanctions, including revocation of a station's license. *See id.* at n.139 (citing 47 CFR 1.917(c)).

[9] *Id.*

[10] *Id.*

[11] Licensees may make minor modifications to station authorizations, as defined in Section 1.929 of this part (other than pro forma transfers and assignments), as a matter of right without prior Commission approval. Where other rule parts permit licensees to make permissive changes to technical parameters without notifying the Commission (*e.g.*, adding, modifying, or deleting internal sites), no notification is required. For all other types of minor modifications (*e.g.*, name, address, point of contact changes), licensees must notify the Commission by filing FCC Form 601 within thirty (30) days of implementing any such changes. *See* 47 CFR 1.947 (Modification of licenses).

[12] *See* 47 CFR 27.1207(b), 47 CFR 27.1209(b).

question ''Is an attachment being filed with this application?''

• Upload an attachment at any time during the filing process following these steps:

• Click on the Attachment link, which is listed at the top of every online filing page.

• Select the newly created **Attachment Type** called ''*BRS Channel 1, 2, 2A Notification*''—and upload an attachment of this type.[13]

• Be sure to select **Attachment Type** ''*BRS Channel 1, 2, 2A Notification*'' when attaching the file. Failure to include this attachment may result in the automated rejection of the application or a charge of an application fee.

B. Form 601 Data

When entering information into the online filing system, licensees will find that certain fields and questions collected on the FCC Form 601 Main Form, Schedule D, and Schedule E must be completed or ULS edits will not allow the licensee to continue to the next screen. ULS will display a message if a required field is left blank and licensees will be given the opportunity to go back to the screen and complete the required fields. When a modification is filed, license information is carried over to the application so it does not have to be reentered, but licensees will have to enter required information that is missing from the license or specific to the application.

Main Form. Initially, the licensee will enter information that is found on the FCC Form 601 Main Form. The information consists of applicant and contact information; general information; application information; alien ownership and basic qualification questions; and questions specific to the Broadband Radio Service. Specifically, Item 55 asks whether the applicant complies with several technical rules including section 27.55, which provides that the predicted or measured median field strength at any location on the geographical border of a licensee's service area shall not exceed the value specified in the rules unless the adjacent affected service area licensee(s) agree(s) to a different field strength.[14]

Schedules D & E. Once the FCC Form 601 Main Form information is completed, the licensee will begin entering information that is requested on FCC Form 601 Schedules D and E. The first two screens request information on Major Economic Area and geographic band plan. Licensees should click **Continue** to go through these screens without making any changes. These screens will be followed by a screen titled ''*Site Specific Technical Data Summary.*'' From this screen the licensee has the option to either add technical information for a new station or modify the technical information for any existing stations that were already listed under your geographic license.

Licensees must provide technical data for their own stations as well as for any constructed and operational stations of their *lessees*.

1. Add Stations to Your License

To add a station(s) that is constructed and operational in the 2150–2160/62 band under authority of your geographic area-wide BRS license, follow these steps:

a. Select **Add Location** from the ''Site Specific Technical Data Summary'' screen.

b. Enter applicable information concerning the need for international coordination, National Environmental Policy Act (NEPA) and quiet zone and click **Continue**.

c. If the above issues do not apply to the location, ULS will generate a message indicating that site data is not required. The licensee should click **OK** to continue filing site data.

d. Select the type of location, **Fixed** or **Mobile**.

Fixed should be selected if the 2150–2160/62 MHz band channel is being transmitted from a fixed or base station (downstream).

Mobile should be selected if the 2150–2160/62 band channel is being transmitted from a subscriber, mobile, or portable station (upstream).

(**Note:** You do not have to provide the transmitter coordinates for any subscriber/customer premises equipment. Report upstream subscriber/customer premises equipment under Mobile.)

e. If Mobile is selected, the licensee should select the Area of Operation Code of **P (KMRA around a centerpoint)**.

f. Click **Continue**.

To add a *Fixed Location,* follow these steps:

Enter information on location, structure height and Antenna Structure Registration.

(1) Click **Add Antenna**.

(2) Enter antenna's make, model, center height, azimuth, beamwidth, polarization, gain and tilt. If an omnidirectional antenna is used, the licensee should enter 360 for the azimuth and beamwidth.

(3) Click **Add Frequency**.

(4) Enter information on frequency and power. The frequency should fall within the 2150–2160/62 MHz band.

(5) Click **Continue**.

(6) Enter emission designator information.

(7) Click **Continue** to go to the ''Emission Designator Summary'' screen.

(8) Click **Continue** to go back to the ''Site Specific Technical Data Summary'' screen.

To add a *Mobile Station*, follow these steps:

(1) Enter the coordinates and location information for the station *receiving* the mobile/portable transmissions, *e.g.*, a response station hub.

(2) Enter '0' as the radius.

(3) Select **Add Frequency.**

(4) Enter frequency and power information for the mobile/portable transmitters. The frequency should fall within the 2150–2160/62 MHz band.

(5) Select **Continue.**

(6) Enter emission designator information.

(7) Click **Continue** to go to the ''Emission Designator Summary'' screen.

(8) Click **Continue** to go to the ''Site Specific Technical Data Summary'' screen.

2. Ensure That Any Stations That Were Already Listed on Your License Are Accurate

If an operational station in the 2150–2160/62 MHz band already exists on your license, you must also verify the accuracy of this information before filing the application. Licensees will follow the steps listed above to initiate the application and enter FCC Form 601 information until they get to the ''Site Specific Technical Data Summary'' screen. If the information for the location is complete and accurate in ULS, there is no need to enter information on the individual stations. The licensee may click **Continue** and proceed with submittal of the application as explained in Part I, section 3, below. If the information for the station is missing or incorrect, the licensee must update the information before submitting the application.

The licensee may click on the location, antenna or frequency from the ''Site Specific Technical Summary'' screen to update the information. Once the information on the individual location, antenna or frequency screens is updated, the licensee may click

[13] The attachment may consist of the supplemental data collection outlined in Section II, or if the supplemental information is not being filed, a simple statement that the application is filed in response to the instant *Public Notice*.

[14] *See* FCC Form 601 Item 55 citing 47 CFR 27.50 (Power and antenna height limits), 47 CFR 27.55 (Signal strength limits), 47 CFR 27.1221 (Interference protection). *See also* 47 CFR 27.55(a)(4).

Continue to return to the summary screen. Entering the location, antenna or frequency data may trigger ULS edits that require entry of certain fields and/or Antenna Structure Registration information. In addition, changing information to a station that requires Quiet Zone, NEPA or international coordination may cause the application to be treated as a major modification and require a fee.

3. Summary Screen; Error Messages; Certify and Submit the Application

When all information for the individual locations is entered, click **Continue** to proceed to the ''Summary'' screen. If the system detects any errors, a message will be displayed that directs the licensee to go back to the relevant section of the application and correct the errors. When all errors are corrected, click **Continue to Certify.** The licensee must sign application and click **Submit Application** to complete filing. Upon successful submittal, the licensee will receive a confirmation screen listing the application file number.

II. Second, Supplemental Data Collection (Optional Pending OMB Approval—See Section III Below)

In order to determine the extent and scope of operations in the 2150–2160/62 MHz band, additional information beyond that collected on the FCC Form 601 for these services is required. Licensees will be required to submit this information electronically by filing an application on the Universal Licensing System (ULS) to modify their BRS license(s). Because this information is not normally collected on ULS, licensees will need to submit the information as an attachment to the application. Licensees must enter the required FCC Form 601 Main Form information even if they are submitting only the attachment with no other changes.

On ULS, you must select the newly created Attachment Type: ''*BRS Channel 1, 2, 2A Notification*'' and file the attachment described below—(see pages 3–4 for ULS-filing instructions)

The following information must be included on the attachment for each operational station in the 2150–2160/62 MHz band.

(1) The ULS location number of the station transmitting on frequencies in the 2150–2160/62 MHz band. The location number can be found on the ''Site Specific Technical Summary'' screen.

(2) Category of service (*e.g.*, one-way or two-way; fixed point-to-point, fixed point-to-multipoint, base-to-mobile).

(3) For each station reported under the first data collection, the following receiver information.

(a) For a fixed point-to-point transmitter: the receiver coordinates, elevation and the receive antenna's make, model, beamwidth, gain, azimuth, and height to center above ground level.

(**Note:** You do not have to provide the receiver coordinates for any subscriber/customer premises equipment.)

(b) For a mobile or portable transmitter: the receiver elevation, covered service area, and the receive antenna's make, model, beamwidth, gain, and height to center above ground.

(c) For a fixed point-to-multipoint or base-to-mobile transmitter: the approximate coverage area and type of receiving equipment. If separate receive antennas are used, include the receive antenna's make, model, beamwidth and gain.

(4) Operational status of the station, including whether the station is providing service to customers or students.

(5) Type of equipment use by subscribers associated with this station (*e.g.* handheld device, fixed customer premises equipment).

(6) Number of subscribers associated with the station as of November 1, 2005.

(7) The type of application being provided (*e.g.*, video, broadband data, backhaul).

(8) For fixed point-to-multipoint systems: the number of links associated with the station.

• Licensees should also note in their attachment if both BRS Channels 1 and 2 are used as part of the same service (*e.g.*, as a link to a two-way data service).

III. Important Information Concerning Your Rights Under the Paperwork Reduction Act of 1995

This Public Notice discusses two data collections: the first is mandatory and you must file the required data on or before December 27, 2005. The second is optional unless and until approved by the Office of Management and Budget under the Paperwork Reduction Act of 1995. This Public Notice describes the supplemental data collection so licensees have the option to gather the supplemental data along with the required data to minimize the need to review similar records again if filing the supplemental data becomes mandatory in the future.

• You are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection unless it displays a currently valid OMB control number with this notice.

○ The first data collection detailed in this Public Notice has been assigned OMB control number 3060–0798, the filing deadline is December 27, 2005.

○ Currently, no OMB control number is assigned to the supplemental data collection so you are not required to respond and there is no filing deadline.

• The Commission has or will soon request OMB approval for the supplemental data collection described in this Public Notice.

• If OMB approves the supplemental collection, we will issue another public notice announcing the OMB control number and the deadline for filing the supplemental data.

Federal Communications Commission.

Lauren M. Van Wazer,

Special Counsel.

Catherine W. Seidel,

Acting Chief, Wireless Telecommunications Bureau.

[FR Doc. 05–23981 Filed 12–13–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[CG Docket No. 02–278; DA 05–2975]

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

AGENCY: Federal Communications Commission.

ACTION: Notice; comments requested.

SUMMARY: In this document, the Commission seeks comment on a petition for declaratory ruling filed by the Fax Ban Coalition (the ''Coalition'') concerning the scope of the Commission's jurisdiction over interstate communications under the Telephone Consumer Protection Act of 1991 (''TCPA''). In particular, the Coalition asks the Commission to: Affirm that, under its general grant of exclusive authority to regulate interstate communications, the Commission has exclusive authority to regulate interstate commercial fax messages; and find that section 17538.43 of the California Business and Professions Code, and all other State laws that purport to regulate interstate facsimile transmissions, are preempted by the federal TCPA, 47 U.S.C. 227.

DATES: Comments are due on or before January 13, 2006, and reply comments are due on or before February 2, 2006.

ADDRESSES: You may submit comments, identified by [docket number and/or

rulemaking number], by any of the following methods:

• Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

• Federal Communications Commission's Web site: *http://www.fcc.gov/cgb/ecfs/.* Follow the instructions for submitting comments.

• Mail: Parties who choose to file by paper should also submit their comment on diskette. These diskettes should be submitted, along with three paper copies to Kelli Farmer, Consumer & Governmental Affairs Bureau, Policy Division, 445 12th Street, SW., Room 5–A866, Washington, DC 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible formatted using Word 97 or compatible software. The diskette should be accompanied by a cover letter and should be submitted in ''read only'' mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the lead docket number in this case CG Docket No. 02–278), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase: ''Disk Copy—Not an Original.'' Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's contractor at Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554.

• People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document

FOR FURTHER INFORMATION CONTACT: Erica McMahon, Consumer Policy Division, Consumer & Governmental Affairs Bureau, (202) 418–2512 (voice), *Erica.McMahon@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, DA 05–2975, released November 22, 2005. The full text of document DA 05–2975, the Coalition's submission, and copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. Document DA 05–2975, the Coalition's submission, and copies of subsequently filed documents in this matter may also be purchased from the Commission's contractor at Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact the Commission's contractor at their Web site *http://www.bcpiweb.com* or call 1–800–378–3160. A copy of the Coalition's submission may also be found by searching ECFS at *http://www.fcc.gov/cgb/ecfs* (insert CG Docket No. 02–278 into the proceeding block).

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY). Document DA 05–2975 can also be downloaded in Word or Portable Document Format (PDF) at *http://www.fcc.gov/cgb/policy.* On July 3, 2003, the Commission released a *Report and Order* (*2003 TCPA Order*) which published in the **Federal Register** on July 25, 2003 (68 FR 44144) revising its rules under the TCPA. In the *2003 TCPA Order*, the Commission determined that it would consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis. This petition argues that the Commission should assert its exclusive jurisdiction over interstate communications, rather than deal with preemption petitions on a case-by-case basis. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

• Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/* or the Federal eRulemaking Portal: *http://www.regulations.gov.* Filers should follow the instructions provided on the website for submitting comments.

• For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to *ecfs@fcc.gov*, and include the following words in the body of the message, ''get form.'' A sample form and directions will be sent in response.

• Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

• The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.

• Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

• U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington, DC 20554.

Synopsis

On November 7, 2005, the Coalition filed with the Commission a joint petition for declaratory ruling. *See* the Coalition's, Petition for Declaratory Ruling, filed November 7, 2005 (''Petition''). The Coalition characterizes its membership as a diverse group of small and large businesses and other organizations active in a variety of industries. Coalition members include bankers, health care providers, magazine publishers, trade show operators, travel agents, attorneys and insurance agents.

The joint petition raises issues concerning the scope of the Commission's jurisdiction over interstate communications under the

Telephone Consumer Protection Act of 1991 (''TCPA''). Telephone Consumer Protection Act of 1991, Public Law 102–243, 105 Statute 2394 (1991), *codified at* 47 U.S.C. 227. In particular, the Coalition asks the Commission to: (1) Affirm that, under its general grant of exclusive authority to regulate interstate communications, the Commission has exclusive authority to regulate interstate commercial fax messages; and (2) find that section 17538.43 of the California Business and Professions Code, and all other State laws that purport to regulate interstate facsimile transmissions, are preempted by the federal TCPA, 47 U.S.C. 227. In this document, the Commission seeks comment on the issues raised in the Coalition's joint petition.

The Coalition asserts that States lack jurisdiction to regulate interstate fax communications. According to the Coalition, Congress granted exclusive jurisdiction to the Commission over ''all interstate and foreign communication'' under the Communications Act of 1934. The Coalition argues that exclusive federal regulation of interstate commercial fax transmissions is consistent with congressional intent, 47 U.S.C. 227(e)(1), and with prior Commission decisions. In addition, the Coalition contends that individual states' attempts to regulate interstate communication have resulted in varying fax regulation that is not only inconsistent with Congressional intent and the optimal goals of the TCPA, but extremely burdensome to the individuals, companies and other organizations that rely heavily on fax technology to conduct business. Accordingly, the Coalition maintains the Commission should preempt all State laws purporting to regulate interstate fax transmissions and assert exclusive jurisdiction over such regulation.

In addition, the Coalition argues that on October 7, 2005, California enacted a law that conflicts with the fax requirements of the TCPA. The Coalition contends that California's new law contains the text of section 227 of the Communications Act, without the Junk Fax Prevention Act of 2005 (''JFPA'') amendments, and applies that language to any person sending faxes into or out of the state. Consequently, the Coalition maintains that the California law effectively eliminates the established business relationship (''EBR'') exception to the prohibition on unsolicited faxes in the JFPA.

The Coalition urges the Commission to declare that the Commission has exclusive jurisdiction to regulate interstate commercial fax messages and all State efforts to do so are preempted.

Federal Communications Commission.

Jay Keithley,

Deputy Bureau Chief, Consumer & Governmental Affairs Bureau.

[FR Doc. 05–23856 Filed 12–13–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 05–3140]

Rescheduling of the Eighth Meeting of the Advisory Committee for the 2007 World Radiocommunication Conference (WRC–07 Advisory Committee)

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the eighth meeting of the WRC–07 Advisory Committee originally scheduled for December 9, 2005 (FR Vol. 70, No. 201, Wednesday, October 19, 2005, Notices) has been rescheduled and will now be held on January 25, 2006, at the Federal Communications Commission. The purpose of the meeting is to continue preparations for the 2007 World Radiocommunication Conference. The Advisory Committee will consider any preliminary views and draft proposals introduced by the Advisory Committee's Informal Working Groups.

DATES: January 25, 2006; 11 a.m.–12 noon.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Room TW–C305, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Alexander Roytblat, FCC International Bureau, Strategic Analysis and Negotiations Division, at (202) 418–7501.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Public Notice, IB Docket No. 04–286, DA 05–3140, released December 5, 2005. The Federal Communications Commission (FCC) established the WRC–07 Advisory Committee to provide advice, technical support and recommendations relating to the preparation of United States proposals and positions for the 2007 World Radiocommunication Conference (WRC–07).

In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, this notice advises interested persons of the eighth meeting of the WRC–07 Advisory Committee. The WRC–07 Advisory Committee has an open membership. All interested parties are invited to participate in the Advisory Committee and to attend its meetings. The proposed agenda for the eighth meeting is as follows:

Agenda

Eighth Meeting of the WRC–07 Advisory Committee, Federal Communications Commission, 445 12th Street, SW., Room TW–C305, Washington, DC 20554; January 25, 2006; 11 a.m.–12 Noon

1. Opening Remarks
2. Approval of Agenda
3. Approval of the Minutes of the Seventh Meeting
4. Reports on Recent WRC–07 Preparatory Meetings
5. NTIA Draft Preliminary Views and Proposals
6. Informal Working Group Reports and Recommendations
7. Future Meetings
8. Other Business

Federal Communications Commission.

Don Abelson,

Chief, International Bureau.

[FR Doc. 05–23857 Filed 12–13–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[Report No. 2745]

Petitions for Reconsideration of Action in Rulemaking Proceeding

December 1, 2005.

Petitions for Reconsideration have been filed in the Commission's Rulemaking proceeding listed in this Public Notice and published pursuant to 47 CFR 1.429(e). The full text of these documents is available for viewing and copying in Room CY–B402, 445 12th Street, SW., Washington, DC or may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI) (1–800–378–3160). Oppositions to these petitions must be filed by December 29, 2005. See § 1.4(b)(1) of the Commission's rules (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions have expired.

Subject: In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities (CC Docket No. 02–33).

Universal Service Obligations of Broadband Providers (CC Docket No. 02–33).

Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services (CC Docket No. 01–337).

Computer III Further Remand Proceedings; Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements (CC Docket Nos. 95–20, 98–10).

Conditional Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises (WC Docket No. 04–242).

Consumer Protection in the Broadband Era (WC Docket No. 05–271).

Number of Petitions Filed: 2.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–23864 Filed 12–13–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on an agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of agreements are available through the Commission's Office of Agreements (202–523–5793 or *tradeanalysis@fmc.gov*).

Agreement No.: 009857–010.

Title: Florida-Caribbean Cruise Association.

Parties: Carnival Cruise Lines; Celebrity Cruises; Costa Cruise Lines; Cunard Line; Disney Cruise Line; Holland America Line; MSC Cruises (USA) Inc.; Norwegian Cruise Line; Princess Cruises; Radisson Seven Seas Cruises; Royal Caribbean International; and Windstar Cruises.

Filing Party: Matthew Thomas, Esq.; Troutman Sanders LLP; 401 9th Street NW., Suite 1000; Washington, DC 20004–2134.

Synopsis: The amendment removes Topaz International Cruises as a party to the agreement.

Agreement No.: 011587–013.

Title: United States South Europe Conference.

Parties: A.P. Moller-Maersk A/S; P&O Nedlloyd Limited; and Hapag-Lloyd Container Linie GmbH.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell; 1850 M Street, NW., Suite 900; Washington, DC 20036.

Synopsis: The amendment removes Hapag-Lloyd as a party to the agreement.

Agreement No.: 011637–012.

Title: AMPAC Cooperative Working Agreement.

Parties: Hamburg-Sd and Compania Chilena de Navegacion Interoceanica, S.A.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP; 1850 M Street NW., Suite 900; Washington, DC 20036.

Synopsis: The amendment deletes the Far East from the geographic scope, reduces the number and size of vessels deployed under the agreement, establishes a new minimum duration for the revised agreement, makes various corresponding and technical changes, and restates the agreement.

By order of the Federal Maritime Commission.

Dated: December 9, 2005.

Bryant L. VanBrakle,

Secretary.

[FR Doc. E5–7340 Filed 12–13–05; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 9, 2006.

A. Federal Reserve Bank of Chicago (Patrick M. Wilder, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. FBOP Corporation, Oak Park, Illinois; to acquire 28.26 percent of the voting shares of Community Bank of Lemont, Lemont, Illinois.

Board of Governors of the Federal Reserve System, December 9. 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E5–7334 Filed 12–13–05; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 29, 2005.

A. Federal Reserve Bank of Atlanta (Andre Anderson, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30303:

The Savannah Bancorp, Inc., Savannah, Georgia; to acquire 100 percent of the voting shares of Harbourside Community Bank, Hilton Head, South Carolina (in organization), and thereby engage in operating a savings association pursuant to section 225.28(b)(4)(ii) of Regulation Y.

Board of Governors of the Federal Reserve System, December 9, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E5–7335 Filed 12–13–05; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Sunshine Act; Meeting

TIME AND DATE: 9 a.m. (EDT), December 19, 2005.

PLACE: 4th Floor Conference Room, 1250 H Street, NW., Washington, DC.

STATUS: Parts will be open to the public and parts closed to the public.

MATTERS TO BE CONSIDERED:

Parts Open to the Public

1. Approval of the minutes of the November 29, 2005, Board member meeting.

2. Thrift Savings Plan activity report by the Executive Director.

Parts Closed to the Public

3. Agency personnel matters.

CONTACT PERSON FOR MORE INFORMATION: Thomas J. Trabucco, Director, Office of External Affairs, (202) 942–1640.

Dated: December 12, 2005.

Elizabeth S. Woodruff,

Secretary to the Board, Federal Retirement Thrift Investment Board.

[FR Doc. 05–24087 Filed 12–12–05; 2:22 pm]

BILLING CODE 6760–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

[Document Identifier: CMS–10117–10118–10119–10135–10136]

Emergency Clearance: Public Information Collection Requirements Submitted to the Office of Management and Budget (OMB)

AGENCY: Center for Medicare and Medicaid Services.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare and Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments to regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

We are, however, requesting an emergency review of the information collection referenced below. In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, we have submitted to the Office of Management and Budget (OMB) the following requirements for emergency review. We are requesting 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 an Administration Initiative. We cannot reasonably comply with the normal clearance procedures because a statutory deadline under the Medicare Modernization Act (MMA) would be missed.

Title II of the Medicare Modernization Act (MMA) modified and re-named the existing Medicare+Choice (M+C) program established under Part C of title XVIII of the Social Security Act. The program is now called the Medicare Advantage (MA) program. Although some MMA program changes are already in effect, several new features will take effect beginning with the 2006 contract year. These new features include authority for new MA regional plans to be organized as regional preferred provider organizations (RPPOs). The MMA also amended the Social Security Act to introduce a new process for determining beneficiary premiums and benefits for 2006 and future years. Under the new process MA organizations will submit a ''bid'' reflecting their revenue needs for covering the benefits they plan to offer.

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Qualification—Medicare Advantage Application For Coordinated Care, Private Fee-For-Service, Regional Preferred Provider Organization, Service Area Expansion For Coordinated Care and Private Fee-For-Service Plans, Medical Savings Account Plans; *Use:* An entity seeking a contract as an MA organization must be able to provide Medicare's basic benefits plus meet the organizational requirements set out in regulations at 42 CFR part 422. An applicant must demonstrate that is can meet the benefit and other requirements within the specific geographic area it is requesting. The application forms are designed to provide the information needed to determine the health plan's compliance. The regulatory requirements are incorporated into the MA applications. The MA application forms will be used to determine if an entity is eligible to enter into a contract to provide services to Medicare beneficiaries; *Form Number:* CMS–10117, 10118, 10119, 10135, 10136 (OMB#: 0938–0935); *Frequency:* Reporting: One time submission; *Affected Public:* Business or other for-profit, Not-for-profit institutions and State, Local or Tribal Government; *Number of Respondents:* 65; *Total Annual Responses:* 90; *Total Annual Hours:* 2770.

CMS is requesting OMB review and approval of this collection by *January 20, 2006,* with a 180-day approval period. Written comments and recommendations will be considered from the public if received by the individuals designated below by December 28, 2005.

To obtain copies of the supporting statement 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.

Interested persons are invited to send comments regarding the burden or any other aspect of these collections of information requirements. However, as noted above, comments on these information collection and recordkeeping requirements must be mailed and/or faxed to the designees referenced below by December 28, 2005:

Centers for Medicare and Medicaid Services, Office of Strategic Operations and Regulatory Affairs, Room C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850, Fax Number: (410) 786–5267, Attn: Bonnie L. Harkless; and

OMB Human Resources and Housing Branch, Attention: Carolyn Lovett, New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: February 9, 2005

Michelle Shortt,

Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 05–24046 Filed 12–13–05; 8:45 am]

BILLING CODE 4120–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

[Document Identifier: CMS–10137]

Emergency Clearance: Public Information Collection Requirements Submitted to the Office of Management and Budget (OMB)

AGENCY: Center for Medicare and Medicaid Services.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare and Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

We are, however, requesting an emergency review of the information collection referenced below. In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, we have submitted to the Office of Management and Budget (OMB) the following requirements for emergency review. We are requesting 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 an initiative of the Administration. We cannot reasonably comply with the normal clearance procedures because the use of normal clearance procedures is reasonably likely to cause a statutory deadline to be missed.

The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) established a program to offer prescription drug benefits to Medicare enrollees through Prescription Drug Plans, Medicare Advantage Organizations, and Cost Plans, PACE Plans and Employer Group Plans. The Medicare Prescription Drug Benefit program is codified in section 1860D of the Social Security Act (the Act). Section 101 of the MMA amended Title XVIII of the Social Security Act by redesignating Part D as Part E and inserting a Part D, which establishes the Voluntary Prescription Drug Benefit Program (hereinafter referred to as ''Part D''). Prior to the 2007 contract year for the Part D program, the industry must have an appropriate amount of time to respond to the solicitation and CMS must have sufficient time to review and approve organizations that qualify for a Part D contract or service area expansion.

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Application for Prescription Drug Plans (PDP); Application for Medicare Advantage Prescription Drug (MA–PD) Plans; Application for Cost Plans to Offer Qualified Prescription Drug Coverage; Application for PACE Organization to Offer Qualified Prescription Drug Coverage; Application for Employer Group Waiver Plans to Offer Prescription Drug Coverage; Service Area Expansion Application to Offer Prescription Drug Coverage in a New Region; *Form Number:* CMS–10137 (OMB#: 0938–0936); *Use:* Coverage for the prescription drug benefit will be provided through contracted prescription drug plans (PDPs) or through Medicare Advantage (MA) plans that offer integrated prescription drug and health care coverage (MA–PD plans). Cost Plans that are regulated under Section 1876 of the Social Security Act, Employer Group Waiver Plans (EGWP) and PACE plans may also provide a Part D benefit. Organizations wishing to provide services under the Prescription Drug Benefit Program must complete an application, negotiate rates, and receive final approval from CMS. Existing Part D Sponsors may also expand their contracted service area by completing the Service Area Expansion (SAE) application; *Frequency:* Reporting—Annually, depending on program area and data required; *Affected Public:* Business or other for-profit, Not-for-profit institutions, Federal Government; *Number of Respondents:* 101; *Total Annual Responses:* 101; *Total Annual Hours:* 3,828.

CMS is requesting OMB review and approval of this collection by *January 20, 2006,* with a 180-day approval period. Written comments and recommendation will be considered from the public if received by the individuals designated below by December 28, 2005.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS's Web site address at *http://www.cms.hhs.gov/regulations/pra* or E-mail your request, including your address, phone number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

Interested persons are invited to send comments regarding the burden on or any other aspect of these collections of information requirements. However, as noted above, comments on these information collection and recordkeeping requirements must be mailed and/or faxed to the designees referenced below by December 28, 2005:

Centers for Medicare and Medicaid Services, Office of Strategic Operations and Regulatory Affairs, Room C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850, Fax Number: (410) 786–5267, Attn: William N. Parham, III; and

OMB Human Resources and Housing Branch, Attention: Carolyn Lovett, New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: December 9, 2005.

Michelle Shortt,

Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 05–24047 Filed 12–13–05; 8:45 am]

BILLING CODE 4120–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2005D–0483]

Guidance for Industry and Food and Drug Administration; Requesting an Extension to Use Existing Label Stock After the Trans Fat Labeling Effective Date of January 1, 2006; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance document entitled, ''Requesting an Extension to Use Existing Label Stock after the *Trans* Fat Labeling Effective Date of January 1, 2006.'' The *trans* fat final rule published in the **Federal Register** on July 11, 2003. This guidance document provides guidance to FDA and the food industry about when and how businesses may request the agency to consider enforcement discretion for the use, on products introduced into interstate commerce on or after the January 1, 2006, effective date, of some or all existing label stock that does not declare *trans* fat labeling in compliance with the final rule.

DATES: This guidance is final upon the date of publication. Submit written or electronic comments on the guidance at any time.

ADDRESSES: Submit written requests for single copies of this guidance to the Office of Nutritional Products, Labeling and Dietary Supplements (HFS–800), Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740. Send one self-addressed adhesive label to assist that office in processing your requests. Submit written comments on the guidance to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Julie Moss, Center for Food Safety and Applied Nutrition (HFS–830), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740–3835, 301–436–2373, FAX: 301–436–2636.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance document entitled ''Requesting an Extension to Use Existing Label Stock after the *Trans* Fat Labeling Effective Date of January 1, 2006.'' FDA issued a final rule on July 11, 2003 (68 FR 41434), to require food labels to bear the gram amount of *trans* fat without a percent Daily Value in the Nutrition Facts panel (*http://www.cfsan.fda.gov/~acrobat/fr03711a.pdf*). The *trans* fat final rule becomes effective on January 1, 2006. This guidance document provides guidance to FDA staff and the food industry about when and how businesses may request the agency to consider enforcement discretion for the use, on products introduced into interstate commerce on or after the January 1, 2006 effective date, of some or all existing label stock that does not declare *trans* fat labeling in compliance with the final rule.

In compliance with section 212 of the Small Business Regulatory Enforcement Fairness Act (Public Law 104–121), we are making available this guidance that states in plain language the factors the agency intends to consider concerning requests for enforcement discretion by small and other businesses regarding compliance with this regulation.

FDA is issuing this guidance as a level 1 guidance consistent with FDA's good guidance practices regulation § 10.115 (21 CFR 10.115). Consistent with FDA's good guidance practices regulation, the agency will accept comment, but is implementing the guidance document immediately in accordance with § 10.115(g)(2), because the agency has determined that prior public participation is not feasible or appropriate. This document affects the trans fat labeling effective date of January 1, 2006, so it is urgent that FDA explains its new enforcement policy before that date. This guidance represents the agency's current thinking on the subject. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. You may use an alternative approach if such approach satisfies the requirements of the applicable statutes and regulations. If you want to discuss an alternative approach, contact the FDA staff responsible for implementing this guidance (see **FOR FURTHER INFORMATION CONTACT**).

II. Paperwork Reduction Act of 1995

This final guidance contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collection of information in this guidance was approved under OMB control number 0910–0571.

III. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document at any time. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The guidance and received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

IV. Electronic Access

Persons with access to the Internet may obtain the guidance document at *http://www.cfsan.fda.gov/guidance.html*.

Dated: December 5, 2005.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 05–23987 Filed 12–13–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

[Funding Opportunity Number: HHS–2006–IHS–TSGP–0001; CFDA Number: 93.210]

Tribal Self-Governance Program Planning Cooperative Agreement; New Funding Cycle for Fiscal Year 2006

Key Dates: Applications Due—January 20, 2006; Objective Review Committee to Evaluate Applications—March 8–9, 2006; Anticipated Project Start Date—April 1 , 2006.

I. Funding Opportunity Description

The purpose of the program is to award cooperative agreements that provide planning resources to Tribes interested in participating in the Tribal Self-Governance Program (TSGP) as authorized by Title V, Tribal Self-Governance Amendments of 2000 of the Indian Self-Determination and Education Assistance Act of Public Law (Pub. L.) 93–638, as amended. The TSGP is designed to promote self-determination by allowing Tribes to assume more control of Indian Health Service (IHS) programs and services through compacts negotiated with the IHS. The Planning Cooperative

Agreement allows a Tribe to gather information to determine the current types and amounts of Programs, Services, Functions, and Activities (PSFAs), and funding available at the Service Unit, Area, and Headquarters levels and identify programmatic alternatives that will better meet the needs of Tribal members.

II. Award Information

Type of Award: Cooperative Agreement.

Estimated Funds Available: The total amount identified for Fiscal Year (FY) 2006 is $600,000 for approximately twelve (12) Tribes to enter the TSGP planning process for compacts beginning in Fiscal Year (FY) 2007 or Calendar Year (CY) 2007. Awards under this announcement are subject to the availability of funds.

Anticipated Number of Awards: The estimated number of awards to be funded is approximately 12.

Project Period: 12 months.

Award Amount: $50,000 per year.

Programmatic Involvement: IHS TSGP funds will be awarded as cooperative agreements and will have substantial programmatic involvement to establish a basic understanding of IHS Programs, Services, Functions and Activities (PSFAs) as operations at the Service Unit, Area, and Headquarters levels.

The IHS roles and responsibilities will include:

- Identification of IHS staff that will consult with applicants on methods used by the IHS to manage and deliver health care.
- Provide applicants with a list of laws and regulations that provide authority for the various IHS programs.

The Grantee roles and responsibilities will include:

- Research and analysis of the complex IHS budget, at the Service Unit, Area, and Headquarters levels.
- Establishment of a process through which Tribes can effectively approach the IHS to identify programs and associated funding which could be incorporated into programs.

III. Eligibility Information

1. Eligible Applicants

To be eligible for a Planning Cooperative Agreement under this announcement, an applicant must meet all of the following criteria:

A. Be a Federally-recognized Tribe as defined in Title V, Public Law 106–260, Tribal Self-Governance Amendments of 2000, of the Indian Self-Determination and Education Assistance Act (the Act), Public Law 93–638, as amended. However, Alaska Native Villages or Alaska Native Village Corporations, who are located within the area served by an Alaska Native regional health entity already participating in compact status, are not eligible (Pub. L. 106–260, Title V, section 12(a)(2)).

2. Cost Sharing or Matching Funds

The Self-Governance Planning Cooperative Agreement Announcement does not require matching funds or cost sharing to participate in the competitive grant process.

3. Other Requirements

The following documentation is required (if applicable):

A. This program is described at 93.210 in the *Catalog of Federal Domestic Assistance*. There is limited competition under this announcement because the authorizing legislation restricts eligibility to Tribes that meet specific criteria. (Refer to Section III, ELIGIBLE APPLICANTS in this announcement.)

B. Request participation in self-governance by resolution by the governing body of the Indian Tribe. An Indian Tribe that is proposing a cooperative agreement affecting another Indian Tribe must include resolutions from all affected Tribes to be served.

C. Demonstrate, for three fiscal years, financial stability and financial management capability, which is defined as no uncorrected significant and material audit exceptions in the required annual audit of the Indian Tribe's self-determination contracts or self-governance funding agreements with any Federal agency.

D. Grantees are required to submit a current version of the organization's audit report. Audit reports can be lengthy, therefore, the applicants may submit them separately via regular mail by the due date (January 20, 2006). If the grantee determines that audit reports are not lengthy, the applicants may scan the documents and attach them to the electronic application. Applicants must submit two copies of the audits that reflect three previous fiscal years under separate cover directly to the Division of Grants Operations, 801 Thompson Avenue, TMP 360, Rockville, MD 20852, referencing the Funding Opportunity Number, HHS–2006–IHS–TSGP–0001, as prescribed by Public Law 98–502, the Single Audit Act, as amended (see OMB Circular A–133, revised June 24, 1997, Audits of States, Local Governments, and Non-Profit Organizations), for the three previous fiscal years. If this documentation is not submitted by the due date, the application will be considered as unresponsive and will not be considered. Applicants must include the grant tracking number assigned to their electronic submission by Grants.gov and the date submitted via Grants.gov in their cover letter transmitting the required audits for the previous three fiscal years.

E. Tribal Resolution—A resolution of the Indian Tribe served by the project should accompany the application submission. An Indian Tribe that is proposing a project affecting another Indian Tribe must include resolutions from all affected Tribes to be served. Tribal Consortia applying for a Planning Cooperative Agreement, a minimum of two individual Tribal Council Resolutions must be submitted. Draft resolutions are acceptable in lieu of an official resolution. However, an official signed Tribal resolution must be received by the Division of Grants Operations (DGO) by the end of the Objective Review (March 9, 2006). If an official signed resolution is not submitted by March 9, 2006, the application will be considered incomplete and will be returned without consideration.

*It is highly recommended that the Tribal resolution be sent by Federal Express for proof of receipt.

IV. Application and Submission Information

1. Application package may be found on http://Grants.gov

Information regarding the electronic application process may be obtained from either of the following persons:

Ms. Mary E. Trujillo, Office of Tribal Self-Governance, Indian Health Service, 801 Thompson Avenue, Suite 240, Rockville, Maryland 20852. (301) 443–7821.

Ms. Patricia Spotted Horse, Division of Grants Operations, Indian Health Service, 801 Thompson Avenue, TMP 360, Rockville, Maryland 20852. (301) 443–5204.

- Web address to obtain application kit: *http://www.ihs.gov/NonMedicalPrograms/gogp/gogp_submission.asp*

2. Content and Form of Application Submission

A. All applications should:

- Be single spaced.
- Be typewritten.
- Have consecutively numbered pages.
- Use black type not smaller than 12 characters per one inch.
- Be printed on one side only of standard size 8½″ × 11″ paper.
- Contain a narrative that does not exceed 7 typed pages that includes the

sections listed below. (The 7 page narrative does not include the work plan, standard forms, Tribal resolution(s), table of contents, budget, budget justifications, narratives, and/or other appendix items.)

Public Policy Requirements: All Federal-wide public policies apply to HHS grants with exception of Lobbying and Discrimination.

3. Submission Dates and Times

Applications must be submitted on-line by January 20, 2006. Late applications not accepted for processing will be returned to the applicant and will not be considered for funding.

4. Intergovernmental Review

This funding opportunity is not subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.'' State approval is not required.

5. Funding Restrictions

A. Only one planning cooperative agreement will be awarded per applicant.

A. Each planning cooperative agreement shall not exceed $50,000. The available funds are inclusive of direct and indirect costs.

B. Planning awards shall not exceed a maximum period of one year.

C. Pre-award costs are not allowable.

6. Other Submission Requirements

The application must comply with the following:

A. Abstract (one page)—Summarizes the project.

B. Application for Federal Assistance (SF–424, Rev. 09/03).

C. Narrative (no more than 7 pages) with time frame chart (one page); pages numbered consecutively, including appendices, and Table of Contents, and should include the following:

(1) Background information on the Tribe.

(1) Objectives and activities that provide a description of what will be accomplished.

(2) A line-item budget and narrative justification.

(3) Appendix to include:

a. Resumes or position descriptions of key staff.

b. Contractors/Consultants resumes or qualifications.

c. Proposed Scope of Work.

Electronic Transmission—The preferred method for receipt of applications is electronic submission through *http://Grants.gov.* However, should any technical problems arise regarding the submission, please contact our Grants Policy Staff at (301) 443–6528 at least ten days prior to the application deadline. To submit an application electronically, please use the *http://www.Grants.gov* apply site. Download a copy of the application package on the Grants.gov Web site, complete it offline and then upload and submit the application via the Grants.gov site. You may not e-mail an electronic copy of a grant application to us.

Please note the following:

- Under the new IHS requirements, paper applications are not the preferred method. However, if you have technical problems submitting your application on-line, and you have contacted the Grants Policy Staff and advised them of the difficulties you are having in submitting your application on-line, and if it is determined by the Grants Policy Staff that the technical difficulties cannot be resolved, you may submit a paper application after you have downloaded the application package from Grants.gov. The paper application may be sent directly to the Division of Grants Operations, 801 Thompson Avenue, TMP 360, Rockville, MD 20852 by the due date, January 20, 2006.
- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation. We strongly recommend that you do not wait until the deadline date to begin the application process through Grants.gov.
- To use Grants.gov, you, as the applicant, must have a DUNS Number and register in the Central Contractor Registry (CCR). You should allow a minimum of 10–15 days to complete CCR registration. See below on how to apply.
- You must submit all documents electronically, including all information typically included on the SF–424 and all necessary assurances and certifications.
- Your application must comply with any page limitation requirements described in the program announcement.
- After you electronically submit your application, you will receive an automatic acknowledgment from Grants.gov that contains a Grants.gov tracking number. The Indian Health Service will retrieve your application from Grants.gov.
- You may access the electronic application for this program on *http://www.Grants.gov.*
- You must search for the downloadable application package by CFDA number.
- To receive an application package, the applicant must provide the Funding Opportunity Number: HHS–2006–IHS–TSGP–0001.

E-mail applications will not be accepted under this announcement.

DUNS Number: Beginning October 1, 2003, applicants were required to have a Dun and Brandstreet (DUNS) Number. The DUNS number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–866–705–5711. Interested parties may wish to obtain their DUNS number by phone to expedite the process.

Applications submitted electronically must also be registered with the Central Contractor Registry (CCR). A DUNS number is required before CCR registration can be completed. Many organizations may already have a DUNS number. Please use the number listed above to investigate whether or not your organization has a DUNS number. Registration with the CCR is free of charge.

Applicants may register by calling 1–888–227–2423. Please review and complete the CCR ''Registration Worksheet'' located in the appendix of the TSGP Planning Cooperative Agreement application kit or on *http://www.Grants.gov/CCRRegister.*

More detailed information regarding these registration processes can be found at *http://www.Grants.gov.*

V. Application Review Information

The instructions for preparing the application narrative also constitute the evaluation criteria for reviewing and scoring the application. Weights assigned to each section are noted in parentheses.

1. Criteria

Goals And Objectives of the Project (30 points). Are the goals and objectives measurable; are they consistent with the purpose of the program and terms of this announcement; and, are they achievable as demonstrated by an implementation schedule?

Organizational Capabilities And Qualifications (25 points). Describe the organizational structure of the Tribe/Tribal organization and the ability of the organization to manage the proposed project. Include resumes or position descriptions of key staff showing requisite experience and expertise and, where applicable, include resumes of consultants that demonstrate experience and expertise relevant to the project.

Methodology (20 points). Describe fully and clearly the methodology used to reflect the needs of Tribal members

and if the project can be accomplished with expected available resources.

Budget Justification (15 points). Submit a line-item budget with a brief narrative justification for all expenditures. Are costs identified reasonable and allowable in accordance with OMB Circulars A–87, ''Cost Principles for State and Local Governments'' and A–122, ''Cost Principles for Non-Profit Organizations?''

Management Of Health Program(s) (10 points). Does the applicant propose an improved approach to managing the health program(s) and state/demonstrate how the delivery of quality health services will be maintained under self-governance?

Appendix Items:

- Work plan for proposed objectives.
- Position descriptions for key staff.
- Resumes of key staff that reflect current duties.
- Consultant proposed scope of work (if applicable).
- Indirect Cost Agreement.
- Organizational chart (optional).

2. Review and Selection Process

In addition to the above criteria/requirements, applications are considered according to the following:

A. Application Submission (Application Deadline: January 20, 2006). Applications submitted in advance of or by the deadline and verified by the tracking number will undergo a preliminary review to determine that:

(1) The applicant and proposed project type is eligible in accordance with this grant announcement.

(2) The application is not a duplication of a previously funded project.

(3) The application narrative, forms, and materials submitted meet the requirements of the announcement allowing the review panel to undertake an in-depth evaluation; otherwise, it may be returned.

B. Competitive Review of Eligible Applications (Objective Review: March 8–9, 2006). Applications meeting eligibility requirements that are complete, responsive, and conform to this program announcement will be reviewed for merit by the Ad Hoc Objective Review Committee (ORC) appointed by the IHS to review and make recommendations on these applications. The review will be conducted in accordance with the IHS Objective Review Guidelines. The technical review process ensures selection of quality projects in a national competition for limited funding. Applications will be evaluated and rated on the basis of the evaluation criteria listed in Section V.1. The criteria are used to evaluate the quality of a proposed project, determine the likelihood of success, and assign a numerical score to each application. The scoring of approved applications will assist the IHS in determining which proposals will be funded if the amount of TSGP funding is not sufficient to support all approved applications. Applications recommended for approval, having a score of 60 or above by the ORC and scored high enough to be considered for funding, are forwarded by the Division of Grants Operations (DGO) for cost analysis and further recommendation. The program official forwards the final approval list to the IHS Director for final review and approval. Applications scoring below 60 points will be disapproved and returned to the applicant.

NOTE: In making the final selections, the IHS Director will consider the ranking factor and the status of the applicant's single audit reports. The comments from the ORC will be advisory only. The IHS Director will make the final decision on awards.

3. Anticipated Award Date

Earliest Anticipated Award Date: April 1, 2006.

VI. Award Administration Information

1. Award Notices

Division of Grants Operations (DGO) will not award a grant without an approved application in conformance with regulatory and policy requirements which describes the purpose and scope of the project to be funded. When the application is approved for funding, the DGO will prepare a Notice of Award (NoA) with special terms and conditions binding upon the award and refer to all general terms applicable to the award. The NoA will serve as the official notification of a grant award and will state the amount of Federal funds awarded, the purpose of the grant, the terms and conditions of the grant award, the effective date of the award, the project period, and the budget period. Any other correspondence announcing to the Project Director that an application was selected is not an authorization to begin performance.

2. Administrative and National Policy Requirements

Grants are administered in accordance with the following documents:

- This grant announcement.
- Health and Human Services regulations governing Public Law 93–638 grants at 42 CFR 36.101 et seq.
- 45 CFR part 92, ''Department of Health and Human Services, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments Including Indian Tribes.''
- Public Health Service Grants Policy Statement.
- Grants Policy Directives.
- Appropriate Cost Principles: OMB Circular A–87, ''State and Local Governments.''
- OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.''
- Other Applicable OMB Circulars.

3. Reporting

A. Progress Report.

Program progress reports are required semi-annually. These reports will include a brief comparison of actual accomplishments to the goals established for the period, reasons for slippage (if applicable), and other pertinent information as required. A final report must be submitted within 90 days of expiration of the budget/project period.

B. Financial Status Report

Semi-annual financial status reports must be submitted within 30 days of the end of the half year. Final financial status reports are due within 90 days of expiration of the budget/project period. Standard Form 269 (long form) will be used for financial reporting.

Grantees are responsible and accountable for accurate reporting of the Progress Reports and Financial Status Reports which are generally due semi-annually. Financial Status Reports (SF–269) are due 90 days after each budget period and the final SF–269 must be verified from the grantee records on how the value was derived. Grantees are allowed a reasonable period of time in which to submit financial and performance reports.

Failure to submit required reports within the time allowed may result in suspension or termination of an active grant, withholding of additional awards for the project, or other enforcement actions such as withholding of payments or converting to the reimbursement method of payment. Continued failure to submit required reports may result in one or both of the following: (1) The imposition of special award provisions; and (2) the non-funding or non-award of other eligible projects or activities. This applies whether the delinquency is attributable to the failure of the grantee organization or the individual responsible for preparation of the reports.

VII. Agency Contact(s)

1. Questions on the programmatic and technical issues may be directed to: Mary E. Trujillo, Program Specialist, Telephone No.: 301–443–7821. Fax No.: 301–443–1050. E-mail: *metrujil@hqe.ihs.gov.*

2. Questions on grants management and fiscal matters may be directed to: Patricia Spotted Horse, Grants Management Specialist, Telephone No.: 301–443–5204. Fax No.: 301–443–9602. E-mail: *pspotted@hqe.ihs.gov.*

VIII. Other Information

The Public Health Service (PHS) strongly encourages all grant and contract recipients to provide a smoke-free workplace and promote the non-use of all tobacco products. In addition, Public Law 103–227, the Pro-Children Act of 1994, prohibits smoking in certain facilities (or in some cases, any portion of the facility) in which regular or routine education, library, day care, health care or early childhood development services are provided to children. This is consistent with the PHS mission to protect and advance the physical and mental health of the American people.

Dated: December 7, 2005.

Robert G. McSwain,

Deputy Director, Indian Health Service.

[FR Doc. E5–7280 Filed 12–13–05; 8:45 am]

BILLING CODE 4160–16–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Clinical Center; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the NIH Advisory Board for Clinical Research.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set froth in section 552b(c)(6), Title 5 U.S.C., as amended for discussion of personal qualifications and performance, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: NIH Advisory Board for Clinical Research.

Date: January 30, 2006.

Open: 10 a.m. to 1:30 p.m.

To review the Clinical Center operating plan, ABCR workgroups and Budgetary issues.

National Institutes of Health, Building 10, 10 Center Drive, 4–2551, CRC Medical Board Room, Bethesda, MD 20892.

Closed: 1:30 p.m. to 2 p.m.

Agenda: To review and evaluate for discussion of personal qualifications and performance the disclosure of which constitute a clearly unwarranted invasion of privacy.

Place: National Institutes of Health, Building 10, 10 Center Drive, 4–2551, CRC Medical Board Room, Bethesda, MD 20892.

Contact Person: Maureen E. Gormley, Executive Secretary, Mark O. Hatfield Clinical Research Center, National Institutes of Health, Building 10, Room 6–15610, Bethesda MD 20892, 301/496–2897.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Dated: December 7, 2005.

Anna Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–24015 Filed 12–13–05; 8:45am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel, Genomics of Transplantation Cooperative Research Program.

Date: December 19–21, 2005.

Time: 6 p.m. to 4 p.m.

Agenda: To review and evaluate cooperative agreement applications.

Place: Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Quirijn Vos, PhD, Scientific Review Administrator, Scientific Review Program, Division of Extramural Activities, NIAID/NIH/DHHS, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616, (301) 496–2550, *qvos@niaid.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 6, 2005.

Anna Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–24009 Filed 12–13–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel, SBIR Phase 1 Contracts Topics 053 and 056.

Date: January 5, 2006.

Time: 12 p.m. to 4 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Tracy Waldeck, PhD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6132, MSC 9608, Bethesda, MD 20852–9609, 301/435–0322, *waldeckt@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: December 7, 2005.

Anna Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–24010 Filed 12–13–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel, Time-Sensitive Research.

Date: January 3, 2006.

Time: 4 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20952, (Telephone Conference Call).

Contact Person: Aileen Schulte, PhD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6140, MSC 9608, Bethesda, MD 20892–9608, 301–443–1225, *aschulte@mail.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Mental Health Special Emphasis Panel, PTSD Rapids.

Date: January 12, 2006.

Time: 1 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Serena P. Chu, PhD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6154, MSC 9609, Rockville, MD 20892–9609, 301–443–0004, *sechu@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institute of Health, HHS)

Dated: December 7, 2005.

Anna Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–24011 Filed 12–13–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases, Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Liver Injury and Repopulation by Bone Marrow Stem Cells.

Date: February 7, 2006.

Time: 2 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: D. G. Patel, Ph.D., Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 755, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7682, *pateldg@niddk.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: December 7, 2005.

Anna Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–24013 Filed 12–13–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel NIDA–K Teleconference Meeting.

Date: December 22, 2005.

Time: 10 a.m. to 11:30 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6101 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Eliane Lazar-Wesley, PhD, Health Scientist Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, 301–451–4530.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 7, 2005.

Anna Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–24014 Filed 12–13–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Hematopoietic Stem Cells.

Date: December 19, 2005.

Time: 1:30 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Delia Tang, MD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4126, MSC 7802, Bethesda, MD 20892, 301–435–2506, *tangd@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Neuro Genetics.

Date: December 20, 2005.

Time: 2 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Robert C. Elliott, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3130, MSC 7850, Bethesda, MD 20892, 301–435–3009, *elliotro@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 7, 2005.

Anna Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–24012 Filed 12–13–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Toxicology Program (NTP); Center for the Evaluation of Risks to Human Reproduction (CERHR); Extension of the Public Comment Period on the Di-(2-Ethylhexyl)Phthalate (DEHP) Update Expert Panel Report

AGENCY: National Institute for Environmental Health Sciences (NIEHS); National Institutes of Health (NIH).

ACTION: Extension of public comment period.

SUMMARY: The CERHR announces a 30-day extension of the public comment period on the DEHP update expert panel report. The CERHR previously announced a public comment period on the DEHP update expert panel report in a prior **Federal Register** Notice [November 16, 2005 (Vol. 70, No. 220, pg. 69567)]. The DEHP update expert panel report was released by CERHR on November 21, 2005 and public comments will now be accepted by CERHR through Friday, February 3, 2006 instead of the original deadline of January 4, 2006. The DEHP update expert panel report is available from the CERHR Web site (*http://cerhr.niehs.nih.gov*) or in print from the CERHR (see **ADDRESSES** below).

DATES: The final DEHP update expert panel report is available for public comment. Written public comments on this report should be received by February 3, 2006.

ADDRESSES: Comments on the expert panel report and any other correspondence should be sent to Dr. Michael D. Shelby, CERHR Director, NIEHS, P.O. Box 12233, MD EC–32, Research Triangle Park, NC 27709 (mail), (919) 316–4511 (fax), or *shelby@niehs.nih.gov* (e-mail). Courier address: CERHR, 79 T.W. Alexander Drive, Building 4401, Room 103, Research Triangle Park, NC 27709.

SUPPLEMENTARY INFORMATION:

Background Information on the CERHR

The NTP established the CERHR in June 1998 [**Federal Register**, December 14, 1998 (Vol. 63, No. 239, pp. 68782)]. The CERHR is a publicly accessible resource for information about adverse reproductive and/or developmental health effects associated with exposure to environmental and/or occupational exposures. Expert panels conduct scientific evaluations of agents selected by the CERHR in public forums.

The CERHR invites the nomination of agents for review or scientists for its expert registry. Information about CERHR and the nomination process can be obtained from its Web site (*http://cerhr.niehs.nih.gov*) or by contacting Dr. Shelby (see **ADDRESSES** above). The CERHR selects chemicals for evaluation based upon several factors including production volume, potential for human exposure from use and occurrence in the environment, extent of public concern, and extent of data from reproductive and developmental toxicity studies.

The CERHR follows a formal, multi-step process for review and evaluation of selected chemicals. The formal evaluation process was published in the **Federal Register** notice July 16, 2001 (Vol. 66, No. 136, pp. 37047–37048) and is available on the CERHR Web site under ''About CERHR'' or in printed copy from the CERHR.

Dated: December 5, 2005.

Samuel H. Wilson,

Deputy Director, National Institute of Environmental Health Sciences.

[FR Doc. E5–7290 Filed 12–13–05; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Comment Request

ACTION: 60-Day notice of information collection under review: Immigrant Petition by Alien Entrepreneur, Form I–526, 1615–0026.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is

published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until February 13, 2006.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Director, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, 3rd Floor, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov.* When submitting comments by e-mail please make sure to add OMB Control Number 1615–0026 in the subject box. Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a Currently Approved Information Collection.

(2) *Title of the Form/Collection:* Immigrant Petition by Alien Entrepreneur.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–526. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or Households. This form is used by qualified immigrants seeking to enter the United States under section 203(b)(5) of the Immigration and Nationality Act for the purpose of engaging in a commercial enterprise, must petition the U.S. Citizenship and Immigration Services.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 1,368 responses at 1 hour and 15 minutes (1.25 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 1,710 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit the USCIS Web site at: *http://uscis.gov/graphics/formsfee/forms/pra/index.htm.*

If additional information is required contact: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, 3rd Floor, Washington, DC 20529, (202) 272–8377.

Dated: December 8, 2005.

Richard A. Sloan,

Director, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. 05–23996 Filed 12–13–05; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Comment Request

ACTION: 60-Day notice of information collection under review: Affidavit of Support Under Section 213A of the Act and Contract Between Sponsor and Household Member, Form I–864, 1615–0075.

The Department of Homeland Security, U.S. Citizenship and Immigration Services has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until February 13, 2006.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Director, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, 3rd floor, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs.@dhs.gov.* When submitting comments by e-mail please make sure to add OMB Control Number 1615–0075 in the subject box. Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection: Extension of a currently approved collection.*

(2) *Title of the Form/Collection:* Affidavit of Support under Section 213A of the Act, and Contract Between Sponsor and Household Member.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–864 and Form I–864A. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or Households. The collection of information is mandated by law for a petitioning relative to submit an affidavit on their relative's behalf. The executed form creates a contract between the sponsor and any entity that provides means-tested public benefits.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 539,500 principal I–864 responses at 3.8 hours per response and 195,000 dependent I–864 responses at .08 hours per response; and 215,800 I–864A responses at 1.75 minutes per response.

(6) *An estimate of the total public burden (in hours) associated with the collection(s):* 2,443,350 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit the USCIS Web site at: *http://uscis.gov/graphics/formsfee/forms/pra/index.htm.*

If additional information is required contact: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, 3rd Floor, Washington, DC 20529, (202) 272–8377.

Dated: December 8, 2005.

Richard A. Sloan,

Director, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 05–23997 Filed 12–13–05; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

U.S Citizenship and Immigration Services

Agency Information Collection Activities: Comment Request

ACTION: 60-Day Notice of information collection under review: Sponsor's Notice of Change of Address, Form I–865, 1615–0076.

The Department of Homeland Security, U.S. Citizenship and Immigration Services has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until February 13, 2006.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Director, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, 3rd floor, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov*. When submitting comments by e-mail please make sure to add OMB Control Number 1615–0076 in the subject box. Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Sponsor's Notice of Change of Address.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–865. U.S. Citizenship and Immigration Services (USCIS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or Households. This form will be used by every sponsor who has filed an Affidavit of Support under Section 213A of the Immigration and Nationality Act (INA) to notify the USCIS of a change of address. The data will be used to locate a sponsor if there is a request for reimbursement.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 100,000 responses at .233 hours (14 minutes) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 23,300 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit the USCIS Web site at: *http://uscis.gov/graphics/formsfee/forms/pra/index.htm.*

If additional information is required contact: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, 3rd Floor, Washington, DC 20529, (202) 272–8377.

Dated: December 8, 2005.

Richard A. Sloan,

Director, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. 05–23998 Filed 12–13–05; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Comment Request

ACTION: 60-Day notice of information collection under review: Application to Replace Alien Registration Card, Form I–90, 1615–0082.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until February 13, 2006.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Director, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, 3rd floor, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov.* When submitting comments by e-mail please make sure to add OMB Control Number 1615–0082 in the subject box. Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection: Extension of currently approved collection.*

(2) *Title of the Form/Collection:* Application to Replace Alien Registration Card.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–90. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. The information collected will be used by USCIS to determine eligibility for an initial Alien Registration Card, or to replace a previously issued card.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 410,799 responses at 55 minutes (.916) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 376,292 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit the USCIS Web site at: *http://uscis.gov/graphics/formsfee/forms/pra/index.htm.*

If additional information is required contact: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, 3rd Floor, Washington, DC 20529, (202) 272–8377.

Dated: December 9, 2005.

Richard A. Sloan,

Director, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. 05–24017 Filed 12–13–05; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Comment Request

ACTION: 60-Day notice of information collection under review: Application requirements for the adjustment of status under section 586 of Public Law 106–249; OMB–27, 1615–0081.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until February 13, 2006.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Director, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, 3rd floor, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov.* When submitting comments by e-mail please make sure to add OMB Control Number 1615–0081 in the subject box. Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Application Requirements for the Adjustment of Status under Section 586 of Public Law 106–249.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* No Agency Form Number; File No. OMB–27, U.S. Citizenship and Immigration Services. [1615–0081]

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or Households. The data is used by the agency to determine an applicant's eligibility for adjustment of status under section 586 of Public Law 106–249.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 5,000 responses at 30 (.05) minutes per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 2,500 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit the USCIS Web site at: *http://uscis.gov/graphics/formsfee/forms/pra/index.htm.*

If additional information is required contact: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, 3rd Floor, Washington, DC 20529, (202) 272–8377.

Dated: December 9, 2005.

Richard A. Sloan,

Director, Regulatory Management Division, U.S. Citizenship and Immigration Services.

FR Doc. 05–24018 Filed 12–13–05; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Comment Request

ACTION: 60-Day notice of information collection under review: Petition for Amerasian, Widow(er) or Special Immigrant, Form I–360, 1615–0020.

The Department of Homeland Security, U.S. Citizenship and

Immigration Services has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until February 13, 2006.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Director, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, 3rd floor, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov.* When submitting comments by e-mail please make sure to add OMB Control Number 1615–0020 in the subject box. Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of currently approved collection.

(2) *Title of the Form/Collection:* Petition for Amerasian, Widow(er), or Special Immigrant.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–360. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. This form is used to determine eligibility or to classify an alien as an Amerasian, widow or widower, battered or abused spouse or child and special immigrant, including religious worker, juvenile court dependent and armed forces member.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 8,397 responses at (2) hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 16,794 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit the USCIS Web site at: *http://uscis.gov/graphics/formsfee/forms/pra/index.htm.*

If additional information is required contact: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, 3rd Floor, Washington, DC 20529, (202) 272–8377.

Dated: December 9, 2005.

Richard A. Sloan,

Director, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. 05–24019 Filed 12–13–05; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF THE INTERIOR

Fish And Wildlife Service

Endangered and Threatened Wildlife and Plants; Initiation of a 5-Year Review of Greenback Cutthroat Trout (Oncorhynchus clarki stomias)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces a 5-year review of greenback cutthroat trout (*Oncorhynchus clarki stomias*) under the Endangered Species Act of 1973 (ESA). A 5-year review is a periodic process conducted to ensure that the listing classification of a species is accurate. A 5-year review is based on the best scientific and commercial data available at the time of the review; therefore, we are requesting submission of any such information on greenback cutthroat trout that has become available since its reclassification as a threatened species in 1978. Based on the results of this 5-year review, we will make the requisite finding under the ESA.

DATES: To allow us adequate time to conduct this review, we must receive your information no later than February 13, 2006. However, we will continue to accept new information about any listed species at any time.

ADDRESSES: Submit information to Susan Linner, Field Supervisor, Colorado Field Office, U.S. Fish and Wildlife Service, 755 Parfet Street, Suite 361, Lakewood, Colorado 80215. Information received in response to this notice and review, as well as other documentation in our files, will be available for public inspection, by appointment, during normal business hours, at the above address.

FOR FURTHER INFORMATION CONTACT: Susan Linner, Field Supervisor, at the above address, or at 303–275–2370.

SUPPLEMENTARY INFORMATION:

Under the ESA (16 U.S.C. 1531 et seq.), the Service maintains a list of endangered and threatened wildlife and plant species at 50 CFR 17.11 (for animals) and 17.12 (for plants). Section 4(c)(2)(A) of the ESA requires that we conduct a review of listed species at least once every 5 years. Based on such reviews, under section 4(c)(2)(B), we then determine whether or not any species should be removed from the List (delisted), or reclassified from endangered to threatened or from threatened to endangered. Delisting a species must be supported by the best scientific and commercial data available and is only considered if these data substantiate that the species is neither endangered nor threatened for one or more of the following reasons—(1) The species is considered extinct; (2) the species is considered to be recovered; and/or (3) the original data available when the species was listed, or the interpretation of such data, were in error. Any change in Federal classification would require a separate rulemaking process. The regulations in 50 CFR 424.21 require that we publish a notice in the **Federal Register** announcing those species currently under active review. This notice announces our active review of the greenback cutthroat trout currently listed as threatened. We request submission of any new information on the greenback cutthroat trout that has become available since since its reclassification as a threatened species in 1978 (43 FR 16343, April 18, 1978).

Public Solicitation of New Information

To ensure that the 5-year review is complete and based on the best available scientific and commercial information, we are soliciting new information from the public, concerned governmental agencies, tribes, the scientific community, industry,

environmental entities, and any other interested parties concerning the status of the greenback cutthroat trout.

The 5-year review considers the best scientific and commercial data and all new information that has become available since the listing determination. Categories of requested information include—(A) species biology, including but not limited to, population trends, distribution, abundance, demographics, and genetics; (B) habitat conditions, including but not limited to amount, distribution, and suitability; (C) conservation measures that have been implemented that benefit the species; (D) threat status and trends; and (E) other new information, data, or corrections, including but not limited to taxonomic or nomenclatural changes, identification of erroneous information contained in the List, and improved analytical methods.

If you wish to provide information for this 5-year review, you may submit your comments and materials to the Colorado Field Office Supervisor (see **ADDRESSES**). Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Respondents may request that we withhold a respondent's identity, as allowable by law. If you wish us to withhold your name or address, you must state this request prominently at the beginning of your comment. However, we will not consider anonymous comments. To the extent consistent with applicable law, we will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours (see **ADDRESSES**).

Authority: This document is published under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.).

Dated: November 16, 2005.

Richard A. Coleman,

Regional Director, Denver, Colorado.

[FR Doc. E5–7283 Filed 12–13–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before December 3, 2005. Pursuant to section 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service,1201 Eye St., NW., 8th floor, Washington DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by December 29, 2005.

John W. Roberts,

Acting Chief, National Register/National Historic Landmarks Program.

Arizona

Maricopa County

First Methodist Episcopal Church of Glendale Sanctuary, 7102 N. 58th Dr., Glendale, 05001502

Floralcroft Historic District, Roughly bounded by State St., 59th Ave., Myrtle St., Grand Ave. and 61st Ave., Glendale, 05001505

Glendale Grammar School One-room Class Building, 7301 N. 58th Dr., Glendale, 05001503

Glendale Tract Historic District, 51st Ave. and Northern Ave., Glendale, 05001506

Tinker, C.H., House, 6838 N. 59th Dr., Glendale, 05001504

Colorado

Delta County

First Presbyterian Church of Eckert, 13011 and 13025 CO 65, Eckert, 05001507

Iowa

Montgomery County

Red Oak Firehouse and City Jail, 318 E. Washington Ave., Red Oak, 05001508

Kansas

Chautauqua County

Niotaze Methodist Episcopal Church, 301 N. F St., Niotaze, 05001512

Dickinson County

Abilene Historic District #1, 301, 303, 305, 307, 309 N. Buckeye, Abilene, 05001514

Leavenworth County

First Presbyterian Church, Leavenworth, 407 Walnut St., Leavenworth, 05001515

Lincoln County

Nielsen Farm, 1125 E. Pike Dr., Sylvan Grove, 05001513

Shawnee County

Veale, Tinkham, Building, 909–911 S. Kansas Ave., Topeka, 05001511

Massachusetts

Suffolk County

Stony Brook Reservation Parkways, Metropolitan Park System of Great Boston MPS, (Metropolitan Park System of Greater Boston MPS) Dedham, Enneking, Turtle Pond Parkways, Smith Field, Reservation, W. Border Rds., Boston, 05001509

Worcester County

West Main Street Historic District (Boundary Increase II), Roughly bounded by Charles, Forbes, South and Cross Sts., Westborough, 05001516

North Dakota

Walsh County

Odalen Lutherske Kirke, 6 mi W and ¼ mi N of Jct of ND 32 and Cty Rte 9, Edinburg, 05001517

Ohio

Clinton County

Underwood Farms Rural Historic District, Vicinity of OH 73 and Brimstone Rd., Chester Township, 05001519

Columbiana County

McBean, Daniel, Farmstead, 18709 Fife Coal Rd., Wellsville, 05001518

Oregon

Marion County

Union Street Railroad Bridge and Trestle, Jct of Union St. NE and Water St. NE, Salem, 05001520

Vermont

Orange County

Camp Billings, (Organized Summer Camping in Vermont MPS) 1452 VT 244, Thetford, 05001524

Washington County

Bridge No. 27, Town Hwy 61, Lover's Ln., Berlin, 05001523

Windsor County

Spaulding Bridge, Mill St., Cavenish, 05001522

Virginia

Culpeper County

Fairview Cemetery, VA 522, approx. ¼ mi. W of Main St., Culpeper, 05001521

In the interest of preservation of the resource the comment period for the following resource has been shortened to three (3) days:

Michigan

Gratiot County

Ithaca Downtown Historic District, 100–168 and 101–161 E. Center St., Ithaca, 05001510

[FR Doc. E5–7282 Filed 12–13–05; 8:45 am]

BILLING CODE 4312–51–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Safety Modifications and Flood Damage Reduction Project for Folsom Dam and Appurtenant Structures (Combined Federal Effort)—Sacramento, El Dorado, and Placer Counties, CA

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of additional public scoping meeting.

SUMMARY: Pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969 (NEPA) and Public Resources Code, sections 21000–21177 of the California Environmental Quality Act (CEQA), the Bureau of Reclamation (Reclamation), the lead Federal agency; the U.S. Army Corps of Engineers, a cooperating Federal agency; and the California Reclamation Board/Department of Water Resources, the lead State agencies; intend to prepare a joint Draft Environmental Impact Statement/Environmental Impact Report (Draft EIS/EIR) for the Safety Modifications and Flood Damage Reduction Project for Folsom Dam and Appurtenant Structures (Combined Federal Effort).

The notice of intent to prepare an environmental impact statement (EIS) and notice of public scoping meetings was published in the **Federal Register** on October 6, 2005 (70 FR 58469). A notice of change to public scoping meeting dates and locations was published in the **Federal Register** on December 2, 2005 (70 FR 72314). Reclamation will have an additional scoping meeting on December 15, 2005.

DATES: The additional meeting will be on December 15, 2005, from 5 to 7 p.m. in Sacramento, CA.

ADDRESSES: The added location is County Administration Center, Board Chamber Foyer, 700 H Street, Sacramento, CA.

FOR FURTHER INFORMATION CONTACT: Mr. Shawn Oliver, Bureau of Reclamation, 7794 Folsom Dam Road, Folsom, California 95630; telephone number (916) 989–7256; e-mail *soliver@mp.usbr.gov.*

Dated: December 2, 2005.

Frank Michny,

Regional Environmental Officer, Mid-Pacific Region.

[FR Doc. E5–7294 Filed 12–13–05; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on November 22, 2005, a proposed Consent Decree (''Consent Decree'') in *United States* v. *Summit Equipment & Supplies, Inc., et al.,* Civil Action No. 5:90CV1704, was lodged with the United States District Court for the Northern District of Ohio, Eastern Division.

In this action, the United States sought to recover response costs incurred by the United States at or in connection with the Summit Equipment & Supplies, Inc. Superfund Site (the ''Site'') in Akron, Ohio, against alleged generators of hazardous waste disposed of at the Site, pursuant to Sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA''), 42 U.S.C. 9607, 9613. The United States sought to recover response costs incurred at or in connection with the Site on behalf of the Administrator of the United States Environmental Protection Agency (''EPA'') and the United States Defense Logistics Agency (''DLA''), an agency within the United States Department of Defense. Since July 1991, DLA has been performing the response action at the Site pursuant to an Administrative Order by Consent (''AOC'') with EPA under sections 104 and 106 of CERCLA, 42 U.S.C. 9604 and 9606.

The Consent Decree would resolve the United States' claims for past and future response costs with regard to the Site against Settling Defendants through a reimbursement to the Superfund of a portion of the response costs incurred or to be incurred by the United States at or in connection with the Site. Settling Defendants would collectively pay a total of $1.36 million in reimbursement for response costs that EPA has incurred at or in connection with the Site. (Each Settling Defendant's individual payment is listed in Appendix A to the Consent Decree). As a condition of settlement, Settling Defendants would relinquish all claims or causes of action with respect to the Site against the United States, including DLA, and would waive all affirmative CERCLA claims or causes of action that they may have against any person. In return, the Settling Defendants would receive contribution protection and a covenant not to sue from the United States for the work at the Site as well as past and future response costs, subject to certain reservations of rights. DLA would pay $1.48 million in reimbursement for past response costs incurred by EPA, its remaining obligations under the AOC would terminate, and EPA would assume responsibility for completing the remaining clean up of the Site. DLA also would receive contribution protection.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Summit Equipment & Supplies, Inc., et al.,* Civil Action No. 5:90CV1704, D.J. Ref. 90–11–3–633 and 90–11–3–633/2.

The Consent Decree may be examined at the Office of the United States Attorney, 801 West Superior Avenue, Suite 400, Cleveland, Ohio 44113–1852, and at U.S. EPA Region 5, 77 West Jackson Boulevard, 14th Floor, Chicago, Illinois. During the public comment period, the Consent Decree, may also be examined on the following Department of Justice Web site, *http://www/usdoj.gov/enrd/open.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 for by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $12.75 (25 cents per page reproduction cost) payable to the U.S. Treasury.

William D. Brighton,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 05–24037 Filed 12–13–05; 8:45 am]

BILLING CODE 4410–15–M

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA)

publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before January 30, 2006. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting the Life Cycle Management Division (NWML) using one of the following means (Note the new address for requesting schedules using e-mail):

Mail: NARA (NWML), 8601 Adelphi Road, College Park, MD 20740–6001,

E-mail: *requestschedule@nara.gov*, FAX: 301–837–3698.

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Laurence Brewer, Director, Life Cycle Management Division (NWML), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: 301–837–1539. E-mail: *records.mgt@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval, using the Standard Form (SF) 115, Request for Records Disposition Authority. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

Schedules Pending (Note the New Address for Requesting Schedules Using E-Mail)

1. Department of Homeland Security, Transportation Security Administration (N1–560–04–7, 11 items, 7 temporary items). Records accumulated in the Office of International Affairs, including copies of correspondence relating to international aviation matters, foreign assistance country files, background materials relating to international agreements, routine foreign airport assessments, and related records associated with activities involving foreign countries and international air carriers. Also included are electronic copies of records created using electronic mail and word processing. Proposed for permanent retention are recordkeeping copies of files relating to the advisement and policy coordination of international transportation security issues and foreign policy matters, final agreements and technical analysis, and foreign airport assessments resulting in negative actions.

2. Department of Homeland Security, U.S. Citizenship and Immigration Service (N1–566–05–1, 4 items, 4 temporary items). Inputs, outputs, master files, and documentation associated with an electronic information system used to track and control administrative inquiries, criminal referrals, and national security cases related to fraudulent immigration claims.

3. Department of Homeland Security, U.S. Coast Guard (N1–26–05–1, 11 items, 9 temporary items). Inputs, master files, outputs, and system documentation associated with an electronic system used to manage the training activities of Coast Guard personnel, course development, funding, and instruction. Also included are electronic copies of records created using electronic mail and word processing. Proposed for permanent retention are unique or significant training and course development materials, and related system documentation.

4. Department of Homeland Security, U.S. Coast Guard (N1–26–05–11, 6 items, 6 temporary items). Inputs, master files, outputs, system documentation, and electronic mail and word processing copies associated with an electronic system used to process, screen, and store data relating to ship arrival and departure notifications at U.S. seaports.

5. Department of Homeland Security, U.S. Coast Guard (N1–26–05–20, 3 items, 3 temporary items). Electronic mail and word processing copies associated with routine medical and dentistry correspondence. This schedule also extends the retention period for recordkeeping copies of this correspondence, which were previously approved for disposal.

6. Department of Homeland Security, U.S. Coast Guard (N1–26–05–23, 5 items, 5 temporary items). Electronic mail and word processing copies associated with laboratory and immunology tests and logs, and prosthetic case files. This schedule also extends the retention period for recordkeeping copies of these files,

which were previously approved for disposal.

7. Department of the Interior, Office of the Secretary (N1–48–05–4, 11 items, 2 temporary items). Photographic records, including inputs associated with a digital imaging system and routine photographs. Proposed for permanent retention are recordkeeping copies of historically significant photographs, including a master file of digital images from historically significant shoots with related system documentation and outputs. Select photographs of senior officials and logbooks of photography sessions are also proposed as permanent.

8. Department of the Interior, Office of the Secretary (N1–48–05–5, 9 items, 9 temporary items). Records associated with legal discovery and document production. Included are copies of agency documents collected from bureaus and offices in response to congressional committee and subcommittee requests, and court subpoenas. Also included are guidance memoranda and coordination plans, adequacy of search certifications, and electronic copies of records created using electronic mail and word processing. This schedule authorizes the agency to apply the proposed disposition instructions to any recordkeeping medium.

9. Department of the Interior, Office of the Secretary (N1–48–05–7, 16 items, 9 temporary items). Records of the Office of Communications, including drafts and clearance files of public information releases and speeches of senior officials, Web versions of the employee news magazine and magazine planning and publication files, press clippings in hardcopy format, and electronic copies of records created using electronic mail and word processing. Proposed for permanent retention are recordkeeping copies of public information releases and speeches in hardcopy format and electronic format as posted on the agency's Web site. This schedule modifies descriptions of these records previously approved as permanent. Also proposed as permanent are recordkeeping copies of the employee news magazine in hardcopy and electronic formats, and daily compilations of news articles and editorials in electronic format.

10. Department of the Interior, Office of the Secretary (N1–48–05–8, 3 items, 3 temporary items). Records relating to the administration of the agency's public web site and electronic recordkeeping copies of Web site content, not including English-language versions of speeches and public information releases, which are proposed for permanent retention in a separate schedule. Also included are electronic copies of records created using electronic mail and word processing.

11. Department of State, Bureau of Diplomatic Security (N1–59–06–4, 1 item, 1 temporary item). Hard copies of notification messages relating to travel by foreign officials in the United States.

12. Department of Transportation, Bureau of Transportation Statistics (N1–570–04–21, 4 items, 4 temporary items). Records relating to requests from air carriers for compensation resulting from business losses after the events of September 11, 2001. Included are such records as applications for compensation, correspondence, working papers, and other documentation associated with the calculation of compensation. Also included are electronic copies of records created using electronic mail and word processing. This schedule authorizes the agency to apply the proposed disposition instructions to any recordkeeping medium.

13. Department of Transportation, Bureau of Transportation Statistics (N1–570–05–3, 10 items, 10 temporary items). Records of the Research and Innovative Technology Administration consisting of patent, trademark, and copyright case files. Also included are electronic copies of records using electronic mail and word processing. The schedule authorizes the agency to apply the proposed disposition instructions to any recordkeeping medium.

14. Department of Transportation, Federal Motor Carrier Safety Administration (N1–557–05–5, 26 items, 24 temporary items). Records accumulated by the Office of Management Information and Services, including budget background records, chronological files, directives files, property and supplies files, and employee safety program files. Also included are electronic copies of records created using electronic mail and word processing. Proposed for permanent retention are recordkeeping copies of internal directives relating to significant policy issues. This schedule authorizes the agency to apply the proposed disposition instructions to any recordkeeping medium.

15. Department of the Treasury, Bureau of Public Debt (N1–53–06–1, 4 items, 4 temporary items). Activity analysis records of the Financial Management Division consisting of spreadsheets of financial data detailing the costs of Bureau services. Also included are electronic copies of records created using electronic mail or word processing.

16. Department of the Treasury, Financial Management Service (N1–425–06–1, 4 items, 4 temporary items). Project files relating to terminated, obsolete, or superseded electronic information systems, and records relating to the planning, preparing, and conducting of electronic information system training programs. Also included are electronic copies of records created using electronic mail or word processing.

17. Department of the Treasury, Internal Revenue Service (N1–58–05–2, 58 items, 56 temporary items). Records of the Division of Government Liaison and Disclosure relating to controlling access to taxpayer information. Included are disclosure accounting forms, disclosure certification documents, government information exchange agreements, requests for information, and an electronic tracking system for disclosure cases. Also included are electronic copies created using electronic mail and word processing applications. Proposed for permanent retention are Congressional reports and related background files. This schedule authorizes the agency to apply the proposed disposition instructions to any recordkeeping medium.

18. Environmental Protection Agency, Office of the Chief Financial Officer (N1–412–05–10, 5 items, 5 temporary items). Inputs, outputs, master files, documentation, and software associated with an administrative data warehouse consisting of read-only copies of data from various agency financial management systems.

19. Environmental Protection Agency, Office of Prevention, Pesticides, and Toxic Substances (N1–412–05–7, 6 items, 4 temporary items). Inputs, outputs, and software associated with an electronic system used to provide statistics on pesticide accidents involving human, animal, and environmental injuries. Master files and supporting documentation are proposed for permanent retention.

20. District Courts of the United States (N1–21–06–1, 3 items, 3 temporary items). Electronic and paper inputs into the Case Management and Electronic Case Filing System. Case files in electronic and paper form are covered by previously approved schedules.

Dated: December 8, 2005.

Michael J. Kurtz,

Assistant Archivist for Records Services—Washington, DC.

[FR Doc. E5–7323 Filed 12–13–05; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–271; License No. Dpr–28]

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.; Receipt of Request for Action Under 10 CFR 2.206

Notice is hereby given that by petition dated October 11, 2005, Mr. Jonathan M. Block requested that the Nuclear Regulatory Commission (NRC) take action with regard to Vermont Yankee Nuclear Power Station (Vermont Yankee). The petitioner requested that the NRC require a temporary closure or de-rating of Vermont Yankee.

As a basis for this request, the petitioner stated that evacuations would be impossible as a result of recent storm damage to the city of Keene, town of Hinsdale in New Hampshire, and other portions of New Hampshire that are part of existing evacuation routes for Vermont Yankee or within the effluent pathway in an emergency event.

The petition is being treated pursuant to 10 CFR 2.206 of the Commission's regulations. The petition has been referred to the Director of the Office of Nuclear Reactor Regulation. As provided by Section 2.206, appropriate action will be taken on this petition within a reasonable time. Copies of the petition are available for inspection at the Commission's Public Document Room, located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible 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/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209 or 301–415–4737, or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland this 7th day of December, 2005.

For the Nuclear Regulatory Commission.

Cornelius F. Holden,

Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E5–7300 Filed 12–13–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 040–07354]

Notice of Availability of Environmental Assessment and Finding of No Significant Impact for License Amendment for Department of the Army's Bomb Throwing Device (BTD) Area in Aberdeen Proving Ground, MD

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability.

FOR FURTHER INFORMATION CONTACT: Elizabeth Ullrich, Commerical and R&D Branch, Division of Nuclear Materials Safety, Region I, 475 Allendale Road, King of Prussia, Pennsylvania 19406, telephone (610) 337–5040, fax (610) 337–5269; or by e-mail: *exu@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Nuclear Regulatory Commission (NRC) is considering issuing a license amendment to the Department of the Army, U.S. Army Aberdeen Test Center, for Materials License No. SUB–834, to authorize release of its Bomb Throwing Device (BTD) area in Aberdeen Proving Ground, Maryland, for unrestricted use. NRC has prepared an Environmental Assessment (EA) in support of this action in accordance with the requirements of 10 CFR Part 51. Based on the EA, the NRC has concluded that a Finding of No Significant Impact (FONSI) is appropriate.

II. EA Summary

The purpose of the proposed action is to authorize the release of the licensee's BTD area located at Aberdeen Proving Ground, Aberdeen, Maryland, for unrestricted use. The Department of the Army was authorized by AEC/NRC from June 4, 1965, to use radioactive materials for munitions testing and research and development purposes in the BTD area. On January 13, 2005, the Department of the Army requested that NRC release the facility for unrestricted use. The Department of the Army has conducted surveys of the facility and provided information to the NRC to demonstrate that the site meets the license termination criteria in Subpart E of 10 CFR Part 20 for unrestricted use.

The NRC staff has prepared an EA in support of the license amendment. The BTD area was remediated and surveyed prior to the licensee requesting the license amendment. The NRC staff has reviewed the information and final status survey submitted by the Department of the Army. Based on its review, the staff has determined that there are no additional remediation activities necessary to complete the proposed action. Therefore, the staff considered the impact of the residual radioactivity in the BTD area and concluded that since the residual radioactivity meets the requirements in Subpart E of 10 CFR Part 20, a Finding of No Significant Impact is appropriate.

III. Finding of No Significant Impact

The staff has prepared the EA (summarized above) in support of the license amendment to release the BTD area for unrestricted use. The NRC staff has evaluated the Department of the Army's request and the results of the surveys and has concluded that the completed action complies with the criteria in Subpart E of 10 CFR Part 20. The staff has found that the radiological environmental impacts from the action are bounded by the impacts evaluated by NUREG–1496, Volumes 1–3, ''Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Facilities'' (ML042310492, ML042320379, and ML042330385). Additionally, no non-radiological or cumulative impacts were identified. On the basis of the EA, the NRC has concluded that the environmental impacts from the action are expected to be insignificant and has determined not to prepare an environmental impact statement for the action.

IV. Further Information

Documents related to this action, including the application for the license amendment and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*. From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this Notice are: ''Environmental Assessment Related to Issuance of a License Amendment of U.S. Nuclear Regulatory Commission Materials License No. SUB–834, Department of the Army, Aberdeen, Maryland'' [ML053410059], ''Radiological Final Status Survey Report, Bomb Throwing Device Site—Soils'' [ML052770370], and Remediation and Final Status Survey, Bomb Throwing Device Site—Structures'' [ML052770376]. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS,

should contact the NRC PDR Reference staff by telephone at (800) 397–4209 or (301) 415–4737, or by e-mail to *pdr@nrc.gov*.

Documents related to operations conducted under this license not specifically referenced in this Notice may not be electronically available and/or may not be publicly available. Persons who have an interest in reviewing these documents should submit a request to NRC under the Freedom of Information Act (FOIA). Instructions for submitting a FOIA request can be found on the NRC's Web site at *http://www.nrc.gov/reading-rm/foia/foia-privacy.html.*

Dated at King of Prussia, Pennsylvania this 7th day of December, 2005.

For the Nuclear Regulatory Commission.

James P. Dwyer,

Chief, Commercial and R&D Branch, Division of Nuclear Materials Safety, Region I.

[FR Doc. E5–7298 Filed 12–13–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 040–06394]

Notice of Availability of Environmental Assessment and Finding of No Significant Impact for License Amendment for Department of the Army's Transonic Range Facility in Aberdeen Proving Ground, MD

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability.

FOR FURTHER INFORMATION CONTACT: Elizabeth Ullrich, Commercial and R&D Branch, Division of Nuclear Materials Safety, Region I, 475 Allendale Road, King of Prussia, Pennsylvania 19406, telephone (610) 337–5040, fax (610) 337–5269; or by e-mail: *exu@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The Nuclear Regulatory Commission (NRC) is considering issuing a license amendment to the Department of the Army, U.S. Army Research Laboratory, for Materials License No. SMB–141, to authorize release of its Transonic Range in Aberdeen Proving Ground, Maryland, for unrestricted use. NRC has prepared an Environmental Assessment (EA) in support of this action in accordance with the requirements of 10 CFR Part 51. Based on the EA, the NRC has concluded that a Finding of No Significant Impact (FONSI) is appropriate.

II. EA Summary

The purpose of the proposed action is to authorize the release of the licensee's Transonic Range located on Aberdeen Proving Ground, Maryland, for unrestricted use. Department of the Army was authorized by AEC/NRC from April 12, 1961, to use radioactive materials for munitions testing and research and development purposes at the site. On January 13, 2005, the Department of the Army requested that NRC release the site for unrestricted use. The Department of the Army has conducted surveys of the site and provided information to the NRC to demonstrate that the site meets the license termination criteria in Subpart E of 10 CFR Part 20 for unrestricted use.

The NRC staff has prepared an EA in support of the license amendment. The site was remediated and surveyed prior to the licensee requesting the license amendment. The NRC staff has reviewed the information and final status survey submitted by the Department of the Army. Based on its review, the staff has determined that there are no additional remediation activities necessary to complete the proposed action. Therefore, the staff considered the impact of the residual radioactivity at the site and concluded that since the residual radioactivity meets the requirements in Subpart E of 10 CFR Part 20, a Finding of No Significant Impact is appropriate.

III. Finding of No Significant Impact

The staff has prepared the EA (summarized above) in support of the license amendment to release the Transonic Range for unrestricted use. The NRC staff has evaluated the Department of the Army's request and the results of the surveys and has concluded that the completed action complies with the criteria in Subpart E of 10 CFR Part 20. The staff has found that the radiological environmental impacts from the action are bounded by the impacts evaluated by NUREG–1496, Volumes 1–3, ''Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Facilities'' (ML042310492, ML042320379, and ML042330385). Additionally, no non-radiological or cumulative impacts were identified. On the basis of the EA, the NRC has concluded that the environmental impacts from the action are expected to be insignificant and has determined not to prepare an environmental impact statement for the action.

IV. Further Information

Documents related to this action, including the application for the license amendment and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this Notice are: ''Environmental Assessment Related to Issuance of a License Amendment of U.S. Nuclear Regulatory Commission Materials License No. SMB–141, Department of the Army, Aberdeen, Maryland'' [ML053410278], ''Remediation and Final Status Survey, Transonic Range Depleted Uranium Study Area—Structures'' [ML050280349 and ML050280354], and ''Radiological Final Status Survey, Transonic Range-Land Areas, Depleted Uranium Study Area'' [ML050280341]. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at (800) 397–4209 or (301) 415–4737, or by e-mail to *pdr@nrc.gov.*

Documents related to operations conducted under this license not specifically referenced in this Notice may not be electronically available and/or may not be publicly available. Persons who have an interest in reviewing these documents should submit a request to NRC under the Freedom of Information Act (FOIA). Instructions for submitting a FOIA request can be found on the NRC's web site at *http://www.nrc.gov/reading-rm/foia/foia-privacy.html.*

Dated at King of Prussia, Pennsylvania this 7th day of December, 2005.

For the Nuclear Regulatory Commission.

James P. Dwyer,

Chief, Commercial and R&D Branch, Division of Nuclear Materials Safety, Region I.

[FR Doc. E5–7297 Filed 12–13–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act: Meetings

DATES: Weeks of December 12, 19, 26, 2005, January 2, 9, 16, 2006.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and closed.

MATTERS TO BE CONSIDERED:

Week of December 12, 2005

Monday, December 12, 2005

8:50 a.m. Affirmation Session (Public Meeting) (Tentative). a. Exelon Generation Company, LLC (Early Site Permit for Clinton Site) (Tentative)

9:00 a.m. Discussion of Security Issues (closed—ex. 1)

Wednesday, December 14, 2005

2:00 p.m. Discussion of Security Issues (closed—ex. 1)

Thursday, December 15, 2005

1:30 p.m. Briefing on Threat Environment Assessment (closed—ex. 1)

Week of December 19, 2005—Tentative

There are no meetings scheduled for the Week of December 19, 2005.

Week of December 26, 2005—Tentative

There are no meetings scheduled for the Week of December 26, 2005.

Week of January 2, 2006—Tentative

There are no meetings scheduled for the Week of January 2, 2006.

Week of January 9, 2006—Tentative

Tuesday, January 10, 2006

9:30 a.m. Briefing on International Research and Bilateral Agreements. (Contact: Roman Shaffer, 301–415–7606.)

This meeting will be webcast live at the Web address *http://www.nrc.gov*.

Wednesday, January 11, 2006

9:30 a.m. Meeting with Advisory Committee on Nuclear Waste (ACNW). (Contact: John Larkins, 301–415–7360.)

This meeting will be webcast live at the Web address *http://www.nrc.gov.*

Thursday, January 12, 2006

9:30 a.m. Discussion of Security Issues (closed—ex. 1 & 2)

Week of January 16, 2006—Tentative

Thursday, January 19, 2006

1:30 p.m. Discussion of Security Issues (closed—ex. 1)

*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292. Contact person for more information: Michelle Schroll, (301) 415–1662.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/what-we-do/policy-making/schedule.html.*

* * * * *

ADDITIONAL INFORMATION: By a vote of 4–1 on December 7, the Commission determined pursuant to U.S.C. 552b(e) and § 9.107(a) of the Commission's rules that ''Discussion of International Issues (closed—ex. 9)'' be held December 8, and on less than one week's notice to the public.

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.* braille, large print), please notify the NRC's Disability Program Coordinator, August Spector, at 301–415–7080, TDD: 301–415–2100, or by e-mail at *aks@nrc.gov*. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov.*

Dated: December 8, 2005

R. Michelle Schroll,

Office of the Secretary.

[FR Doc. 05–24064 Filed 12–12–05; 12:07 pm]

BILLING CODE 7590–01–M

NUCLEAR REGULATORY COMMISSION

Notice of Opportunity To Comment on Model Safety Evaluation on Technical Specification Improvement for Boiling Water Reactor Plants; to Risk-Inform Requirements Regarding Selected Required Action End States Using the Consolidated Line Item Improvement Process

AGENCY: Nuclear Regulatory Commission.

ACTION: Request for comment.

SUMMARY: Notice is hereby given that the staff of the Nuclear Regulatory Commission (NRC) has prepared a model safety evaluation (SE) relating to changes to end state requirements for required actions in Boiling Water Reactor (BWR) plants' technical specifications (TS). The NRC staff has also prepared a model no-significant-hazards-consideration (NSHC) determination relating to this matter. The purpose of these models is to permit the NRC to efficiently process amendments that propose to adopt technical specifications changes, designated as TSTF–423, related to Topical Report GE NEDC–32988, Revision 2, ''Technical Justification to support Risk Informed Modification to Selected Required Action End States for BWR Plants,'' which was approved by an NRC SE dated September 27, 2002. Licensees of BWR nuclear power reactors to which the models apply could then request amendments, confirming the applicability of the SE and NSHC determination to their reactors. The NRC staff is requesting comment on the model SE and model NSHC determination prior to announcing their availability for referencing in license amendment applications.

DATES: The comment period expires January 13, 2006. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Comments may be submitted either electronically or via U.S. mail. Comments may be submitted by electronic mail to *CLIIP@nrc.gov*. Submit written comments to Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, Mail Stop: T–6 D59, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Hand deliver comments to: 11545 Rockville Pike, Rockville, Maryland, between 7:45 a.m. and 4:15 p.m. on Federal workdays. Copies of comments received may be examined at the NRC's Public Document Room, 11555 Rockville Pike (Room O–1F21), Rockville, Maryland.

FOR FURTHER INFORMATION CONTACT: T. R. Tjader, Mail Stop: O–12H2, Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301–415–1187.

SUPPLEMENTARY INFORMATION:

Background

Regulatory Issue Summary 2000–06, ''Consolidated Line Item Improvement Process for Adopting Standard Technical Specification Changes for Power Reactors,'' was issued on March

20, 2000. The consolidated line item improvement process (CLIIP) is intended to improve the efficiency of NRC licensing processes, by processing proposed changes to the standard technical specifications (STS) in a manner that supports subsequent license amendment applications. The CLIIP includes an opportunity for the public to comment on proposed changes to the STS after a preliminary assessment by the NRC staff and finding that the change will likely be offered for adoption by licensees. The CLIIP directs the NRC staff to evaluate any comments received for a proposed change to the STS and to either reconsider the change or announce the availability of the change for adoption by licensees. Licensees opting to apply for this TS change are responsible for reviewing the staff's evaluation, referencing the applicable technical justifications, and providing any necessary plant-specific information. Each amendment application made in response to the notice of availability will be processed and noticed in accordance with applicable NRC rules and procedures.

This notice solicits comment on changes to end state requirements for required actions, if risk is assessed and managed, for the primary purpose of accomplishing short-duration repairs which necessitated exiting the original Mode of operation. The change was proposed in Topical Report GE NEDC–32988, Revision 2, ''Technical Justification to support Risk Informed Modification to Selected Required Action End States for BWR Plants,'' which was approved by an NRC SE dated September 27, 2002. This change was proposed for incorporation into the standard technical specifications by the owners groups participants in the Technical Specification Task Force (TSTF) and is designated TSTF–423. TSTF–423 can be viewed on the NRC's Web page at *http://www.nrc.gov/reactors/operating/licensing/techspecs.html.*

Applicability

This proposal to modify technical specification requirements by the adoption of TSTF–423 is applicable to all licensees of BWR plants who have adopted or will adopt, in conjunction with the proposed change, technical specification requirements for a Bases control program consistent with the TS Bases Control Program described in Section 5.5 of the applicable vendor's STS.

To efficiently process the incoming license amendment applications, the staff requests that each licensee applying for the changes proposed in TSTF–423 include Bases for the proposed TS consistent with the Bases proposed in TSTF–423. In addition, licensees that have not adopted requirements for a Bases control program by converting to the improved STS or by other means, are requested to include the requirements for a Bases control program consistent with the STS in their application for the proposed change. The need for a Bases control program stems from the need for adequate regulatory control of some key elements of the proposal that are contained in the proposed Bases in TSTF–423. The staff is requesting that the Bases be included with the proposed license amendments in this case because the changes to the TS and the changes to the associated Bases form an integral change to a plant's licensing bases. To ensure that the overall change, including the Bases, includes appropriate regulatory controls, the staff plans to condition the issuance of each license amendment on the licensee's incorporation of the changes into the Bases document and on requiring the licensee to control the changes in accordance with the Bases Control Program. The CLIIP does not prevent licensees from requesting an alternative approach or proposing the changes without the requested Bases and Bases control program. However, deviations from the approach recommended in this notice may require additional review by the NRC staff and may increase the time and resources needed for the review.

Public Notices

This notice requests comments from interested members of the public within 30 days of the date of publication in the **Federal Register**. After evaluating the comments received as a result of this notice, the staff will either reconsider the proposed change or announce the availability of the change in a subsequent notice (perhaps with some changes to the safety evaluation or the proposed NSHC determination as a result of public comments). If the staff announces the availability of the change, licensees wishing to adopt the change must submit an application in accordance with applicable rules and other regulatory requirements. For each application, the staff will publish a notice of consideration of issuance of amendment to facility operating licenses, a proposed NSHC determination, and a notice of opportunity for a hearing. The staff will also publish a notice of issuance of an amendment to operating license to announce the modification of end state requirements for required actions in plant technical specifications.

Proposed Model Plant Specific Safety Evaluation for Technical Specification Task Force (TSTF) Change TSTF–423, Risk Informed Modification to Selected Required Action End States, a Consolidated Line Item Improvement

Safety Evaluation by the Office of Nuclear Reactor Regulation; Related to Amendment No. [____] to Facility Operating License NFP–[____], [Utility Name], [Plant Name], [Unit____], Docket No.–[____]

1.0 Introduction

By letter dated _____, 20 __, [Utility Name] (the licensee) proposed changes to the technical specifications (TS) for [plant name]. The requested changes are the adoption of TSTF–423, Revision 0, to the Boiling Water Reactor (BWR) Standard Technical Specifications (STS) (NUREG 1433 and NUREG 1434), which was proposed by the Nuclear Energy Institute (NEI) Risk Informed Technical Specifications Task Force (RITSTF) on August 12, 2003, on behalf of the industry. TSTF–423, Revision 0, incorporates the BWR Owners Group (BWROG) approved Topical Report NEDC–32988, Revision 2, ''Technical Justification to Support Risk Informed Modification to Selected Required Action End States for BWR Plants'' (Reference 1), into the BWR STS (**Note:** The changes are made with respect to Revision 2 of the STS NUREGs).

TSTF–423 is one of the industry's initiatives developed under the Risk Management Technical Specifications (RMTS) program. These initiatives are intended to maintain or improve safety through the incorporation of risk assessment and management techniques in TS, while reducing unnecessary burden and making TS requirements consistent with the Commission's other risk-informed regulatory requirements, in particular the maintenance rule.

The Code of Federal Regulations, 10 CFR 50.36, ''Technical Specifications,'' states: ''When a limiting condition for operation of a nuclear reactor is not met, the licensee shall shut down the reactor or follow the remedial action permitted by the technical specification until the condition can be met.'' The STS and many plant TS provide a completion time (CT) for the plant to meet the limiting condition for operation (LCO). If the LCO or the remedial action cannot be met, then the reactor is required to be shut down. When the STS and individual plant technical specifications were written, the shutdown condition or end state specified was usually cold shutdown.

Topical Report NEDC–32988, Revision 2, provides the technical basis to change certain required end states when the TS Actions for remaining in power operation cannot be met within the CTs. Most of the requested TS changes permit an end state of hot shutdown (Mode 3), if risk is assessed and managed, rather than an end state of cold shutdown (Mode 4) contained in the current TS. The request was limited to those end states where: (1) Entry into the shutdown mode is for a short interval, (2) entry is initiated by inoperability of a single train of equipment or a restriction on a plant operational parameter, unless otherwise stated in the applicable TS, and (3) the primary purpose is to correct the initiating condition and return to power operation as soon as is practical.

The STS for BWR plants define five operational modes. In general, they are:

- Mode 1—Power Operation. The reactor mode switch is in run position.
- Mode 2—Reactor Startup. The reactor mode switch is in refuel position (with all reactor vessel head closure bolts fully tensioned) or in startup/hot standby position.
- Mode 3—Hot Shutdown. The reactor coolant system (RCS) temperature is above 200 degrees F (TS specific) and the reactor mode switch is in shutdown position (with all reactor vessel head closure bolts fully tensioned).
- Mode 4—Cold Shutdown. The RCS temperature is equal to or less than 200 degrees F and the reactor mode switch is in shutdown position (with all reactor vessel head closure bolts fully tensioned).
- Mode 5—Refueling. The reactor mode switch is in shutdown or refuel position, and one or more reactor vessel head closure bolts are less than fully tensioned.

Criticality is not allowed in Modes 3 through 5.

TSTF–423 generally allows a Mode 3 end state rather than a Mode 4 end state for selected initiating conditions in order to perform short-duration repairs which necessitate exiting the original Mode of operation. Short duration repairs are on the order of 2- to 3-days, but not more than a week.

2.0 Regulatory Evaluation

In 10 CFR 50.36, the Commission established its regulatory requirements related to the content of TS. Pursuant to 10 CFR 50.36(c), TS are required to include items in the following five specific categories related to station operation: (1) Safety limits, limiting safety system settings, and limiting control settings; (2) limiting conditions for operation (LCOs); (3) surveillance requirements (SRs); (4) design features; and (5) administrative controls. The rule does not specify the particular requirements to be included in a plant's TS. As stated in 10 CFR 50.36(c)(2)(i), the ''Limiting conditions for operation are the lowest functional capability or performance levels of equipment required for safe operation of the facility. When a limiting condition for operation of a nuclear reactor is not met, the licensee shall shut down the reactor or follow any remedial action permitted by the technical specifications * * *.''

Reference 1 states: ''Cold shutdown is normally required when an inoperable system or train cannot be restored to an operable status within the allowed time. Going to cold shutdown results in the loss of steam-driven systems, challenges the shutdown heat removal systems, and requires restarting the plant. A more preferred operational mode is one that maintains adequate risk levels while repairs are completed without causing unnecessary challenges to plant equipment during shutdown and startup transitions.'' In the end state changes under consideration here, a problem with a component or train has or will result in a failure to meet a TS, and a controlled shutdown has begun because a TS Action requirement cannot be met within the TS CT.

Most of today's TS and the design basis analyses were developed under the perception that putting a plant in cold shutdown would result in the safest condition and the design basis analyses would bound credible shutdown accidents. In the late 1980s and early 1990s, the NRC and licensees recognized that this perception was incorrect and took corrective actions to improve shutdown operation. At the same time, standard TS were developed and many licensees improved their TS. Since enactment of a shutdown rule was expected, almost all TS changes involving power operation, including a revised end state requirement, were postponed (see, for example the Final Policy Statement on TS Improvements, Reference 2). However, in the mid 1990s, the Commission decided a shutdown rule was not necessary in light of industry improvements.

Controlling shutdown risk encompasses control of conditions that can cause potential initiating events and responses to those initiating events that do occur. Initiating events are a function of equipment malfunctions and human error. Responses to events are a function of plant sensitivity, ongoing activities, human error, defense-in-depth, and additional equipment malfunctions.

In practice, the risk during shutdown operations is often addressed via voluntary actions and application of 10 CFR 50.65 (Reference 3), the maintenance rule. Section 50.65(a)(4) states: ''Before performing maintenance activities * * * the licensee shall assess and manage the increase in risk that may result from the proposed maintenance activities. The scope of the assessment may be limited to structures, systems, and components that a risk-informed evaluation process has shown to be significant to public health and safety.'' Regulatory Guide (RG) 1.182 (Reference 4) provides guidance on implementing the provisions of 10 CFR 50.65(a)(4) by endorsing the revised Section 11 (published separately) to NUMARC 93–01, Revision 2. The revised Section 11 of NUMARC 93–01, Revision 2, was subsequently incorporated into Revision 3 of NUMARC 93–01 (Reference 5). However, Revision 3 has not yet been formally endorsed by the NRC. The changes in TSTF–423 are consistent with the rules, regulations and associated regulatory guidance, as noted above.

3.0 Technical Evaluation

The changes proposed in TSTF–423 are consistent with the changes proposed and justified in Topical Report GE NEDC–32988–A, Revision 2, and approved by the associated NRC SE (Reference 6). The evaluation included in Reference 6, as appropriate and applicable to the changes of TSTF–423 (Reference 7), is reiterated here and differences from the SE are justified. In its application the licensee commits to TSTF–IG–05–02, Implementation Guidance for TSTF–423, Revision 0, ''Technical Specifications End States, NEDC–32988–A,'' (Reference 8), which addresses a variety of issues such as considerations and compensatory actions for risk-significant plant configurations. An overview of the generic evaluation and associated risk assessment is provided below, along with a summary of the associated TS changes justified by Reference 1.

3.1 Risk Assessment

The objective of the BWROG topical report (Reference 1) risk assessment was to show that any risk increases associated with the proposed changes in TS end states are either negligible or negative (*i.e.*, a net decrease in risk).

The BWROG topical report documents a risk-informed analysis of the proposed TS change. Probabilistic Risk Assessment (PRA) results and insights are used, in combination with results of deterministic assessments, to

identify and propose changes in ''end states'' for all BWR plants. This is in accordance with guidance provided in RG 1.174 (Reference 9) and RG 1.177 (Reference 10). The three-tiered approach documented in RG 1.177, ''An Approach for Plant-Specific, Risk-Informed Decision Making: Technical Specifications,'' was followed. The first tier of the three-tiered approach includes the assessment of the risk impact of the proposed change for comparison to acceptance guidelines consistent with the Commission's Safety Goal Policy Statement, as documented in RG 1.174 entitled ''An Approach for Using Probabilistic Risk Assessment in Risk-Informed Decisions on Plant-Specific Changes to the Licensing Basis.'' In addition, the first tier aims at ensuring that there are no unacceptable temporary risk increases during the implementation of the proposed TS change, such as when equipment is taken out of service. The second tier addresses the need to preclude potentially high-risk configurations which could result if equipment is taken out of service concurrently with the implementation of the proposed TS change. The third tier addresses the application of 10 CFR 50.65(a)(4) of the Maintenance Rule for identifying risk-significant configurations resulting from maintenance related activities and taking appropriate compensatory measures to avoid such configurations. Unless invoked, such as by this or another TS application, 50.65(a)(4) is applicable to maintenance related activities and does not cover other operational activities beyond the effect they may have on existing maintenance related risk.

BWROG's risk assessment approach was found comprehensive and acceptable in the SE for the topical report. In addition, the analyses show that the three-tiered approach criteria for allowing TS changes are met as follows:

• *Risk Impact of the Proposed Change (Tier 1).* The risk changes associated with the TS changes in TSTF–423, in terms of mean yearly increases in core damage frequency (CDF) and large early release frequency (LERF), are risk neutral or risk beneficial. In addition, there are no significant temporary risk increases, as defined by RG 1.177 criteria, associated with the implementation of the TS end state changes.

• *Avoidance of Risk-Significant Configurations (Tier 2).* The performed risk analyses, which are based on single LCOs, shows that there are no high-risk configurations associated with the TS end state changes. The reliability of redundant trains is normally covered by a single LCO. When multiple LCOs occur, which affect trains in several systems, the plant's risk-informed configuration risk management program (CRMP), or the risk assessment and management program implemented in response to the Maintenance Rule 10 CFR 50.65(a)(4), shall ensure that high-risk configurations are avoided. As part of the implementation of TSTF–423, the licensee commits to follow Section 11 of NUMARC 93–01, Revision 3, and include guidance in appropriate plant procedures and/or administrative controls to preclude high-risk plant configurations when the plant is at the proposed end state. The staff finds that such guidance is adequate for preventing risk-significant plant configurations.

• *Configuration Risk Management (Tier 3).* The licensee has a program in place to comply with 10 CFR 50.65 (a)(4) to assess and manage the risk from proposed maintenance activities. This program can support a licensee decision in selecting the appropriate actions to control risk for most cases in which a risk-informed TS is entered.

The generic risk impact of the proposed end state mode change was evaluated subject to the following assumptions:

1. The entry into the proposed end state is initiated by the inoperability of a single train of equipment or a restriction on a plant operational parameter, unless otherwise stated in the applicable technical specification.

2. The primary purpose of entering the end state is to correct the initiating condition and return to power as soon as is practical.

3. When Mode 3 is entered as the repair end state, the time the reactor coolant pressure is above 500 psig will be minimized. If reactor coolant pressure is above 500 psig for more than 12 hours, the associated plant risk will be assessed and managed.

These assumptions are consistent with typical entries into Mode 3 for short duration repairs, which is the intended use of the TS end state changes.

The staff concludes that, in general, going to Mode 3 (hot shutdown) instead of going to Mode 4 (cold shutdown) to carry out equipment repairs that are of short duration, does not have any adverse effect on plant risk.

3.2 Assessment of TS Changes

The changes proposed by the licensee and in TSTF–423 are consistent with the changes proposed in topical report GE NEDC–32988, Revision 2, and approved by the NRC SE of September 27, 2002. [NOTE: Only those changes proposed in TSTF–423 are addressed in this SE. The SE and associated topical report address the entire fleet of BWR plants, and the plants adopting TSTF–423 must confirm the applicability of the changes to their plant.] Following are the proposed changes, including a synopsis of the STS LCO, the change, and a brief conclusion of acceptability.

3.2.1 TS 4.5.1.2 and LCO 3.4.3 (BWR/4); TS 4.5.2.2 and LCO 3.4.4 (BWR/6), Safety/Relief Valves (SRVs)

The function of the SRVs is to protect the plant against severe overpressurization events. These TS provide the operability requirements for the SRVs as described below. The TS change allows the plant to remain in Mode 3 until the repairs are completed.

[**Note:** Plant Applicability, BWR4/6]

LCO: The safety function of 11 SRVs must be operable (BWR/4 plants). The safety function of seven SRVs must be operable and the relief function of seven additional SRVs must be operable (BWR/6 plants).

Condition requiring entry into end state: If the LCO cannot be met with one or two SRVs inoperable, the inoperable valves must be returned to operability within 14 days. If the SRVs cannot be returned to operable status within that time, the plant must be placed in Mode 3 within 12 hours and in Mode 4 within 36 hours.

Proposed modification for end state required actions: If the LCO cannot be met with one or two SRVs inoperable, the inoperable valves must be returned to operability within 14 days. If the one or two inoperable SRVs cannot be returned to operable status within 14 days, the plant must be placed in Mode 3 within 12 hours. If three or more SRVs become inoperable, the plant must be placed in Mode 4 within 36 hours.

Assessment: The BWROG topical report did a comparative PRA evaluation of the core damage risks of operation in the current end state and in the proposed Mode 3 end state. The evaluation indicates that the core damage risks are lower in Mode 3 than in Mode 4. Going to Mode 4 for one inoperable SRV would cause loss of the high-pressure steam-driven injection system (reactor core isolation cooling (RCIC)/high pressure coolant injection (HPCI)), and loss of the power conversion system (condenser/feedwater), and require activating the residual heat removal (RHR) system. In addition, emergency operating procedures (EOPs) direct the operator to take control of the depressurization function if low pressure injection/spray

systems are needed for reactor pressure vessel (RPV) water makeup and cooling. Based on the low probability of loss of the necessary overpressure protection function and the number of systems available in Mode 3, the staff concludes in the SE (reference 6) for the BWROG topical report that the risks of staying in Mode 3 are approximately the same as, and in some cases lower than, the risks of going to the Mode 4 end state. The change allows the inoperable SRV to be repaired in a plant operating mode with lower risks. After repairs are made, the plant can be brought to full-power operation with less potential for transients and errors. The plant is taken into cold shutdown only when three or more SRVs are inoperable. Since the time spent in Mode 3 to perform the repair is infrequent and limited, the proposed change is acceptable, particularly in light of defense-in-depth considerations.

Finding: Based on the above assessment, the staff finds that the requested change to allow operation in Mode 3 with a minimum number of SRVs inoperable after plant risk has been assessed and managed, is acceptable.

3.2.2 TS 4.5.1.3 and LCO 3.5.1 (BWR/4); TS 4.5.2.3 and LCO 3.5.1 (BWR/6), Emergency Core Cooling Systems (ECCS) (Operating)

The ECCS systems provide cooling water to the core in the event of a loss-of-coolant accident (LOCA). This set of ECCS TS provide the operability requirements for the various ECCS subsystems as described below. This TS change would delete the secondary actions. The plant can remain in Mode 3 until the required repair actions are completed. The reactor is not depressurized.

[**Note:** Plant Applicability, BWR4/6]

LCO: Each ECCS injection/spray subsystem and the automatic depressurization system (ADS) function of seven BWR/4, or eight BWR/6, SRVs must be operable.

Conditions requiring entry into end state: If the LCO cannot be met, the following actions must be taken for the listed conditions:

a. If one low-pressure ECCS injection/spray subsystem is inoperable, the subsystem must be restored to operable status in 7 days.

b. If the inoperable ECCS injection/core spray cannot be restored to operable status, the plant must be placed in Mode 3 within 12 hours and Mode 4 within 36 hours (BWR/4 plants only).

c. If two ECCS injection subsystems are inoperable or one ECCS injection subsystem and one ECCS spray system are inoperable, one ECCS injection/spray subsystem must be restored to operable status within 72 hours. If this required action cannot be met, the plant must be placed in Mode 3 within 12 hours and in Mode 4 within 36 hours (BWR/6 plants only).

d. If the HPCI/High Pressure Core Spray (HPCS) system is inoperable, the RCIC system must be verified to be operable by administrative means within 1 hour and the HPCI/HPCS system restored to operable status within 14 days.

e. If one ADS valve is inoperable, it must be restored to operable status within 14 days.

f. If one ADS valve is inoperable and one low-pressure ECCS injection/spray subsystem is inoperable, the ADS valve must be restored to operable status within 72 hours or the low-pressure ECCS injection/spray subsystem must be restored to operable status within 72 hours.

g. If two or more ADS valves become inoperable, or the required actions described in items e and/or f cannot be met, the plant must be placed in Mode 3 within 12 hours and the reactor steam dome pressure reduced to less than 150 psig within 36 hours.

Proposed modification for end state required actions:

a. No change

b. If the ECCS injection or spray system is inoperable, the plant must be restored to operable status within 12 hours. The plant is not taken into Mode 4 (cold shutdown).

c. If two ECCS injection subsystems are inoperable or one ECCS injection subsystem and one ECCS spray system are inoperable, one ECCS injection/spray subsystem must be restored to operable status within 72 hours. If this required action cannot be met, the plant must be placed in Mode 3 within 12 hours. The plant is not taken into Mode 4 (BWR/6 plants only).

d. No change

e. No change

f. No change

g. If two or more ADS valves become inoperable or the required actions described in item e and/or f cannot be met, the plant must be placed in Mode 3 within 12 hours. The reactor is not depressurized and not taken to Mode 4.

Assessment: The BWROG topical report did a comparative PRA evaluation of the core damage risks of operation in the current end state and the proposed Mode 3 end state. The evaluation indicates that the core damage risks are lower in Mode 3 than in the current end state Mode 4. Going to Mode 4 for one ECCS subsystem or one ADS valve would cause loss of the high-pressure steam-driven injection system (RCIC/HPCI), and loss of the power conversion system (condenser/feedwater), and require activating the RHR system. In addition, Plant Emergency Operating Procedures (EOPs) direct the operator to take control of the depressurization function if low-pressure injection/spray systems are needed for RPV water makeup and cooling. Based on the low probability of loss of the reactor coolant inventory and the number of systems available in Mode 3, the staff concludes in the SE to the BWR topical report that the risks of staying in Mode 3 are approximately the same as, and in some cases lower than, the risks of going to the Mode 4 end state.

Finding: Based on the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.3 TS 4.5.1.4 and LCO 3.5.3 (BWR/4 only), Reactor Core Isolation Cooling (RCIC) System

The function of the RCIC system is to provide reactor coolant makeup during loss of feedwater and other transient events. This TS provides the operability requirements for the RCIC system as described below. The TS change allows the plant to remain in Mode 3 until the repairs are completed.

[**Note:** Plant Applicability, BWR/4]

LCO: The RCIC system must be operable during Modes 1, 2 and 3 when the reactor steam dome pressure is greater than 150 psig.

Condition requiring entry into end state: If the LCO cannot be met, the following actions must be taken: (a) verify by administrative means within 1 hour that the HPCI system is operable, (b) restore the RCIC system to operable status within 14 days. If either or both actions cannot be completed within the allotted time, the plant must be placed in Mode 3 within 12 hours and the reactor steam dome pressure reduced to less than 150 psig within 36 hours.

Proposed modification for end state required actions: This TS change keeps the plant in Mode 3 (hot shutdown) until the required repairs are completed. The reactor steam dome pressure is not reduced to less than 150 psig.

Assessment: This change would allow the inoperable RCIC system to be repaired in a plant operating mode with lower risk and without challenging the normal shutdown systems. The BWROG

topical report did a comparative PRA evaluation of the core damage risks of operation in the current end state and in the proposed Mode 3 end state. The evaluation indicates that the core damage risks are lower in Mode 3 than in Mode 4. Going to Mode 3 with reactor steam dome pressure less than 150 psig for inoperability of RCIC would also cause loss of the high-pressure steam-driven injection system HPCI and loss of the power conversion system (condenser/ feedwater), and would require activating the RHR system. In addition, Plant EOPs direct the operator to take control of the depressurization function if low pressure injection/spray systems are needed for RPV water makeup and cooling. Based on the low probability of loss of the necessary overpressure protection function and the number of systems available in Mode 3, the staff concludes in the SE to the BWR topical report that the risks of staying in Mode 3 are approximately the same as, and in some cases lower than, the risks of going to the Mode 4 end state.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.4 TS 4.5.1.6 and LCO 3.6.1.6 (BWR/4); TS 5.5.2.5 and LCO 3.6.1.6 (BWR/6), Low-Low Set Logic (LLS) Valves

The function of LLS logic is to prevent excessive short-duration SRV cycling during an overpressure event. This TS provides operability requirements for the four LLS SRVs as described below. The TS change allows the plant to remain in Mode 3 until the repairs are completed.

[**Note:** Plant Applicability, BWR 4/6]

Conditions requiring entry into end state: If one LLS valve is inoperable, it must be returned to operability within 14 days. If the LLS valve cannot be returned to operable status within the allotted time, the plant must be placed in Mode 3 within 12 hours and in Mode 4 within 36 hours.

Proposed modification for end state required actions: The TS change would keep the plant in Mode 3 until the required repair actions are completed. The plant would not be taken into Mode 4 (cold shutdown).

Assessment: The BWROG topical report did a comparative PRA evaluation of the core damage risks of operation in the current end state and the proposed Mode 3 end state. The evaluation indicates that the core damage risks are lower in Mode 3 than in Mode 4, the current end state. Going to Mode 4 for one LLS inoperable SRV would cause loss of the high-pressure steam-driven injection system (RCIC/ HPCI), and loss of the power conversion system (condenser/feedwater), and would require activating the RHR system. With one LLS valve inoperable, the remaining valves are adequate to perform the required function. EOPs direct the operator to take control of the depressurization function if low pressure injection/spray systems are needed for RPV water makeup and cooling. Based on the low probability of loss of the necessary overpressure protection function during the infrequent and limited time in Mode 3 and the number of systems available in Mode 3, the staff concludes in the SE to the BWR topical report that the risks of staying in Mode 3 are approximately the same as and in some cases lower than the risks of going to the Mode 4 end state. The proposed change allows repairs of the inoperable SRV to be performed in a plant operating mode with lower risks.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.5 TS 4.5.1.1, TS 4.5.2.1 and LCO 3.3.8.2, Reactor Protection System (RPS) Electric Power Monitoring

RPS Electric Power Monitoring System is provided to isolate the RPS bus from the motor generator (MG) set or an alternate power supply in the event of over voltage, under voltage, or under frequency. This system protects the load connected to the RPS bus against unacceptable voltage and frequency conditions and forms an important part of the primary success path of the essential safety circuits. Some of the essential equipment powered from the RPS buses includes the RPS logic, scram solenoids, and various valve isolation logic. The TS change allows the plant to remain in Mode 3 until the repairs are completed.

[**Note:** Plant Applicability, BWR 4/6]

LCO: For Modes 1, 2, 3 and Modes 4 and 5 (with any control rod withdrawn from a core cell containing one or more fuel assemblies), two RPS electric power monitoring assemblies shall be operable for each in-service RPS motor generator set or alternate power supply.

Condition Requiring Entry into End State: If the LCO cannot be met, the associated in-service power supply(s) must be removed from service within 72 hours for one Electric Power Assembly (EPA) inoperable or within one hour for both EPAs inoperable. In Modes 1, 2, and 3, if the in-service power supply(s) cannot be removed from service within the allotted time, the plant must be placed in Mode 3 within 12 hours and Mode 4 within 36 hours.

Proposed Modification: The proposed change is to keep the plant in Mode 3 until the repair actions are completed. Delete required action in C.2 which required the plant to be in Mode 4.

Assessment: To reach Mode 3 per the TS, there must be a functioning power supply with degraded protective circuitry in operation. However, the over voltage, under voltage, or under frequency condition must exist for an extended time period to cause damage. There is a low probability of this occurring in the short period of time that the plant would remain in Mode 3 without this protection.

The specific failure condition of interest is not risk significant for BWR PRAs. If the required restoration actions cannot be completed within the specified time, going into Mode 4 would cause loss of the high-pressure steam-driven injection system (RCIC/HPCI) and loss of the power conversion system (condenser/feedwater), and would require activating the RHR system. In addition, EOPs direct the operator to take control of the depressurization function if low pressure injection/spray systems are needed for RPV water makeup and cooling. Based on the low probability of loss of the RPS power monitoring system during the infrequent and limited time in Mode 3 and the number of systems available in Mode 3, the staff concludes in the SE to the BWR topical report that the risks of staying in Mode 3 are approximately the same as and in some cases lower than the risks of going to the Mode 4 end state.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.6 TS 4.5.1.19 and LCO 3.8.1(BWR/4); TS 4.5.2.17 and LCO 3.8.1(BWR/6), AC Sources (Operating)

The purpose of the AC electrical system is to provide during all situations the power required to put and maintain the plant in a safe condition and prevent the release of radioactivity to the environment.

The Class 1E electrical power distribution system AC sources consist of the offsite power source (preferred power sources, normal and alternate(s)), and the onsite standby power sources

(*e.g.*, emergency diesel generators (EDGs)). In addition, many sites provide a crosstie capability between units.

As required by General Design Criterion (GDC) 17 of 10 CFR Part 50, Appendix A, the design of the AC electrical system provides independence and redundancy. The onsite Class 1E AC distribution system is divided into redundant divisions so that the loss of any one division does not prevent the minimum safety functions from being performed. Each division has connections to two preferred offsite power sources and a single EDG or other Class 1E Standby AC power source.

Offsite power is supplied to the unit switchyard(s) from the transmission network by two transmission lines. From the switchyard(s), two electrically and physically separated circuits provide AC power through a stepdown transformer(s) to the 4.16-kV emergency buses.

In the event of a loss of offsite power, the emergency electrical loads are automatically connected to the EDGs in sufficient time to provide for a safe reactor shutdown and to mitigate the consequence of a design basis accident (DBA) such as a LOCA.

[**Note:** Plant Applicability, BWR 4/6]

LCO: The following AC electrical power sources shall be operable in Modes 1, 2, and 3:

a. Two qualified circuits between the offsite transmission network and the onsite Class1E AC Electric Power Distribution System,

b. Three EDGs,

c. Automatic Load Sequencers.

Condition requiring entry into end state: Plant operators must bring the plant to Mode 4 within 36 hours following the sustained inoperability of one required Automatic Load Sequencer; either or both required offsite circuits; either one, two or three required EDGs; or one required offsite circuit and one, two or three required EDGs.

Proposed modification for end state require actions: Delete required action G.2 to go to Mode 4 (cold shutdown). The plant will remain in Mode 3 (hot shutdown).

Assessment: Entry into any of the conditions for the AC power sources implies that the AC power sources have been degraded and the single failure protection for the safe shutdown equipment may be ineffective. Consequently, as specified in TS 3.8.1 at present, the plant operators must bring the plant to Mode 4 when the required action is not completed by the specified time for the associated action.

The BWROG topical report did a comparative PRA evaluation of the core damage risks of operation in the current end state and in the proposed Mode 3 end state. Events initiated by the loss of offsite power are dominant contributors to core damage frequency in most BWR PRAs, and the steam-driven core cooling systems, RCIC and HPCI, play a major role in mitigating these events. The evaluation indicates that the core damage risks are lower in Mode 3 than in Mode 4 for one inoperable AC power source. Going to Mode 4 for one inoperable AC power source would cause loss of the high-pressure steam-driven injection system (RCIC/HPCI), and loss of the power conversion system (condenser/feedwater), and require activating the RHR system. In addition, EOPs direct the operator to take control of the depressurization function if low pressure injection/spray systems are needed for RPV water makeup and cooling. Based on the low probability of loss of the AC power and the number of steam-driven systems available in Mode 3, the staff concludes in the SE to the BWR topical report that the risks of staying in Mode 3 are lower than going to the Mode 4 end state.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.7 TS 4.5.1.20 and LCO 3.8.4 (BWR/4); TS 4.5.2.18 and LCO 3.8.4 DC Sources (Operating)

The purpose of the DC power system is to provide a reliable source of DC power for both normal and abnormal conditions. It must supply power in an emergency for an adequate length of time until normal supplies can be restored.

The DC electrical system:

a. Provides the AC emergency power system with control power,

b. Provides motive and control power to selected safety related equipment, and

c. Provides power to preferred AC vital buses (via inverters).

[**Note:** Plant Applicability, BWR 4/6]

LCO: For Modes 1, 2 and 3, the following DC sources are required to be operable:

BWR/4: The (Division 1 and Division 2 station service, and DG 1B, 2A, and 2C) DC electrical power systems shall be operable.

BWR/6: The (Divisions 1, 2, and 3) DC electrical power subsystems shall be operable.

Condition requiring entry into end state: The plant operators must bring the plant to Mode 3 within 12 hours and Mode 4 within 36 hours following the sustained inoperability of one DC electrical power subsystem for a period of 2 hours.

Proposed modification for end state required actions: The proposed TS change is to remove the requirement to place the plant in Mode 4, Required Actions in D.2 (BWR/4) and E.2 (BWR/6) are deleted.

Assessment: If one of the DC electrical power subsystems is inoperable, the remaining DC electrical power subsystems have the capacity to support a safe shutdown and to mitigate an accident condition. The BWROG topical report did a comparative PRA evaluation of the core damage risks of operation in the current end state and in the proposed Mode 3 end state, with one DC system inoperable. Events initiated by the loss of offsite power are dominant contributors to core damage frequency in most BWR PRAs, and the steam-driven core cooling systems, RCIC and HPCI, play a major role in mitigating these events. The evaluation indicates that the core damage risks are lower in Mode 3 than in Mode 4. Going to Mode 4 for one inoperable DC power source would cause loss of the high-pressure steam-driven injection system (RCIC/HPCI), and loss of the power conversion system (condenser/feedwater), and require activating the RHR system. In addition, EOPs direct the operator to take control of the depressurization function if low pressure injection/spray systems are needed for RPV water makeup and cooling. Based on the low probability of loss of the DC power and the number of systems available in Mode 3, the staff concludes in the SE to the BWR topical report that the risks of staying in Mode 3 are approximately the same as and in some cases lower than the risks of going to the Mode 4 end state.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.8 TS 4.5.1.21 and LCO 3.8.7 (BWR/4); TS 4.5.2.19 and 3.8.7 (BWR/6), Inverters (Operating)

In Modes 1, 2, and 3, the inverters provide the preferred source of power for the 120-VAC vital buses which power the reactor protection system (RPS) and the Emergency Core Cooling Systems (ECCS) initiation. The inverter can be powered from an internal AC

source/rectifier or from the station battery.

[**Note:** Plant Applicability, BWR 4/6]

LCO: For Modes 1, 2, and 3 the following Inverters shall be operable:

BWR/4: The (Division 1 and Division 2) shall be operable.

BWR/6: The (Divisions 1, 2, and 3) shall be operable.

Condition requiring entry into end state: The plant operators must bring the plant to Mode 3 within 12 hours and Mode 4 within 36 hours following the sustained inoperability of the required inverter for a period of 24 hours.

Proposed modification for end state required actions: The proposed TS change is to remove the requirement to place the plant in Mode 4. Required Actions in B.2 (BWR/4) and C.2 (BWR/6) are deleted.

Assessment: If one of the Inverters is inoperable, the remaining Inverters have the capacity to support a safe shutdown and to mitigate an accident condition. The BWROG topical report did a comparative PRA evaluation of the core damage risks of operation in the current end state and in the proposed Mode 3 end state, with an inoperable Inverter. Events initiated by the loss of offsite power are dominant contributors to core damage frequency in most BWR PRAs, and the steam-driven core cooling systems, RCIC and HPCI, play a major role in mitigating these events. The evaluation indicates that the core damage risks are lower in Mode 3 than in Mode 4. Going to Mode 4 for one inoperable Inverter power source would cause loss of the high-pressure steam-driven injection system (RCIC/HPCI), and loss of the power conversion system (condenser/feedwater), and require activating the RHR system. In addition, EOPs direct the operator to take control of the depressurization function if low pressure injection/spray systems are needed for RPV water makeup and cooling. Based on the low probability of loss of the Inverters during the infrequent and limited time in Mode 3 and the number of systems available in Mode 3, the staff concludes in the SE to the BWR topical report that the risks of staying in Mode 3 are approximately the same as and in some cases lower than the risks of going to the Mode 4 end state.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.9 TS 4.5.1.22 and LCO 3.8.9 (BWR/4); TS 4.5.2.20 and LCO 3.8.9 (BWR/6), Distribution Systems (Operating)

The onsite Class 1E AC and DC electrical power distribution system is divided into redundant and independent AC, DC, and AC vital bus electrical power distribution systems. The primary AC electrical power distribution subsystem for each division consists of a 4.16-kV Engineered Safety Feature (ESF) bus having an offsite source of power as well as a dedicated onsite EDG source. The secondary plant distribution subsystems include 600-VAC emergency buses and associated load centers, motor control centers, distribution panels and transformers. The 120-VAC vital buses are arranged in four load groups and normally powered from DC via the inverters. There are two independent 125/250-VDC station service electrical power distribution systems and three independent 125-VDC DG electrical power distribution subsystems that support the necessary power for ESF functions. Each subsystem consists of a 125-VDC and 250-VDC bus and associated distribution panels.

[**Note:** Plant Applicability, BWR 4/6]

LCO: For Modes 1, 2, and 3, the following electrical power distribution subsystems shall be operable:

BWR/4: The Division 1 and Division 2 AC, DC, and AC vital buses shall be operable.

BWR/6: The Divisions 1, 2, and 3 AC, DC, and AC vital buses shall be operable.

Condition requiring entry into end state: The plant operators must bring the plant to Mode 3 within 12 hours and Mode 4 within 36 hours following the sustained inoperability of one AC or one DC or one AC vital bus electrical power subsystem for a period of 8 hours, 2 hours and 2 hours, respectively (with a maximum 16 hour Completion Time limit from initial discovery of failure to meet the LCO, to preclude being in the LCO indefinitely).

Proposed modification for end state required actions: The proposed TS change is to remove the requirement to place the plant in Mode 4, Required Action in D.2 (BWR/4) and D.2 (BWR/6) are deleted.

Assessment: If one of the AC/DC/AC vital subsystems is inoperable, the remaining AC/DC/AC vital subsystems have the capacity to support a safe shutdown and to mitigate an accident condition. The BWROG topical report did a comparative PRA evaluation of the core damage risks of operation in the current end state and in the proposed Mode 3 end state, with one of the AC/DC/AC vital subsystems inoperable. Events initiated by the loss of offsite power are dominant contributors to core damage frequency in most BWR PRAs, and the steam-driven core cooling systems, RCIC and HPCI, play a major role in mitigating these events. The evaluation indicates that the core damage risks are lower in Mode 3 than in Mode 4. Going to Mode 4 for one inoperable AC/DC/AC vital subsystem would cause loss of the high-pressure steam-driven injection system (RCIC/HPCI), and loss of the power conversion system (condenser/feedwater), and require activating the RHR system. In addition, EOPs direct the operator to take control of the depressurization function if low pressure injection/spray systems are needed for RPV water makeup and cooling. Based on the low probability of loss of the AC/DC/AC vital electrical subsystems during the infrequent and limited time in Mode 3 and the number of systems available in Mode 3, the staff concludes in the SE to the BWR topical report that the risks of staying in Mode 3 are approximately the same as and in some cases lower than the risks of going to the Mode 4 end state.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.10 TS 4.5.1.5 and LCO 3.6.1.1, Primary Containment

The function of the primary containment is to isolate and contain fission products released from the Reactor Primary System following a design basis LOCA and to confine the postulated release of radioactivity. The primary containment consists of a steel-lined, reinforced concrete vessel, which surrounds the Reactor Primary System and provides an essentially leak-tight barrier against an uncontrolled release of radioactivity to the environment. Additionally, this structure provides shielding from the fission products that may be present in the primary containment atmosphere following accident conditions.

[**Note:** Plant Applicability, BWR 4/6]

LCO: The primary containment shall be operable.

Condition Requiring Entry into End State: If the LCO cannot be met, the primary containment must be returned to operability within one hour (Required Action A.1). If the primary containment cannot be returned to operable status within the allotted time, the plant must be placed in Mode 3 within 12 hours

(Required Action B.1) and in Mode 4 within 36 hours (Required Action B.2).

Proposed Modification for End State Required Actions: Delete Required Action B.2.

Assessment: The primary containment is one of the three primary boundaries to the release of radioactivity. (The other two are the fuel cladding and the Reactor Primary System pressure boundary.) Compliance with this LCO ensures that a primary containment configuration exists, including equipment hatches and penetrations, that is structurally sound and will limit leakage to those leakage rates assumed in the safety analyses. This LCO entry condition does not include leakage through an unisolated release path. The BWROG topical report has determined that previous generic PRA work related to Appendix J requirements has shown that containment leakage is not risk significant. Should a fission product release from the primary containment occur, the secondary containment and related functions would remain operable to contain the release, and the standby gas treatment system would remain available to filter fission products from being released to the environment. By remaining in Mode 3, HPCI, RCIC, and the power conversion system (condensate/feedwater) remain available for water makeup and decay heat removal. Additionally, the EOPs direct the operators to take control of the depressurization function if low pressure injection/spray are needed for reactor coolant makeup and cooling. Therefore, defense-in-depth is maintained with respect to water makeup and decay heat removal by remaining in Mode 3.

Finding: The requested change is acceptable. Note that the staff's approval relies upon the secondary containment and the standby gas treatment system for maintaining defense-in-depth while in this reduced end state.

3.2.11 TS 4.5.1.7 and LCO 3.6.1.7, Reactor Building-to-Suppression Chamber Vacuum Breakers (BWR/4 only)

The reactor building-to-suppression chamber vacuum breakers relieve vacuum when the primary containment depressurizes below the pressure of the reactor building, thereby serving to preserve the integrity of the primary containment.

[**Note:** Plant Applicability, BWR/4]

LCO: Each reactor building-to-suppression chamber vacuum breaker shall be operable.

Condition Requiring Entry into End State: If one line has one or more reactor building-to-suppression chamber vacuum breakers inoperable for opening, the breaker(s) must be returned to operability within 72 hours (Required Action C.1). If the vacuum breaker(s) cannot be returned to operability within the allotted time, the plant must be placed in Mode 3 within 12 hours (Required Action E.1) and in Mode 4 within 36 hours (Required Action E.2).

Proposed Modification for End State Required Actions: Modify the Required Actions so that if vacuum breaker(s) cannot be returned to operable status within the required Completion Times, the plant is placed in hot shutdown. That is, modify Condition E to relate only to Condition C, delete Required Action E.2, and add Condition F, with Required Actions F.1 and F.2, shutting down the plant to Mode 3 and then Mode 4 respectively, to address an inability to comply with the required actions related to the other Conditions (*i.e.*, Conditions A, B, and D).

Assessment: The BWROG topical report has determined that the specific failure condition of interest is not risk significant in BWR PRAs. The reduced end state would only be applicable to the situation where the vacuum breaker(s) in one line are inoperable for opening, with the remaining operable vacuum breakers capable of providing the necessary vacuum relief function. The existing end state remains unchanged, as established by new Condition F, for conditions involving more than one inoperable line or vacuum breaker since they are needed in Modes 1, 2, and 3. In Mode 3, for other accident considerations, HPCI, RCIC, and the power conversion system (condensate/feedwater) remain available for water makeup and decay heat removal. Additionally, the EOPs direct the operators to take control of the depressurization function if low pressure injection/spray are needed for reactor coolant makeup and cooling. Therefore, defense-in-depth is maintained with respect to water makeup and decay heat removal by remaining in Mode 3.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.12 TS 4.5.1.8 and LCO 3.6.1.8, Suppression Chamber-to-Drywell Vacuum Breakers (BWR/4 only)

The function of the suppression chamber-to-drywell vacuum breakers is to relieve vacuum in the drywell, thereby preventing an excessive negative differential pressure across the wetwell/drywell boundary.

[**Note:** Plant Applicability, BWR/4]

LCO: Nine suppression chamber-to-drywell vacuum breakers shall be operable for opening.

Condition Requiring Entry into End State: If one suppression chamber-to-drywell vacuum breaker is inoperable for opening, the breaker must be returned to operability within 72 hours (Required Action A.1). If the vacuum breaker cannot be returned to operability within the allotted time, the plant must be placed in Mode 3 within 12 hours (Required Action C.1) and in Mode 4 within 36 hours (Required Action C.2).

Proposed Modification for End State Required Actions: Modify the Required Actions so that if vacuum breaker(s) cannot be returned to operable status within the required Completion Times, the plant is placed in hot shutdown. That is, modify Condition C to relate only to Condition A, and delete Required Action C.2, and add Condition D, with Required Actions D.1 and D.2, shutting down the plant to Mode 3 and then Mode 4 respectively, to address an inability to comply with the required actions related to Condition B, to close the vacuum breaker.

Assessment: The BWROG topical report has determined that the specific failure of interest is not risk significant in BWR PRAs. The reduced end state would only be applicable to the situation where one suppression chamber-to-drywell vacuum breaker is inoperable for opening, with the remaining operable vacuum breakers capable of providing the necessary vacuum relief function, since they are required in Modes 1, 2, and 3. By remaining in Mode 3, HPCI, RCIC, and the power conversion system (condensate/feedwater) remain available for water makeup and decay heat removal. Additionally, the EOPs direct the operators to take control of the depressurization function if low pressure injection/spray are needed for RCS makeup and cooling. Therefore, defense-in-depth is maintained with respect to water makeup and decay heat removal by remaining in Mode 3. The existing end state remains unchanged for conditions involving any suppression chamber-to-drywell vacuum breakers that are stuck open, as established by new Condition D.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of

defense-in-depth considerations, the proposed change is acceptable.

3.2.13 TS 4.5.1.9, TS 4.5.2.8, and LCO 3.6.1.9, Main Steam Isolation Valve (MSIV) Leakage Control System (LCS)

The MSIV LCS supplements the isolation function of the MSIVs by processing the fission products that could leak through the closed MSIVs after core damage, assuming leakage rate limits which are based on a large LOCA.

[**Note:** Plant Applicability, BWR 4/6]

LCO: Two MSIV LCS subsystems shall be operable.

Condition Requiring Entry Into End State: If one MSIV LCS subsystem is inoperable, it must be restored to operable status within 30 days (Required Action A.1). If both MSIV LCS subsystems are inoperable, one of the MSIV LCS subsystems must be restored to operable status within seven days (Required Action B.1). If the MSIV LCS subsystems cannot be restored to operable status within the allotted time, the plant must be placed in Mode 3 within 12 hours (Required Action C.1) and in Mode 4 within 36 hours (Required Action C.2).

Proposed Modification for End State Required Actions: Delete Required Action C.2.

Assessment: The BWROG topical report has determined that this system is not significant in BWR PRAs and, based on a BWROG program, many plants have eliminated the system altogether. The unavailability of one or both MSIV LCS subsystems has no impact on CDF or LERF, irrespective of the mode of operation at the time of the accident. Furthermore, the challenge frequency of the MSIV LCS system (*i.e.*, the frequency with which the system is expected to be challenged to mitigate offsite radiation releases resulting from MSIV leaks above TS limits) is less than 1.0E–6/yr. Consequently, the conditional probability that this system will be challenged during the repair time interval while the plant is at either the current or the proposed end state (*i.e.*, Mode 4 or Mode 3, respectively) is less than 1.0E–8. This probability is considerably smaller than probabilities considered ''negligible'' in Regulatory Guide 1.177 for much higher consequence risks, such as large early release.

Section 6 of reference 6 summarizes the staff's risk argument for approval of TSs 4.5.1.9, 4.5.2.8, and LCO 3.6.1.9, ''Main Steam Isolation Valve (MSIV) Leakage Control System (LCS).'' The argument for staying in Mode 3 instead of going to Mode 4 to repair the MSIV LCS system (one or both trains) is also supported by defense-in-depth considerations. Section 6.2 makes a comparison between the current (Mode 3) and the proposed (Mode 4) end state, with respect to the means available to perform critical functions (*i.e.*, functions contributing to the defense-in-depth philosophy) whose success is needed to prevent core damage and containment failure and mitigate radiation releases. The risk and defense-in-depth arguments, used according to the ''integrated decision-making'' process of Regulatory Guides 1.174 and 1.177, support the conclusion that the plant in Mode 3 is as safe as Mode 4 (if not safer) for repairing an inoperable MSIV LCS system. Personnel safety must be considered separately.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.14 TS 4.5.1.11 and LCO 3.6.2.4, Residual Heat Removal (RHR) Suppression Pool Spray(BWR/4 only)

Following a DBA, the RHR suppression pool spray system removes heat from the suppression chamber airspace. A minimum of one RHR suppression pool spray subsystem is required to mitigate potential bypass leakage paths from drywell and maintain the primary containment peak pressure below the design limits.

[**Note:** Plant Applicability, BWR/4]

LCO: Two RHR suppression pool spray subsystems shall be operable.

Condition Requiring Entry Into End State: If one RHR suppression pool spray subsystem is inoperable (Condition A), it must be restored to operable status within seven days (Required Action A.1). If both RHR suppression pool spray subsystems are inoperable (Condition B), one of them must be restored to operable status within eight hours (Required Action B.1). If the RHR suppression pool spray subsystem cannot be restored to operable status within the allotted time, the plant must be placed in Mode 3 within 12 hours (Required Action C.1), and in Mode 4 within 36 hours (Required Action C.2).

Proposed Modification for End State Required Actions: Delete Required Action C.2.

Assessment: The main function of the RHR suppression spray system is to remove heat from the suppression chamber so that the pressure and temperature inside primary containment remain within analyzed design limits. The RHR suppression spray system was designed to mitigate potential effects of a postulated DBA, that is, a large LOCA which is assumed to occur concurrently with the most limiting single failure and conservative inputs, such as for initial suppression pool water volume and temperature. Under the conditions assumed in the DBA, steam blown down from the break could bypass the suppression pool and end up in the suppression chamber air space and the RHR suppression spray system could be needed to condense such steam so that the pressure and temperature inside primary containment remain within analyzed design basis limits. However, the frequency of a DBA is very small and the containment has considerable margin to failure above the design limits. For these reasons, the unavailability of one or both RHR suppression spray subsystems has no significant impact on CDF or LERF, even for accidents initiated during operation at power. Therefore, it is very unlikely that the RHR suppression spray system will be challenged to mitigate an accident occurring during power operation. This probability becomes extremely unlikely for accidents that would occur during a small fraction of the year (less than three days) during which the plant would be in Mode 3 (associated with lower initial energy level and reduced decay heat load as compared to power operation) to repair the failed RHR suppression spray system.

Section 6 of reference 6 summarizes the staff's risk argument for approval of TS 4.5.1.11 and LCO 3.6.2.4, ''Residual Heat Removal (RHR) Suppression Pool Spray.'' The argument for staying in Mode 3 instead of going to Mode 4 to repair the RHR Suppression Pool Spray system (one or both trains) is also supported by defense-in-depth considerations. Section 6.2 makes a comparison between the current (Mode 3) and the proposed (Mode 4) end state, with respect to the means available to perform critical functions (*i.e.*, functions contributing to the defense-in-depth philosophy) whose success is needed to prevent core damage and containment failure and mitigate radiation releases, and precluding the need for RHR suppression spray subsystems.

In addition, the probability of a DBA (large break) is much smaller during shutdown as compared to power operation. A DBA in Mode 3 would be considerably less severe than a DBA occurring during power operation since Mode 3 is associated with lower initial energy level and reduced decay heat load. Under these extremely unlikely conditions, an alternate method that can be used to remove heat from the primary

containment (in order to keep the pressure and temperature within the analyzed design basis limits) is containment venting. For more realistic accidents that could occur in Mode 3, several alternate means are available to remove heat from the primary containment, such as the RHR system in the suppression pool cooling mode and the containment spray mode.

The risk and defense-in-depth arguments, used according to the ''integrated decision-making'' process of Regulatory Guides 1.174 and 1.177, support the conclusion that Mode 3 is as safe as Mode 4 (if not safer) for repairing an inoperable RHR suppression spray system.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.15 TS 4.5.1.12, TS 4.5.2.10, and LCO 3.6.4.1, Secondary Containment

Following a DBA, the function of the secondary containment is to contain, dilute, and stop radioactivity (mostly fission products) that may leak from primary containment. Its leak tightness is required to ensure that the release of radioactivity from the primary containment is restricted to those leakage paths and associated leakage rates assumed in the accident analysis and that fission products entrapped within the secondary containment structure will be treated by the standby gas treatment system prior to discharge to the environment.

[**Note:** Plant Applicability, BWR 4/6]

LCO: The secondary containment shall be operable.

Condition Requiring Entry Into End State: If the secondary containment is inoperable, it must be restored to operable status within four hours (Required Action A.1). If it cannot be restored to operable status within the allotted time, the plant must be placed in Mode 3 within 12 hours (Required Action B.1), and in Mode 4 within 36 hours (Required Action B.2).

Proposed Modification for End State Required Actions: Delete Required Action B.2.

Assessment: This LCO entry condition does not include gross leakage through an unisolable release path. The BWROG topical report has determined that previous generic PRA work related to Appendix J requirements has shown that containment leakage is not risk significant. The primary containment, and all other primary and secondary containment-related functions would still be operable, including the standby gas treatment system, thereby minimizing the likelihood of an unacceptable release. By remaining in Mode 3, HPCI, RCIC, and the power conversion system (condensate/feedwater) remain available for water makeup and decay heat removal. Additionally, the EOPs direct the operators to take control of the depressurization function if low pressure injection/spray are needed for RCS makeup and cooling. Therefore, defense-in-depth is improved with respect to water makeup and decay heat removal by remaining in Mode 3.

Finding: The requested change is acceptable. Note that the staff's approval relies upon the primary containment, and all other primary and secondary containment-related functions, to still be operable, including the standby gas treatment system, for maintaining defense-in-depth while in this end state.

3.2.16 TS 4.5.1.13, TS 4.5.2.11, and LCO 3.6.4.3, Standby Gas Treatment (SGT) System

The function of the SGT system is to ensure that radioactive materials that leak from the primary containment into the secondary containment following a DBA are filtered and adsorbed prior to exhausting to the environment.

Applicability: BWR4/6

LCO: Two SGT subsystems shall be operable.

Condition Requiring Entry Into End State: If one SGT subsystem is inoperable, it must be restored to operable status within seven days (Required Action A.1). If the SGT subsystem cannot be restored to operable status within the allotted time, the plant must be placed in Mode 3 within 12 hours (Required Action B.1) and in Mode 4 within 36 hours (Required Action B.2). In addition, if two SGT subsystems are inoperable in Mode 1, 2, or 3, LCO 3.0.3 must be entered immediately (Required Action D.1).

Proposed Modification for End State Required Actions: Delete Required Action B.2. Change Required Action D.1 to ''Be in Mode 3'' with a Completion Time of ''12 hours.''

Assessment: The unavailability of one or both SGT subsystems has no impact on CDF or LERF, irrespective of the mode of operation at the time of the accident. Furthermore, the challenge frequency of the SGT system (*i.e.*, the frequency with which the system is expected to be challenged to mitigate offsite radiation releases resulting from materials that leak from the primary to the secondary containment above TS limits) is less than 1.0E–6/yr. Consequently, the conditional probability that this system will be challenged during the repair time interval while the plant is at either the current or the proposed end state (*i.e.*, Mode 4 or Mode 3, respectively) is less than 1.0E–8. This probability is considerably smaller than probabilities considered ''negligible'' in Regulatory Guide 1.177 for much higher consequence risks, such as large early release.

Section 6 of reference 6 summarizes the staff's risk argument for approval of TSs 4.5.1.13, 4.5.2.11, and LCO 3.6.4.3, ''Standby Gas Treatment (SGT) System.'' The argument for staying in Mode 3 instead of going to Mode 4 to repair the SGT system (one or both trains) is also supported by defense-in-depth considerations. Section 6.2 makes a comparison between the current (Mode 3) and the proposed (Mode 4) end state, with respect to the means available to perform critical functions (*i.e.*, functions contributing to the defense-in-depth philosophy) whose success is needed to prevent core damage and containment failure and mitigate radiation releases. The risk and defense-in-depth arguments, used according to the ''integrated decision-making'' process of Regulatory Guides 1.174 and 1.177, support the conclusion that Mode 3 is as safe as Mode 4 (if not safer) for repairing an inoperable SGT system.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.17 TS 4.5.1.14 and LCO 3.7.1, Residual Heat Removal Service Water (RHRSW) System (BWR/4 only)

The RHRSW system is designed to provide cooling water for the RHR system heat exchangers, which are required for safe shutdown following a normal shutdown or DBA or transient.

[**Note:** Plant Applicability, BWR/4]

LCO: Two RHRSW subsystems shall be operable.

Condition Requiring Entry Into End State: If the LCO cannot be met, the following actions must be taken for the listed conditions:

a. If one RHRSW pump is inoperable (Condition A), it must be restored to operable status within 30 days (Required Action A.1).

b. If one RHRSW pump in each subsystem is inoperable (Condition B), one RHRSW pump must be restored to operable status within seven days (Required Action B.1).

c. If one RHRSW subsystem is inoperable for reasons other than Condition A (Condition C), the RHRSW subsystem must be restored to operable status within seven days (Required Action C.1).

d. If the required action and associated completion time cannot be met within the allotted time (Condition E), the plant must be placed in Mode 3 within 12 hours (Required Action E.1) and in Mode 4 within 36 hours (Required Action E.2). (**Note:** Condition D addresses both RHRSW subsystems inoperable for reason other than Condition B, and its Required Action D.1 is not affected by this change.)

Proposed Modification for End State Required Actions: Renumber Conditions D (and Required Action D.1), and E (and Required Actions E.1 and E.2), to Conditions E (and Required Action E.1) and F (and Required Actions F.1 and F.2), respectively. Modify new Condition F to address new Condition E, which maintains the existing requirements with respect to both RHR subsystems being inoperable for reasons other than Condition B. Add a new Condition D, which establishes requirements for existing Conditions A, B, and C, that are similar to existing Condition E but without Required Action E.2.

Assessment: The BWROG topical report performed a comparative PRA evaluation of the core damage risks when operating in the current end state versus the proposed Mode 3 end state. The results indicated that the core damage risks while operating in Mode 3 (assuming the individual failure conditions) are lower or comparable to the current end state. By remaining in Mode 3, HPCI, RCIC, and the power conversion system (condensate/feedwater) remain available for water makeup and decay heat removal. Additionally, the EOPs direct the operators to take control of the depressurization function if low pressure injection/spray are needed for RCS makeup and cooling. Therefore, defense-in-depth is improved with respect to water makeup and decay heat removal by remaining in Mode 3, and the required safety function can still be performed with the RHRSW subsystem components that are still operable.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.18 TS 4.5.1.15 and LCO 3.7.2, Plant Service Water (PSW) System and Ultimate Heat Sink (UHS) (BWR/4 only)

The PSW system (in conjunction with the UHS) is designed to provide cooling water for the removal of heat from certain safe shutdown-related equipment heat exchangers following a DBA or transient.

[**Note:** Plant Applicability, BWR/4]

LCO: Two PSW subsystems and UHS shall be operable.

Condition Requiring Entry into End State: If the LCO cannot be met, the following actions must be taken for the listed conditions:

a. If one PSW pump is inoperable (Condition A), it must be restored to operable status within 30 days (Required Action A.1).

b. If one PSW pump in each subsystem is inoperable (Condition B), one PSW pump must be restored to operable status within seven days (Required Action B.1).

c. If the required action and associated completion time cannot be met within the allotted time, the plant must be placed in Mode 3 within 12 hours (Required Action E.1) and in Mode 4 within 36 hours (Required Action E.2).

Proposed Modification: Renumber unaffected Conditions C, D, E, and F to Conditions D, E, F, and G respectively, and renumber associated Required Actions accordingly. Add a new Condition C, for the Required Actions and associated Completion Time of Conditions A and B not met, with a Required Action C.1, to be in Mode 3 in a Completion Time of 12 hours. Change the new Condition G to read, ''Required Action and associated Completion Time of Condition E not met, OR Both [PSW] subsystems inoperable for reasons other than Condition(s) B [and D], [OR [UHS] inoperable for reasons other than Conditions D [or E].''

Assessment: The BWROG topical report performed a comparative PRA evaluation of the core damage risks associated with operating in the current end state versus the proposed Mode 3 end state. The results indicated that the core damage risks while operating in Mode 3 (assuming the individual failure conditions) are lower or comparable to the current end state. With one pump inoperable in one or more subsystems, the remaining pumps are adequate to perform the PSW heat removal function. By remaining in Mode 3, HPCI, RCIC, and the power conversion system (condensate/feedwater) remain available for water makeup and decay heat removal. Additionally, the EOPs direct the operators to take control of the depressurization function if low pressure injection/spray are needed for RCS makeup and cooling. Therefore, defense-in-depth is improved with respect to water makeup and decay heat removal by remaining in Mode 3.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.19 TS 4.5.1.16 and LCO 3.7.4, Main Control Room Environmental Control (MCREC) System(BWR/4 only)

The MCREC system provides a radiologically controlled environment from which the plant can be safely operated following a DBA.

[**Note:** Plant Applicability, BWR/4]

LCO: Two MCREC subsystems shall be operable.

Condition Requiring Entry Into End State: If one MCREC subsystem is inoperable, it must be restored to operable status within seven days (Required Action A.1). If the MCREC subsystem cannot be restored to operable status within the allotted time, the plant must be placed in Mode 3 within 12 hours (Required Action B.1) and in Mode 4 within 36 hours (Required Action B.2). If two MCREC subsystems are inoperable in Mode 1, 2, or 3, LCO 3.0.3 must be entered immediately (Required Action D.1).

Proposed Modification for End State Required Actions: Delete Required Action B.2, and change Required Action D.1 to ''Be in Mode 3'' with a Completion Time of ''12 hours.''

Assessment: The unavailability of one or both MCREC subsystems has no significant impact on CDF or LERF, irrespective of the mode of operation at the time of the accident. Furthermore, the challenge frequency of the MCREC system (*i.e.*, the frequency with which the system is expected to be challenged to provide a radiologically controlled environment in the main control room following a DBA which leads to core damage and leaks of radiation from the containment that can reach the control room) is less than 1.0E–6/yr. Consequently, the conditional probability that this system will be challenged during the repair time interval while the plant is at either the current or the proposed end state (*i.e.*, Mode 4 or Mode 3, respectively) is less than 1.0E–8. This probability is considerably smaller than probabilities considered ''negligible'' in Regulatory Guide 1.177 for much higher consequence risks, such as large early release.

Section 6 of reference 6 summarizes the staff's risk argument for approval of TS 4.5.1.16, and LCO 3.7.4, ''Main Control Room Environmental Control (MCREC) System.'' The argument for staying in Mode 3 instead of going to Mode 4 to repair the MCREC system (one or both trains) is also supported by defense-in-depth considerations. Section 6.2 makes a comparison between the current (Mode 3) and the proposed (Mode 4) end state, with respect to the means available to perform critical functions (*i.e.*, functions contributing to the defense-in-depth philosophy) whose success is needed to prevent core damage and containment failure and mitigate radiation releases. The risk and defense-in-depth arguments, used according to the ''integrated decision-making'' process of Regulatory Guides 1.174 and 1.177, support the conclusion that Mode 3 is as safe as Mode 4 (if not safer) for repairing an inoperable MCREC system.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.20 TS 4.5.1.17 and LCO 3.7.5, Control Room Air Conditioning (AC) System (BWR/4 only)

The Control Room AC system provides temperature control for the control room following control room isolation during accident conditions.

[**Note:** Plant Applicability, BWR/4]

LCO: Two control room AC subsystems shall be operable.

Condition Requiring Entry Into End State: If one control room AC subsystem is inoperable, the subsystem must be restored to operable status within 30 days (Required Action A.1). If the required actions and associated completion times cannot be met, the plant must be placed in Mode 3 within 12 hours (Required Action B.1) and in Mode 4 within 36 hours (Required Action B.2). If two control room AC subsystems are inoperable, LCO 3.0.3 must be entered immediately (Required Action D.1)

Proposed Modification for End State Required Actions: Delete Required Action B.2, and change Required Action D.1 to ''Be in Mode 3'' with a Completion Time of ''12 hours.''

Assessment: The unavailability of one or both AC subsystems has no significant impact on CDF or LERF, irrespective of the mode of operation at the time of the accident. Furthermore, the challenge frequency of the AC system (*i.e.*, the frequency with which the system is expected to be challenged to provide temperature control for the control room following control room isolation following a DBA) is less than 1.0E–6/yr. Consequently, the conditional probability that this system will be challenged during the repair time interval while the plant is at either the current or the proposed end state (*i.e.*, Mode 4 or Mode 3, respectively) is less than 1.0E–8. This probability is considerably smaller than probabilities considered ''negligible'' in Regulatory Guide 1.177 for much higher consequence risks, such as large early release.

Section 6 of reference 6 summarizes the staff's risk argument for approval of TS 4.5.1.17, and LCO 3.7.5, ''Control Room Air Conditioning (AC) System.'' The argument for staying in Mode 3 instead of going to Mode 4 to repair the AC system (one or both trains) is also supported by defense-in-depth considerations. Section 6.2 makes a comparison between the current (Mode 3) and the proposed (Mode 4) end state, with respect to the means available to perform critical functions (*i.e.*, functions contributing to the defense-in-depth philosophy) whose success is needed to prevent core damage and containment failure and mitigate radiation releases. The risk and defense-in-depth arguments, used according to the ''integrated decision-making'' process of Regulatory Guides 1.174 and 1.177, support the conclusion that Mode 3 is as safe as Mode 4 (if not safer) for repairing an inoperable AC system.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.21 TS 4.5.1.18 and LCO 3.7.6, Main Condenser Off gas (BWR/4 only)

The Off gas from the main condenser normally includes radioactive gases. The gross gamma activity rate is controlled to ensure that accident analysis assumptions are satisfied and that offsite dose limits will not be exceeded during postulated accidents. The main condenser Off gas (MCOG) gross gamma activity rate is an initial condition of a DBA which assumes a gross failure of the MCOG system pressure boundary.

[**Note:** Plant Applicability, BWR/4]

LCO: The gross gamma activity rate of the noble gases measured at the main condenser evacuation system pretreatment monitor station shall be ≤240 mCi/second after decay of 30 minutes.

Condition Requiring Entry Into End State: If the gross gamma activity rate of the noble gases in the main condenser Off gas (MCOG) system is not within limits, the gross gamma activity rate of the noble gases in the main condenser Off gas must be restored to within limits within 72 hours (Required Action A.1). If the required action and associated completion time cannot be met, one of the following must occur:

a. All steam lines must be isolated within 12 hours (Required Action B.1).

b. The steam jet air ejector (SJAE) must be isolated within 12 hours (Required Action B.2).

c. The plant must be placed in Mode 3 within 12 hours (Required Action B.3.1) and in Mode 4 within 36 hours (Required Action B.3.2).

Proposed Modification for End State Required Actions: Delete Required Action B.3.2.

Assessment: The failure to maintain the gross gamma activity rate of the noble gases in the main condenser Off gas (MCOG) within limits has no significant impact on CDF or LERF, irrespective of the mode of operation at the time of the accident. Furthermore, the challenge frequency of the MCOG system (*i.e.*, the frequency with which the system is expected to be challenged to mitigate offsite radiation releases following a DBA) is less than 1.0E–6/yr. Consequently, the conditional probability that this system will be challenged during the repair time interval while the plant is at either the current or the proposed end state (*i.e.*, Mode 4 or Mode 3, respectively) is less than 1.0E–8. This probability is considerably smaller than probabilities considered ''negligible'' in Regulatory Guide 1.177 for much higher consequence risks, such as large early release.

Section 6 of reference 6 summarizes the staff's risk argument for approval of TS 4.5.1.18 and LCO 3.7.6, ''Main Condenser Off gas.'' The argument for staying in Mode 3 instead of going to Mode 4 to repair the MCOG system (one or both trains) is also supported by defense-in-depth considerations. Section 6.2 makes a comparison between the current (Mode 3) and the proposed (Mode 4) end state, with respect to the means available to perform critical functions (*i.e.*, functions contributing to the defense-in-depth philosophy) whose success is needed to prevent core damage and containment failure and mitigate radiation releases. The risk and defense-in-depth arguments, used according to the ''integrated decision-making'' process of Regulatory Guides 1.174 and 1.177, support the conclusion that Mode 3 is

as safe as Mode 4 (if not safer) for repairing an inoperable MCOG system.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.22 TS 4.5.2.6 and LCO 3.6.1.7, Residual Heat Removal (RHR) Containment Spray System (BWR/6 only)

The primary containment must be able to withstand a postulated bypass leakage pathway that allows the passage of steam from the drywell directly into the primary containment airspace, bypassing the suppression pool. The primary containment also must be able to withstand a low energy steam release into the primary containment airspace. The RHR Containment Spray System is designed to mitigate the effects of bypass leakage and low energy line breaks.

[**Note:** Plant Applicability, BWR/6]

LCO: Two RHR containment spray subsystems shall be operable.

Condition Requiring Entry Into End State: If one RHR Containment Spray Subsystem is inoperable, it must be restored to operable status within 7 days (Required Action A.1). If two RHR Containment Spray Subsystems are inoperable, one of them must be restored to operable status within 8 hours (Required Action B.1). If the RHR Containment Spray System cannot be restored to operable status within the allotted time, the plant must be placed in Mode 3 within 12 hours (Required Action C.1), and in Mode 4 within 36 hours (Required Action C.2)

Proposed Modification for End State Required Actions: Delete Required Action C.2.

Assessment: The primary containment is designed with a suppression pool so that, in the event of a LOCA, steam released from the primary system is channeled through the suppression pool water and condensed without producing significant pressurization of the primary containment. The primary containment is designed so that with the pool initially at the minimum water level and the worst single failure of the primary containment heat removal systems, suppression pool energy absorption combined with subsequent operator controlled pool cooling will prevent the primary containment pressure from exceeding its design value. However, the primary containment must also withstand a postulated bypass leakage pathway that allows the passage of steam from the drywell directly into the primary containment airspace, bypassing the suppression pool. The primary containment also must withstand a postulated low energy steam release into the primary containment airspace. The main function of the RHR containment spray system is to suppress steam, which is postulated to be released into the primary containment airspace through a bypass leakage pathway and a low energy line break under DBA conditions, without producing significant pressurization of the primary containment (i.e., ensure that the pressure inside primary containment remains within analyzed design limits).

Under the conditions assumed in the DBA, steam blown down from the break could find its way into the primary containment through a bypass leakage pathway. In addition to the DBA, a postulated low energy pipe break could add more steam into the primary containment airspace. Under such an extremely unlikely scenario (very small frequency of a DBA combined with the likelihood of a bypass pathway and a concurrent low energy pipe brake inside the primary containment), the RHR containment spray system could be needed to condense steam so that the pressure inside the primary containment remains within analyzed design limits. Furthermore, containments have considerable margin to failure above the design limit (it is very likely that the containment will be able to withstand pressures as much as three times the design limit). For these reasons, the unavailability of one or both RHR containment spray subsystems has no significant impact on CDF or LERF, even for accidents initiated during operation at power. Therefore, it is very unlikely that the RHR containment spray system will be challenged to mitigate an accident occurring during power operation. This probability becomes extremely unlikely for accidents that would occur during a small fraction of the year (less than three days) during which the plant would be in Mode 3 (associated with lower initial energy level and reduced decay heat load as compared to power operation) to repair the failed RHR containment spray system.

Section 6 of reference 6 summarizes the staff's risk argument for approval of TS 4.5.2.6 and LCO 3.6.1.7, ''Residual Heat Removal (RHR) Containment Spray System.'' The argument for staying in Mode 3 instead of going to Mode 4 to repair the RHR containment spray system (one or both trains) is also supported by defense-in-depth considerations. Section 6.2 makes a comparison between the current (Mode 3) and the proposed (Mode 4) end state, with respect to the means available to perform critical functions (i.e., functions contributing to the defense-in-depth philosophy) whose success is needed to prevent core damage and containment failure and mitigate radiation releases. The risk and defense-in-depth arguments, used according to the ''integrated decision-making'' process of Regulatory Guides 1.174 and 1.177, support the conclusion that Mode 3 is as safe as Mode 4 (if not safer) for repairing an inoperable RHR containment spray system.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.23 TS4.5.2.7 and LCO 3.6.1.8, Penetration Valve Leakage Control System (PVLCS)(BWR/6 only)

The PVLCS supplements the isolation function of primary containment isolation valves (PCIVs) in process lines that also penetrate the secondary containment. These penetrations are sealed by air from the PVLCS to prevent fission products leaking past the isolation valves and bypassing the secondary containment after a design basis loss-of-coolant accident (LOCA).

[**Note:** Plant Applicability, BWR/6]

LCO: Two PVLCS subsystems shall be operable.

Condition Requiring Entry Into End State: If one PVLCS subsystem is inoperable, it must be restored to operable status within 30 days (Required Action A.1). If two PVLCS subsystems are inoperable, one of the PVLCS subsystems must be restored to operable status within seven days (Required Action B.1). If the PVLCS subsystem cannot be restored to operable status within the allotted time, the plant must be placed in Mode 3 within 12 hours (Required Action C.1) and in Mode 4 within 36 hours (Required Action C.2).

Assessment: The BWROG topical report has determined that this system is not significant in BWR PRAs. The unavailability of one or both PVLCS subsystems has no impact on CDF or LERF, irrespective of the mode of operation at the time of the accident. Furthermore, the challenge frequency of the PVLCS system (i.e., the frequency with which the system is expected to be challenged to prevent fission products leaking past the isolation valves and bypassing the secondary containment) is less than 1.0E–6/yr. Consequently, the

conditional probability that this system will be challenged during the repair time interval while the plant is at either the current or the proposed end state (i.e., Mode 4 or Mode 3, respectively) is less than 1.0E–8. This probability is considerably smaller than probabilities considered ''negligible'' in Regulatory Guide 1.177 for much higher consequence risks, such as large early release.

Section 6 of reference 6 summarizes the staff's risk argument for approval of TS 4.5.2.7 and LCO 3.6.1.8, ''Penetration Valve Leakage Control System (PVLCS).'' The argument for staying in Mode 3 instead of going to Mode 4 to repair the PVLCS system (one or both trains) is also supported by defense-in-depth considerations. Section 6.2 makes a comparison between the current (Mode 3) and the proposed (Mode 4) end state, with respect to the means available to perform critical functions (i.e., functions contributing to the defense-in-depth philosophy) whose success is needed to prevent core damage and containment failure and mitigate radiation releases. The risk and defense-in-depth arguments, used according to the ''integrated decision-making'' process of Regulatory Guides 1.174 and 1.177, support the conclusion that Mode 3 is as safe as Mode 4 (if not safer) for repairing an inoperable PVLCS system.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.24 TS 4.5.1.10, TS 4.5.2.9 and LCO 3.6.2.3, Residual Heat Removal (RHR) Suppression Pool Cooling

Some means must be provided to remove heat from the suppression pool so that the temperature inside the primary containment remains within design limits. This function is provided by two redundant RHR suppression pool cooling subsystems.

[**Note:** Plant Applicability, BWR 4/6]

LCO: Two RHR suppression pool cooling subsystems shall be operable.

Condition Requiring Entry Into End State: If one RHR suppression pool cooling subsystem is inoperable (Condition A), it must be restored to operable status within seven days (Required Action A.1). If the RHR suppression pool spray subsystem cannot be restored to operable status within the allotted time (Condition B), the plant must be placed in Mode 3 within 12 hours (Required Action B.1), and in Mode 4 within 36 hours (Required Action B.2).

Proposed Modification for End State Required Actions: Delete Required Action B.2, and retain Condition B and Required Action B.1 for one RHR suppression pool spray subsystem inoperable. Add Condition C, with Required Actions C.1 and C.2, identical to existing Condition B, with Required Actions B.1 and B.2, to maintain existing requirements unchanged for two RHR suppression pool subsystems inoperable.

Assessment: The BWROG topical report has completed a comparative PRA evaluation of the core damage risks of operation in the current end state versus operation in the proposed Mode 3 end state. The results indicated that the core damage risks while operating in Mode 3 (assuming the individual failure conditions) are lower or comparable to the current end state. One loop of the RHR suppression pool cooling system is sufficient to accomplish the required safety function. By remaining in Mode 3, HPCS, RCIC, and the power conversion system (condensate/feedwater) remain available for water makeup and decay heat removal. Additionally, the EOPs direct the operators to take control of the depressurization function if low pressure injection/spray are needed for RCS makeup and cooling. Therefore, defense-in-depth is improved with respect to water makeup and decay heat removal by remaining in Mode 3.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.25 TS 4.5.2.12 and LCO 3.6.5.6, Drywell Vacuum Relief System (BWR/6 only)

The Mark III pressure suppression containment is designed to condense, in the suppression pool, the steam released into the drywell in the event of a loss-of-coolant accident (LOCA). The steam discharging to the pool carries the non-condensibles from the drywell. Therefore, the drywell atmosphere changes from low humidity air to nearly 100% steam (no air) as the event progresses. When the drywell subsequently cools and depressurizes, non-condensibles in the drywell must be replaced to avoid excessive weir wall overflow into the drywell. Rapid weir wall overflow must be controlled in a large break LOCA, so that essential equipment and systems located above the weir wall in the drywell are not subjected to excessive drag and impact loads. The drywell post-LOCA and the drywell purge vacuum relief subsystems are the means by which non-condensibles are transferred from the primary containment back to the drywell.

[**Note:** Plant Applicability, BWR/6]

LCO: Two drywell post-LOCA and two drywell purge vacuum relief subsystems shall be operable.

Condition Requiring Entry Into End State: If one or two drywell post-LOCA vacuum relief subsystems are inoperable (Condition A), or if one drywell purge vacuum relief subsystem is inoperable (Condition B), for reasons other than being not closed, the subsystem(s) must be restored to operable status within 30 days (Required Actions B.1 and C.1, respectively). If the required actions cannot be completed within the allotted time, the plant must be placed in Mode 3 within 12 hours and in Mode 4 within 36 hours.

Proposed Modification for End State Required Actions: Renumber Conditions D, E, F and G, to Conditions E, F, G, and H respectively, and renumber associated Required Actions accordingly. Add a new Condition D for when Required Action and Associated Completion Time of Condition B or C not met, with Required Action D.1 to be in Mode 3 in a Completion Time of 12 hours. Change new Condition G to read, ''Required Action and Associated Completion Time of Condition A, E or F not met.''

Assessment: The BWROG topical report has determined that the specific failure conditions of interest are not risk significant in BWR PRAs. With one or two drywell post-LOCA vacuum relief subsystems inoperable or one drywell purge vacuum relief subsystem inoperable, for reasons other than not being closed, the remaining operable vacuum relief subsystems are adequate to perform the depressurization mitigation function. By remaining in Mode 3, HPCS, RCIC, and the power conversion system (condensate/feedwater) remain available for water makeup and decay heat removal. Additionally, the EOPs direct the operators to take control of the depressurization function if low pressure injection/spray are needed for RCS makeup and cooling. Therefore, defense-in-depth is improved with respect to water makeup and decay heat removal by remaining in Mode 3.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.26 TS 4.5.2.13 and LCO 3.7.1, Standby Service Water (SSW) System and Ultimate Heat Sink (UHS)(BWR/6 only)

The SSW system (in conjunction with the UHS) is designed to provide cooling water for the removal of heat from certain safe shutdown-related equipment heat exchangers following a DBA or transient.

[**Note:** Plant Applicability, BWR/6]

LCO: Division 1 and 2 SSW subsystems and UHS shall be operable.

Condition Requiring Entry Into End State: If one or more cooling towers with one cooling tower fan is inoperable (Condition A), the cooling tower fan(s) must be restored to operable status within seven days (Required Action A.1). If one SSW subsystem is inoperable for reasons other than Condition A (Condition C), the SSW subsystem must be restored to operable status within 72 hours (Required Action C.1). If the required action(s) and associated completion time(s) (of Conditions A or C) cannot be met (Condition D), the plant must be placed in Mode 3 within 12 hours (Required Action D.1) and in Mode 4 within 36 hours (Required Action D.2).

Proposed Modification: The existing second and third conditions of existing Condition D have been transferred to a new Condition E in an unchanged form (with Required Actions E.1 and E.2 identical to existing Required Actions D.1 and D.2). Existing Condition B with its associated Required Actions and Associated Completion Times, has been transferred to a new Condition D in an unchanged form. Existing Condition C, with its associated Required Action and Associated Completion Time, has been moved to a new Condition B in unchanged form. A new Condition C has been created. If the Required Actions and Associated Completion Times for new Condition A or B are not met (new Condition C), then the plant must be placed in Mode 3 in 12 hours (new Required Action C.1).

Assessment: The BWROG topical report determined that the specific failure condition of interest is not risk significant in BWR PRAs. With the specified inoperable components/subsystems, a sufficient number of operable components/subsystems are still available to perform the heat removal function. By remaining in Mode 3, HPCS, RCIC, and the power conversion system (condensate/feedwater) remain available for water makeup and decay heat removal. Additionally, the EOPs direct the operators to take control of the depressurization function if low pressure injection/spray are needed for RCS makeup and cooling. Therefore, defense-in-depth is improved with respect to water makeup and decay heat removal by remaining in Mode 3.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.27 TS 4.5.2.14 and LCO 3.7.3, Control Room Fresh Air (CRFA) System (BWR/6 only)

The CRFA system provides a radiologically controlled environment from which the unit can be safely operated following a DBA. The CRFA system consists of two independent and redundant high efficiency air filtration subsystems for treatment of recirculated air or outside supply air. Each subsystem consists of a demister, an electric heater, a prefilter, a high efficiency particulate air (HEPA) filter, an activated charcoal adsorber section, a second HEPA filter, a fan, and the associated ductwork and dampers. Demisters remove water droplets from the airstream. Prefilters and HEPA filters remove particulate matter that may be radioactive. The charcoal adsorbers provide a holdup period for gaseous iodine, allowing time for decay.

[**Note:** Plant Applicability, BWR/6]

LCO: Two CRFA subsystems shall be operable.

Condition Requiring Entry Into End State: If one CRFA subsystem is inoperable (Condition A), it must be restored to operable status within seven days (Required Action A.1). If two CRFA subsystems are inoperable (Condition B for control room boundary and Condition E for reasons for inoperability), one CRFA subsystem must be restored to operable status in 24 hours (Required Action B.1) or enter LCO 3.0.3 (Required Action E.1). If Conditions A or B, and associated Required Actions A.1 and B.1) cannot be met in the required Completion Time (Condition C), the plant must be placed in Mode 3 within 12 hours (Required Action C.1) and in Mode 4 within 36 hours (Required Action C.2).

Proposed Modification for End State Required Actions: Delete Required Action C.2, and change Required Action E.1 to ''Be in Mode 3'' within a Completion Time of ''12 hours.''

Assessment: The unavailability of one or both CRFA subsystems has no significant impact on CDF or LERF, irrespective of the mode of operation at the time of the accident. Furthermore, the challenge frequency of the CRFA system (i.e., the frequency with which the system is expected to be challenged to provide a radiologically controlled environment in the main control room following a DBA which leads to core damage and leaks of radiation from the containment that can reach the control room) is less than 1.0E–6/yr. Consequently, the conditional probability that this system will be challenged during the repair time interval while the plant is at either the current or the proposed end state (i.e., Mode 4 or Mode 3, respectively) is less than 1.0E–8. This probability is considerably smaller than probabilities considered ''negligible'' in Regulatory Guide 1.177 for much higher consequence risks, such as large early release.

Section 6 of reference 6 summarizes the staff's risk argument for approval of TS 4.5.2.14 and LCO 3.7.3, ''Control Room Fresh Air (CRFA) System.'' The argument for staying in Mode 3 instead of going to Mode 4 to repair the CRFA system (one or both trains) is also supported by defense-in-depth considerations. Section 6.2 makes a comparison between the current (Mode 3) and the proposed (Mode 4) end state, with respect to the means available to perform critical functions (i.e., functions contributing to the defense-in-depth philosophy) whose success is needed to prevent core damage and containment failure and mitigate radiation releases. The risk and defense-in-depth arguments, used according to the ''integrated decision-making'' process of Regulatory Guides 1.174 and 1.177, support the conclusion that Mode 3 is as safe as Mode 4 (if not safer) for repairing an inoperable CRFA system.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.28 TS 4.5.2.15 and LCO 3.7.4, Control Room Air Conditioning (CRAC) System (BWR/6 only)

The control room AC system provides temperature control for the control room following control room isolation. The control room AC system consists of two independent, redundant subsystems that provide cooling and heating of recirculated control room air. Each subsystem consists of heating coils, cooling coils, fans, chillers, compressors, ductwork, dampers, and instrumentation and controls to provide for control room temperature control. The control room AC system is designed to provide a controlled environment under both normal and accident

conditions. A single subsystem provides the required temperature control to maintain a suitable control room environment for a sustained occupancy of 12 persons.

[**Note:** Plant Applicability, BWR/6]

LCO: Two control room AC subsystems shall be operable.

Condition Requiring Entry Into End State: If one control room AC subsystem is inoperable, it must be restored to operable status within 30 days (Required Action A.1). If the required actions and associated completion times cannot be met, the plant must be placed in Mode 3 within 12 hours (Required Action B.1) and in Mode 4 within 36 hours (Required Action B.2). If two control room AC subsystems are inoperable, LCO 3.0.3 must be entered immediately (Condition D).

Proposed Modification for End State Required Actions: Delete Required Action B.2, and change Required Action D.1 to ''Be in Mode 3'' with a Completion Time of ''12 hours.''

Assessment: The unavailability of one or both AC subsystems has no significant impact on CDF or LERF, irrespective of the mode of operation at the time of the accident. Furthermore, the challenge frequency of the AC system (i.e., the frequency with which the system is expected to be challenged to provide temperature control for the control room following control room isolation following a DBA which leads to core damage) is less than 1.0E–6/yr. Consequently, the conditional probability that this system will be challenged during the repair time interval while the plant is at either the current or the proposed end state (i.e., Mode 4 or Mode 3, respectively) is less than 1.0E–8. This probability is considerably smaller than probabilities considered ''negligible'' in Regulatory Guide 1.177 for much higher consequence risks, such as large early release.

Section 6 of reference 6 summarizes the staff's risk argument for approval of TS 4.5.2.15 and LCO 3.7.4, ''Control Room Air Conditioning (AC) System.'' The argument for staying in Mode 3 instead of going to Mode 4 to repair the CRAC system (one or both trains) is also supported by defense-in-depth considerations. Section 6.2 makes a comparison between the current (Mode 3) and the proposed (Mode 4) end state, with respect to the means available to perform critical functions (i.e., functions contributing to the defense-in-depth philosophy) whose success is needed to prevent core damage and containment failure and mitigate radiation releases. The risk and defense-in-depth arguments, used according to the ''integrated decision-making'' process of Regulatory Guides 1.174 and 1.177, support the conclusion that Mode 3 is as safe as Mode 4 (if not safer) for repairing an inoperable CRAC system.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

3.2.29 TS 4.5.2.16 and LCO 3.7.5, Main Condenser Off gas (BWR/6 only)

The Off gas from the main condenser normally includes radioactive gases. The gross gamma activity rate is controlled to ensure that accident analysis assumptions are satisfied and that offsite dose limits will not be exceeded during postulated accidents.

[**Note:** Plant Applicability, BWR/6]

LCO: The gross gamma activity rate of the noble gases measured at the Off gas recombiner effluent shall be ≤380 mCi/second after decay of 30 minutes.

Condition Requiring Entry Into End State: If the gross gamma activity rate of the noble gases in the main condenser Off gas is not within limits (Condition A), the gross gamma activity rate of the noble gases in the main condenser Off gas must be restored to within limits within 72 hours (Required Action A.1). If the required action and associated completion time cannot be met, one of the following must occur:

a. All steam lines must be isolated within 12 hours (Required Action B.1).

b. The steam jet air ejector (SJAE) must be isolated within 12 hours (Required Action B.2).

c. The plant must be placed in Mode 3 within 12 hours (Required Action B.3.1) and in Mode 4 within 36 hours (Required Action B.3.2).

Proposed Modification for End State Required Actions: Delete Required Action B.3.2.

Assessment: The failure to maintain the gross gamma activity rate of the noble gases in the main condenser Off gas (MCOG) within limits has no significant impact on CDF or LERF, irrespective of the mode of operation at the time of the accident. Furthermore, the challenge frequency of the MCOG system (i.e., the frequency with which the system is expected to be challenged to mitigate offsite radiation releases following a DBA) is less than 1.0E–6/yr. Consequently, the conditional probability that this system will be challenged during the repair time interval while the plant is at either the current or the proposed end state (i.e., Mode 4 or Mode 3, respectively) is less than 1.0E–8. This probability is considerably smaller than probabilities considered ''negligible'' in Regulatory Guide 1.177 for much higher consequence risks, such as large early release.

Section 6 of reference 6 summarizes the staff's risk argument for approval of TS 4.5.2.16 and LCO 3.7.5, ''Main Condenser Off gas.'' The argument for staying in Mode 3 instead of going to Mode 4 to repair the MCOG system (one or both trains) is also supported by defense-in-depth considerations. Section 6.2 makes a comparison between the current (Mode 3) and the proposed (Mode 4) end state, with respect to the means available to perform critical functions (i.e., functions contributing to the defense-in-depth philosophy) whose success is needed to prevent core damage and containment failure and mitigate radiation releases. The risk and defense-in-depth arguments, used according to the ''integrated decision-making'' process of Regulatory Guides 1.174 and 1.177, support the conclusion that Mode 3 is as safe as Mode 4 (if not safer) for repairing an inoperable MCOG system.

Finding: Based upon the above assessment, and because the time spent in Mode 3 to perform the repair is infrequent and limited, and in light of defense-in-depth considerations, the proposed change is acceptable.

4.0 State Consultation

In accordance with the Commission's regulations, the [__] State official was notified of the proposed issuance of the amendment. The State official had [(1) no comments or (2) the following comments—with subsequent disposition by the staff].

5.0 Environmental Consideration

The amendment changes requirements with respect to the installation or use of a facility component located within the restricted area as defined in 10 CFR Part 20. [For licensees adding a Bases Control Program: The amendment also changes record keeping, reporting, or administrative procedures or requirements.] The NRC staff has determined that the amendment involves no significant increase in the amounts and no significant change in the types of any effluents that may be released offsite, and that there is no significant increase in individual or cumulative occupational radiation exposure. The Commission has previously issued a proposed finding that the amendment involves no significant hazards considerations, and there has been no public comment on

the finding [FR]. Accordingly, the amendments meet the eligibility criteria for categorical exclusion set forth in 10 CFR 51.22(c)(9) [and (c)(10)]. Pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared in connection with the issuance of the amendment.

6.0 Conclusion

The Commission has concluded, on the basis of the considerations discussed above, that (1) There is reasonable assurance that the health and safety of the public will not be endangered by operation in the proposed manner, (2) such activities will be conducted in compliance with the Commission's regulations, and (3) the issuance of the amendments will not be inimical to the common defense and security or to the health and safety of the public.

7.0 References

1. NEDC–32988–A, Revision 2, ''Technical Justification to Support Risk-Informed Modification to Selected Required Action End States for BWR Plants,'' September 2005.

2. **Federal Register**, Vol. 58, No. 139, p. 39136, ''Final Policy Statement on Technical Specifications Improvements for Nuclear Power Plants,'' July 22, 1993.

3. 10 CFR 50.65, Requirements for Monitoring the Effectiveness of Maintenance at Nuclear Power Plants.''

4. Regulatory Guide 1.182, ''Assessing and Managing Risk Before Maintenance Activities at Nuclear Power Plants,'' May 2000. (ML003699426)

5. NUMARC 93–01, ''Industry Guideline for Monitoring the Effectiveness of Maintenance at Nuclear Power Plants,'' Nuclear Management and Resource Council, Revision 3, July 2000.

6. NRC Safety Evaluation for Topical Report NEDC–32988, Revision 2, September 27, 2002. (ML022700603)

7. TSTF–423, Revision 0, ''Technical Specifications End States, NEDC–32988–A.''

8. TSTF–IG–05–02, Implementation Guidance for TSTF–423, Revision 0, ''Technical Specifications End States, NEDC–32988–A,'' September 2005.

9. Regulatory Guide 1.174, ''An Approach for Using Probabilistic Risk Assessment in Risk-Informed Decision Making on Plant Specific Changes to the Licensing Basis,'' USNRC, August 1998. (ML003740133)

10. Regulatory Guide 1.177, ''An Approach for Pant Specific Risk-Informed Decision Making: Technical Specifications,'' USNRC, August 1998. (ML003740176)

Proposed No Significant Hazards Consideration Determination

Description of Amendment Request: A change is proposed to the technical specifications (TS) of [plant name], consistent with Technical Specifications Task Force (TSTF) change TSTF–423 to the standard technical specifications (STS) for BWR Plants (NUREG 1433 and NUREG 1434) to allow, for some systems, entry into hot shutdown rather than cold shutdown to repair equipment, if risk is assessed and managed consistent with the program in place for complying with the requirements of 10 CFR 50.65(a)(4). Changes proposed in will be made to the [plant name] TS for selected Required Action end states providing this allowance.

Basis for proposed no-significant-hazards-consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of no-significant-hazards-consideration is presented below:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The proposed change allows a change to certain required end states when the TS Completion Times for remaining in power operation will be exceeded. Most of the requested technical specification (TS) changes are to permit an end state of hot shutdown (Mode 3) rather than an end state of cold shutdown (Mode 4) contained in the current TS. The request was limited to: (1) Those end states where entry into the shutdown mode is for a short interval, (2) entry is initiated by inoperability of a single train of equipment or a restriction on a plant operational parameter, unless otherwise stated in the applicable technical specification, and (3) the primary purpose is to correct the initiating condition and return to power operation as soon as is practical. Risk insights from both the qualitative and quantitative risk assessments were used in specific TS assessments. Such assessments are documented in Section 6 of GE NEDC–32988, Revision 2, ''Technical Justification to support Risk Informed Modification to Selected Required Action End States for BWR Plants.'' They provide an integrated discussion of deterministic and probabilistic issues, focusing on specific technical specifications, which are used to support the proposed TS end state and associated restrictions. The staff finds that the risk insights support the conclusions of the specific TS assessments. Therefore, the probability of an accident previously evaluated is not significantly increased, if at all. The consequences of an accident after adopting proposed TSTF–423, are no different than the consequences of an accident prior to adopting TSTF–423. Therefore, the consequences of an accident previously evaluated are not significantly affected by this change. The addition of a requirement to assess and manage the risk introduced by this change will further minimize possible concerns. Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Previously Evaluated

The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed). If risk is assessed and managed, allowing a change to certain required end states when the TS Completion Times for remaining in power operation are exceeded, i.e., entry into hot shutdown rather than cold shutdown to repair equipment, will not introduce new failure modes or effects and will not, in the absence of other unrelated failures, lead to an accident whose consequences exceed the consequences of accidents previously evaluated. The addition of a requirement to assess and manage the risk introduced by this change and the commitment by the licensee to adhere to the guidance in TSTF–IG–05–02, Implementation Guidance for TSTF–423, Revision 0, ''Technical Specifications End States, NEDC–32988–A,'' will further minimize possible concerns. Thus, this change does not create the possibility of a new or different kind of accident from an accident previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

The proposed change allows, for some systems, entry into hot shutdown rather than cold shutdown to repair equipment, if risk is assessed and managed. The BWROG's risk assessment approach is comprehensive and follows staff guidance as documented in RGs 1.174 and 1.177. In addition, the analyses show that the criteria of the three-tiered approach for allowing TS changes are met. The risk impact of the proposed TS changes was assessed following the three-tiered approach recommended in RG 1.177. A risk assessment was performed to justify the proposed TS changes. The net change to

the margin of safety is insignificant. Therefore, this change does not involve a significant reduction in a margin of safety.

Based upon the reasoning presented above and the previous discussion of the amendment request, the requested change does not involve a significant hazards consideration.

Dated at Rockville, Maryland, this 8th day of December, 2005.

For the Nuclear Regulatory Commission.

T. Robert Tjader, Sr.,

Acting Branch Chief, Technical Specifications Branch, Division of Inspection & Regional Support, Associate Director for Operating Reactor Oversight & Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 05–24021 Filed 12–13–05; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–27184; 812–13176]

The Integrity Funds, et al.; Notice of Application

December 8, 2005.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under section 12(d)(1)(J) of the Investment Company Act of 1940 (''Act'') for an exemption from section 12(d)(1)(F)(ii) of the Act.

Summary of Application: Applicants request an order to permit certain registered open-end management investment companies relying on section 12(d)(1)(F) of the Act to charge a sales load in excess of 1½ percent.

Applicants: Integrity Money Management, Inc. (the ''Adviser''), Integrity Funds Distributor, Inc. (the ''Distributor''), and The Integrity Funds on behalf of itself and certain series thereof, and future registered open-end management investment companies and series thereof advised by the Adviser or an entity controlling, controlled by, or under common control with the Adviser or for which the Distributor or any entity controlling, controlled by, or under common control with the Distributor serves as principal underwriter (the ''Funds'').

Filing Dates: The application was filed on March 17, 2005 and amended on December 2, 2005.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 3, 2006 and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303; Applicants: Brenda Sem, c/o Integrity Mutual Funds, Inc., 1 Main Street North, Minot, North Dakota 58703.

FOR FURTHER INFORMATION CONTACT: Keith A. Gregory, Senior Counsel, at (202) 551–6815 or Mary Kay Frech, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Desk, 100 F Street, NE., Washington, DC 20549–0102 (tel. (202) 551–8090).

Applicants' Representations

1. The Integrity Funds is a Delaware statutory trust registered with the Commission under the Act as an open-end management investment company. The Integrity Funds currently consists of ten Funds.[1] The Adviser is registered as an investment adviser under the Investment Advisers Act of 1940. The Distributor is the principal underwriter to the Funds and is registered as a broker-dealer under the Securities Exchange Act of 1934.

2. Certain Funds, including the All Season Fund, intend to invest all or a portion of their assets in the shares of various other registered investment companies that are not part of the same ''group of investment companies'' as defined in section 12(d)(1)(G)(ii) of the Act as the Funds (''Underlying Funds'') in reliance on section 12(d)(1)(F) of the Act. Each of the Underlying Funds will be registered as a closed-end investment company, an open-end investment company or unit investment trust. The Underlying Funds may also be registered as open-end investment companies or unit investment trusts that have received exemptive relief to, among other things, issue shares of limited redeemability that can be traded on an exchange at negotiated prices (''Exchange-Traded Funds''). The Funds also may invest a portion of their assets directly in equity or fixed income securities, and other investments. Applicants request relief to permit the Funds to charge a sales load in excess of the limit in section 12(d)(1)(F)(ii) of the Act.

Applicants' Legal Analysis

A. Section 12(d)(1) of the Act

1. Section 12(d)(1)(A) of the Act provides that no registered investment company may acquire securities of another investment company if those securities represent more than 3% of the acquired company's total outstanding voting stock, more than 5% of the acquiring company's total assets, or if the securities, together with the securities of any other acquired investment companies, represent more than 10% of the acquiring company's total assets. Section 12(d)(1)(B) of the Act provides that no registered open-end investment company, its principal underwriter and any broker or dealer may sell securities of the company to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies.

2. Section 12(d)(1)(F) of the Act provides that section 12(d)(1) shall not apply to the acquisition by a registered investment company of the securities of an investment company if, among other things, the acquiring company and its affiliates immediately after the purchase own no more than 3% of an acquired company's total outstanding stock and the acquiring company does not charge a sales load in excess of 1½%. Applicants state that the Funds will comply with section 12(d)(1)(F) in all respects except for the sales load limit of 1½%.

3. Section 12(d)(1)(J) of the Act provides that the Commission may exempt persons or transactions from any provision of section 12(d)(1), if and to the extent that such exemption is consistent with the public interest and the protection of investors.

4. Applicants request an order under section 12(d)(1)(J) exempting them from the sales load limitation in section

[1] The Integrity All Season Fund (the ''All Season Fund'') is the only existing Fund that currently intends to rely on the requested relief. Any existing or future registered open-end management investment company or series thereof that relies on the order in the future will do so only in accordance with the terms and conditions of the application.

12(d)(1)(F)(ii). Applicants have agreed, as a condition to the requested relief, that any sales charges and/or service fees with respect to shares of a Fund will not exceed the limits set forth in Rule 2830 of the NASD Conduct Rules (''NASD Conduct Rules'') applicable to a fund of funds. Applicants believe that it is appropriate to apply the NASD's rule to the proposed arrangement instead of the sales load limitation in section 12(d)(1)(F)(ii) because the proposed limit would cap the aggregate sales charges that may be imposed by a fund of funds. Applicants assert that the NASD's rule more accurately reflects today's regulatory environment with respect to the methods by which investment companies finance sales expenses. Applicants also state that the Funds will incur brokerage commissions in connection with their purchase and sale of shares of closed-end funds or Exchange-Traded Funds. The commissions on such transactions will not differ from those customarily incurred in connection with the purchase and sale of comparable securities.

Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. The Funds will comply with section 12(d)(1)(F) in all respects except for the sales load limitation of section 12(d)(1)(F)(ii).

2. Any sales charges and/or service fees (as those terms are defined in Rule 2830 of the NASD Conduct Rules) charged with respect to shares of a Fund will not exceed the limits applicable to a fund of funds as set forth in Rule 2830 of the NASD Conduct Rules.

3. No Underlying Fund will acquire securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent that such Underlying Fund (a) receives securities of another investment company as a dividend or as a result of a plan of reorganization of a company (other than a plan devised for the purpose of evading section 12(d)(1)of the Act); or (b) acquires (or is deemed to have acquired) securities of another investment company pursuant to exemptive relief from the Commission permitting such Underlying Fund to (i) acquire securities of one or more affiliated investment companies for short-term cash management purposes; or (ii) engage in interfund borrowing and lending transactions.

4. Prior to reliance on the requested order, the board of directors or trustees (''Board'') of each Fund, including a majority of the Board who are not ''interested persons'' (as defined in section 2(a)(19) of the Act) (''Disinterested Directors''), shall find that the advisory fees, if any, charged under the Fund's advisory contract(s) are based on services provided that are in addition to, rather than duplicative of, services provided under any Underlying Fund's advisory contract(s). Such finding, and the basis upon which the finding was made, will be recorded fully in the minute books of the appropriate Fund. In addition, in connection with the approval of any investment advisory contract pursuant to section 15 of the Act subsequent to such initial determination, the Board of each Fund, including a majority of the Disinterested Directors, shall find that the advisory fees, if any, charged under the Fund's advisory contract(s) are based on services provided that are in addition to, rather than duplicative of, services provided pursuant to any Underlying Fund's advisory contract(s). Such finding, and the basis upon which the finding was made, will be recorded fully in the minute books of the appropriate Fund.

5. The Board of each Fund will satisfy fund governance standards as defined in rule 0–1(a)(7) under the Act by the compliance date for the rule.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. E5–7302 Filed 12–13–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 27183; 812–12935]

Rydex ETF Trust, et al.; Notice of Application

December 8, 2005.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under section 12(d)(1)(J) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 12(d)(1)(A) and (B) and under sections 6(c) and 17(b) of the Act for an exemption from section 17(a) of the Act.

SUMMARY OF THE APPLICATION: The order would amend a prior order to permit principal underwriters and brokers and dealers to sell shares of certain registered open-end management investment companies, certain of which operate as exchange-traded funds, to other registered open-end management investment companies that are not part of the same group of investment companies.[1] The order would also amend a condition in another prior order.[2]

APPLICANTS: Rydex ETF Trust, Rydex Series Funds, Rydex Dynamic Funds, PADCO Advisors, Inc. (''PADCO'') and PADCO Advisors II, Inc. (''PADCO II'').

FILING DATES: The application was filed on February 28, 2003, and amended on February 19, 2004, June 4, 2004 and September 29, 2005. Applicants have agreed to file a final amendment during the notice period, the substance of which is reflected here.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 3, 2006, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303; Applicants, 9601 Blackwell Road, Suite 500, Rockville, MD 20850.

FOR FURTHER INFORMATION CONTACT: Stacy L. Fuller, Branch Chief, and Michael W. Mundt, Senior Special Counsel, at (202) 551–6821 (Office of Investment Company Regulation, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 100 F Street, NE., Washington, DC 20549–0102 (tel. 202–551–5850).

Applicants' Representations:

1. Rydex Series Funds and Rydex Dynamic Funds (the ''Original Trusts'')

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[1] *PADCO Advisors, Inc., et al.*, Investment Company Act Rel. Nos. 24678 (Oct. 5, 2000) (notice) and 24722 (Oct. 31, 2000) (order) (''Original Order'').

[2] *Rydex ETF Trust, et al.*, Investment Company Act Rel. Nos. 25948 (Feb. 27, 2003) (notice) and 25970 (Mar. 25, 2003) (order) (''ETF Order'').

and Rydex ETF Trust are open-end management investment companies registered under the Act, each of which is comprised of separate series (''Rydex Funds'' or ''Funds''). PADCO and PADCO II, which do business as Rydex Investments, are Maryland corporations registered as investment advisers under the Investment Advisers Act of 1940 (''Advisers Act''). All Rydex Funds are, and will be, advised by PADCO, PADCO II or an entity that is controlling, controlled by or under common control with PADCO and PADCO II and is registered as an investment adviser under the Advisers Act, and are, and will be, in the same group of investment companies, as defined in section 12(d)(1)(G)(ii) of the Act.

2. The Commission issued the Original Order to the Original Trusts and PADCO upon their application (''Original Application'') to permit registered open-end management investment companies (''Funds of Funds'') that are not part of the same group of investment companies as the Original Trusts to acquire shares of the Rydex Funds beyond the limits of section 12(d)(1)(A) of the Act, and to permit the Original Trusts, and each existing and future registered open-end management investment company that is part of the same group of investment companies as the Original Trusts to sell shares beyond the limits in section 12(d)(1)(B) of the Act. The Commission issued the ETF Order to permit the series of Rydex ETF Trust (''Rydex ETF Funds'') to issue shares of limited redeemability (''Rydex ETF Shares'' or ''Shares'') that trade in the secondary market at negotiated prices.

3. Applicants request an order amending both the Original Order and the ETF Order. The requested order would amend the Original Order to (a) permit any principal underwriter of a Rydex Fund and broker or dealer (''Broker'') registered under the Securities Exchange Act of 1934 knowingly to sell shares of Rydex Funds, including Rydex ETF Shares, beyond the limits set forth in section 12(d)(1)(B) to Funds of Funds and (b) modify certain terms and conditions of the Original Order. In addition, the requested order would amend a condition of the ETF Order in order to render it consistent with the relief from section 12(d)(1) granted by the Original Order as modified by the requested order.[3]

Applicants' Legal Analysis

A. Original Order

1. Section 12(d)(1)(B) prohibits any registered open-end investment company, principal underwriter or Broker from knowingly selling any security issued by an open-end investment company (''acquired company'') to another investment company (''acquiring company'') if the sale would cause either the acquiring company to own more than 3% of the acquired company's voting stock or investment companies generally to own more than 10% of the acquired company's voting stock. Applicants state that the Rydex Funds, including Rydex ETF Funds, are permitted under the Original Order to sell their shares to Funds of Funds in excess of the limits of section 12(d)(1)(B). However, applicants state that because Rydex ETF Shares have begun to be listed and traded on a national securities exchange, as defined in section 2(a)(26) of the Act, or on The Nasdaq Stock Market since the Original Order, Brokers are now virtually certain to be involved in sales of Rydex ETF Shares to Funds of Funds, which may require the requested relief. Accordingly, applicants seek to amend the Original Order to permit any principal underwriter and Broker knowingly to sell shares of Rydex Funds to Funds of Funds in excess of the limits prescribed by section 12(d)(1)(B).

2. Applicants also seek to clarify the Original Order in certain respects. First, applicants seek to clarify that a Fund of Funds that intends to rely on the amended order will enter into a participation agreement with the relevant Rydex Fund before exceeding any of the investment limits of section 12(d)(1)(A). Second, applicants seek to amend the Original Order to better address situations where a Fund of Funds employs an investment adviser within the meaning of section 2(a)(20)(A) of the Act (''Fund of Funds Adviser'') and one or more investment advisers within the meaning of section 2(a)(20)(B) of the Act (''Subadvisers''). Applicants state that any investment adviser to a Fund of Funds will be registered, or exempt from registration, under the Advisers Act.

3. Applicants state that their legal analysis is unchanged from that provided in the Original Application. Specifically, applicants state that they will continue to be, and that any principal underwriter and Brokers will be, fully subject to all of the terms and conditions of the Original Order, as amended by the requested order. Applicants posit that the proposed amendments raise no additional regulatory or investor protection concerns that are not addressed by the terms and conditions of the requested order. Applicants, therefore, contend that the previously requested relief, as it would be amended, will be (a) appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act, (b) consistent with the public interest and the protection of investors, and (c) conducted on terms that are reasonable and fair and do not involve overreaching on the part of any person concerned, and consistent with the policy of each registered fund involved and with the purposes of the Act.

B. ETF Order

4. Existing condition 2 to the ETF Order provides that the prospectus (''Prospectus'') and the product description (''Product Description'') of each Rydex ETF Fund will disclose that Rydex ETF Shares are issued by a Rydex Fund and that the acquisition of Rydex ETF Shares is subject to the restrictions of section 12(d)(1). In light of the relief requested to permit Funds of Funds to purchase, and the principal underwriter, Brokers and Rydex ETF Funds to sell, Rydex ETF Shares in excess of the limits of sections 12(d)(1)(A) and (B), respectively, applicants seek to replace existing condition 2 with condition 14, as stated below. Condition 14 generally provides that the Funds of Funds will be alerted that they may invest in Rydex ETF Funds in excess of the limits of section 12(d)(1) to the extent that they comply with the terms and conditions of the Original Order, as amended by the requested order, including the requirement that they enter into a participation agreement with the Rydex ETF Fund regarding the terms of the investment.

Applicants' Conditions

A. Original Order

Applicants agree the conditions to the Original Order will be superseded by, and the requested order will be subject to, the following conditions:

1. (a) The Fund of Funds Adviser, (b) any person controlling, controlled by, or under common control with the Fund of Funds Adviser, and (c) any investment

[3] Applicants state that, except for Brokers and Funds of Funds, all parties that currently intend to rely on the requested order are named as applicants. Any other party that relies on the requested order in the future, including principal underwriters, Brokers and Funds of Funds, will comply with the terms and conditions of the Original Application, as amended by this application. Applicants acknowledge that Funds of Funds may rely on the requested order only to invest in Rydex Funds and not in any other registered investment company. Applicants state that Funds of Funds do not include Rydex Funds.

company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act that is advised or sponsored by the Fund of Funds Adviser, or any person controlling, controlled by, or under common control with the Fund of Funds Adviser (collectively, the ''Adviser Group'') will not control (individually or in the aggregate) a Rydex Fund within the meaning of section 2(a)(9) of the Act. (a) Any Subadviser, (b) any person controlling, controlled by, or under common control with the Subadviser, and (c) any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Subadviser or any person controlling, controlled by, or under common control with the Subadviser (collectively, the ''Subadviser Group'') will not control (individually or in the aggregate) a Rydex Fund within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding voting securities of a Rydex Fund, the Adviser Group or the Subadviser Group, each in the aggregate, becomes a holder of more than 25 percent of the outstanding voting securities of a Rydex Fund, it will vote its shares of the Rydex Fund in the same proportion as the vote of all other holders of the Rydex Fund's shares. This condition does not apply to the Subadviser Group with respect to a Rydex Fund for which the Subadviser or a person controlling, controlled by, or under common control with the Subadviser acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act.

2. No Fund of Funds or Fund of Funds Adviser, Subadviser, promoter, principal underwriter, or any person controlling, controlled by, or under common control with any of those entities (each, a ''Fund of Funds Affiliate'') will cause any existing or potential investment by the Fund of Funds in shares of a Rydex Fund to influence the terms of any services or transactions between the Fund of Funds or a Fund of Funds Affiliate and the Rydex Fund or its investment adviser(s), promoter, principal underwriter, or any person controlling, controlled by, or under common control with any of those entities (each, a ''Rydex Fund Affiliate'').

3. The board of directors of a Fund of Funds, including a majority of the disinterested directors, will adopt procedures reasonably designed to assure that the Fund of Funds Adviser and any Subadviser are conducting the investment program of the Fund of Funds without taking into account any consideration received by the Fund of Funds or a Fund of Funds Affiliate from a Rydex Fund or a Rydex Fund Affiliate in connection with any services or transactions.

4. Once an investment by a Fund of Funds in the securities of a Rydex Fund exceeds the limit in section 12(d)(1)(A)(i) of the Act, the board of trustees of the Rydex Fund (''Board of Trustees''), including a majority of the disinterested trustees, will determine that any consideration paid by the Rydex Fund to the Fund of Funds or a Fund of Funds Affiliate in connection with any services or transactions: (a) is fair and reasonable in relation to the nature and quality of the services and benefits received by the Rydex Fund; (b) is within the range of consideration that the Rydex Fund would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (c) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between a Rydex Fund and its investment adviser(s), or any person controlling, controlled by, or under common control with such investment adviser(s).

5. No Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Rydex Fund) will cause a Rydex Fund to purchase a security in an offering of securities during the existence of any underwriting or selling syndicate of which a principal underwriter is an officer, director, member of an advisory board, Fund of Funds Adviser, Subadviser or employee of the Fund of Funds, or a person of which any such officer, director, member of an advisory board, Fund of Funds Adviser, Subadviser or employee is an affiliated person (each, an ''Underwriting Affiliate,'' except that any person whose relationship to the Rydex Fund is covered by section 10(f) of the Act is not an Underwriting Affiliate). An offering of securities during the existence of an underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate is an ''Affiliated Underwriting.''

6. The Board of Trustees, including a majority of the disinterested trustees, will adopt procedures reasonably designed to monitor any purchases of securities by a Rydex Fund in an Affiliated Underwriting once an investment by a Fund of Funds in the securities of the Rydex Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board of Trustees will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Fund of Funds in the Rydex Fund. The Board of Trustees will consider, among other things, (i) whether the purchases were consistent with the investment objectives and policies of the Rydex Fund, (ii) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index, and (iii) whether the amount of securities purchased by the Rydex Fund in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board of Trustees shall take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to assure that purchases of securities in Affiliated Underwritings are in the best interest of shareholders.

7. Each Rydex Fund shall maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications, and shall maintain and preserve for a period of not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in Affiliated Underwritings once an investment by a Fund of Funds in the securities of the Rydex Fund exceeds the limit of section 12(d)(1)(A)(i), setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the purchase, and the information or materials upon which the Board of Trustees' determinations were made.

8. Prior to an investment in a Rydex Fund in excess of the limits in section 12(d)(1)(A), each Fund of Funds and the Rydex Fund will execute an agreement stating, without limitation, that their boards of directors and their investment advisers understand the terms and conditions of the order and agree to fulfill their responsibilities under the order. At the time of its investment in a Rydex Fund in excess of the limit in section 12(d)(1)(A)(i), a Fund of Funds will notify the Rydex Fund of the investment. At such time, the Fund of Funds will also transmit to the Rydex Fund a list of the names of each Fund

of Funds Affiliate and Underwriting Affiliate. The Fund of Funds will notify the Rydex Fund of any changes to the list of the names as soon as reasonably practicable after a change occurs. The Rydex Fund and the Fund of Funds will maintain and preserve a copy of the order, the agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

9. Prior to approving any advisory contract under section 15 of the Act, the board of directors of each Fund of Funds, including a majority of the disinterested directors, will find that the advisory fees charged under such advisory contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Rydex Fund in which the Fund of Funds may invest. These findings and their basis will be recorded fully in the minute books of the appropriate Fund of Funds.

10. A Fund of Funds Adviser will waive fees otherwise payable to it by the Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Rydex Fund under rule 12b-1 under the Act) received from a Rydex Fund by the Fund of Funds Adviser, or an affiliated person of the Fund of Funds Adviser, other than any advisory fees paid to the Fund of Funds Adviser or its affiliated person by the Rydex Fund, in connection with the investment by the Fund of Funds in the Rydex Fund. Any Subadviser will waive fees otherwise payable to the Subadviser, directly or indirectly, by the Fund of Funds in an amount at least equal to any compensation received from a Rydex Fund by the Subadviser, or an affiliated person of the Subadviser, other than any advisory fees paid to the Subadviser or its affiliated person by the Rydex Fund, in connection with the investment by the Fund of Funds in the Rydex Fund made at the direction of the Subadviser. In the event that the Subadviser waives fees, the benefit of the waiver will be passed through to the Fund of Funds.

11. Any sales charges and/or service fees charged with respect to shares of the Funds of Funds will not exceed the limits applicable to a fund of funds as set forth in rule 2830 of the NASD Conduct Rules.

12. No Rydex Fund will acquire securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent permitted by section 12(d)(1)(E) of the Act or an exemptive order that allows the Rydex Fund to purchase shares of an affiliated money market fund for short-term cash management purposes.

13. The board of directors of any Fund of Funds and the Board of Trustees of any Rydex Fund will satisfy the fund governance standards as defined in rule 0–1(a)(7) under the Act by the later of (i) the compliance date for the rule or (ii) the date on which the Fund of Funds and the Rydex Fund execute a Participation Agreement.

B. ETF Order

Applicants agree to replace condition 2 of the ETF Order with the following condition:

14. Each Fund's Prospectus and Product Description will clearly disclose that, for purposes of the Act, Shares are issued by a Fund and the acquisition of Shares by investment companies is subject to the restrictions of section 12(d)(1) of the Act, except as permitted by an exemptive order that permits registered investment companies to invest in a Fund beyond the limits of section 12(d)(1), subject to certain terms and conditions, including that the registered investment company enter into an agreement with the Fund regarding the terms of the investment.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E5–7339 Filed 12–13–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52886; File No. S7–24–89]

Joint Industry Plan; Solicitation of Comments and Order Granting Summary Effectiveness To Request To Extend the Operation of the Reporting Plan for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis, Submitted by The Pacific Exchange, Inc., The National Association of Securities Dealers, Inc., The American Stock Exchange LLC, The Boston Stock Exchange, Inc., The Chicago Stock Exchange, Inc., The National Stock Exchange, Inc., and The Philadelphia Stock Exchange, Inc. and To Extend Certain Exemptive Relief

December 5, 2005.

I. Introduction and Description

On December 2, 2005, the Pacific Exchange, Inc. (''PCX'') on behalf of itself and the National Association of Securities Dealers, Inc. (''NASD''), the American Stock Exchange LLC (''Amex''), the Boston Stock Exchange, Inc. (''BSE''), the Chicago Stock Exchange, Inc. (''CHX''), the National Stock Exchange, Inc. (''NSX''), and the Philadelphia Stock Exchange, Inc. (''Phlx'') (hereinafter referred to collectively as ''Participants''),[1] as members of the operating committee (''Operating Committee'' or ''Committee'') of the Plan submitted to the Securities and Exchange Commission (''Commission'') a request to extend the operation of the Plan and also to extend certain exemptive relief as described below.[2] The Nasdaq UTP Plan governs the collection, processing, and dissemination on a consolidated basis of quotation and last sale information for each of its Participants. This consolidated information informs investors of the current quotation and recent trade prices of The Nasdaq Stock Market, Inc. (''Nasdaq'') securities. It enables investors to ascertain from one data source the current prices in all the markets trading Nasdaq securities. The Plan serves as the required transaction reporting plan for its Participants, which is a prerequisite for their trading

[1] PCX is the chair of the operating committee (''Operating Committee'' or ''Committee'') for the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis (''Nasdaq UTP Plan'' or ''Plan'') by the Participants.

[2] See letter from Bridget M. Farrell, Chairman, OTC/UTP Operating Committee, to Jonathan G. Katz, Secretary, Commission, dated December 2, 2005.

Nasdaq securities. Currently, the Plan is scheduled to expire on December 21, 2005.

This order grants summary effectiveness, pursuant to Rule 608(b)(4) under the Securities Exchange Act of 1934 (''Act''),[3] to the request to extend operation of the Plan, as modified by all changes previously approved, and to the request to extend certain exemptive relief (''Date Extension''). Pursuant to Rule 608(b)(4) under the Act,[4] the Date Extension will be effective upon publication in the **Federal Register** on temporary basis not to exceed 120 days.

II. Exemptive Relief

While both Nasdaq and the NASD operate under the umbrella of a single Plan Participant, the submission of two distinct best bids and offers (''BBOs'') could be deemed inconsistent with Section VI.C.1 of the Plan.[5] Pursuant to the 13th Amendment of the Plan and Rule 608(a)(3),[6] Nasdaq cannot be granted Plan Participant status until it is registered as a national securities exchange. While Nasdaq submits a distinct BBO from the NASD and until Nasdaq is registered as a national securities exchange, the NASD will submit quotes to the Plan's Securities Information Processor (''SIP'') in a manner different than specified in Section VI.C.1. of the Plan and, thus, in conflict with Commission Rule 608(c).[7] As discussed at length in the notice of the 13th Amendment,[8] the Commission had determined to relieve the potential conflict among the SuperMontage approval order,[9] Rule 608,[10] and the Plan, by granting the NASD an exemption under Rule 608(e)[11] from compliance with Section VI.C.1. of the Plan as required by Rule 608(c)[12] until such time as Nasdaq is registered as a national securities exchange.[13] The Plan Participants have requested an extension of the exemptive relief.

III. Discussion

The Commission finds that extending the operation of the Plan is consistent with the requirements of the Act and the rules and regulations thereunder, and, in particular, Section 12(f)[14] and Section 11A(a)(1)[15] of the Act and Rules 601 and 608 thereunder.[16] Section 11A of the Act directs the Commission to facilitate the development of a national market system for securities, ''having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets,'' and cites as an objective of that system the ''fair competition * * * between exchange markets and markets other than exchange markets.''[17] When the Commission first approved the Plan on a pilot basis, it found that the Plan ''should enhance market efficiency and fair competition, avoid investor confusion, and facilitate surveillance of concurrent exchange and OTC trading.''[18] The Plan has been in existence since 1990 and Participants have been trading Nasdaq securities under the Plan since 1993. The Commission finds that extending the operation of the Plan through summary effectiveness furthers the goals described above by preventing the lapse of the sole effective transaction reporting plan for Nasdaq securities traded by exchanges pursuant to unlisted trading privileges. The Commission believes that the Plan is currently a critical component of the national market system and that the Plan's expiration would have a serious, detrimental impact on the further development of the national market system. The Commission also finds that it is appropriate to grant summary effectiveness to the request to extend the exemption under Rule 608(e)[19] from compliance with Section VI.C.1. of the Plan as required by Rule 608(c).[20] The Commission believes that the Plan is a critical component of the national market system and that the requested exemptive relief is necessary to assure the effective operation of the Plan. The Commission believes that the requested exemptive relief extension is consistent with the Act, the Rules thereunder, and, specifically, with the objectives set forth in Sections 12(f) and 11A of the Act[21] and Rules 601 and 608 thereunder.[22]

IV. Solicitation of Comments

The Commission seeks general comments on the extension of the operation of the Plan and the extension of exemptive relief. Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal 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 S7–24–89 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549–9303.

All submissions should refer to File Number S7–24–89. 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

[3] 17 CFR 242.608(b)(4).

[4] 17 CFR 242.608(b)(4).

[5] Section VI.C.1. of the Plan, as approved by the Operating Committee in the 13th Amendment, states that ''[t]he Processor shall disseminate on the UTP Quote Data Feed the best bid and offer information supplied by each Participant, including the NASD....''

[6] 17 CFR 242.608(a)(3).

[7] 17 CFR 242.608(c). Commission Rule 608(c) requires a self-regulatory organization participant of national market system plan to comply with the terms of that plan.

[8] See Securities Exchange Act Release No. 46139 (June 28, 2001), 67 FR 44888 (July 5, 2002) (''13th Amendment Notice'').

[9] See Securities Exchange Act Release No. 43863 (January 19, 2001), 66 FR 8020 (January 26, 2001).

[10] 17 CFR 242.608.

[11] 17 CFR 242.608(e).

[12] 17 CFR 242.608(c).

[13] On March 15, 2001, the Nasdaq Stock Market, Inc. (''Nasdaq'') submitted to the Commission a Form 1 application pursuant to Section 6 of the Act, seeking registration as a national securities exchange. The most recent Form 1 and accompanying amendments were published for comment. See Securities Exchange Act Release No. 52559 (October 4, 2005), 70 FR 59097 (October 11, 2005).

[14] 15 U.S.C. 78l(f). The Commission finds that extending the Plan is consistent with fair and orderly markets, the protection of investors and the public interest, and otherwise in furtherance of the purposes of the Act. The Commission has taken into account the public trading activity in securities traded pursuant to the Plan, the character of the trading, the impact of the trading of such securities on existing markets, and the desirability of removing impediments to, and the progress that has been made toward the development of a national market system.

[15] 15 U.S.C. 78k–1(a)(1).

[16] 17 CFR 242.601 and 17 CFR 242.608.

[17] 15 U.S.C. 78k–1(a).

[18] *See* Securities Exchange Act Release No. 28146 (June 26, 1990), 55 FR 27917 (July 6, 1990).

[19] 17 CFR 242.608(e).

[20] 17 CFR 242.608(c).

[21] 15 U.S.C. 781(f) and 15 U.S.C. 78k–1.

[22] 17 CFR 242.601 and 17 CFR 242.608.

Room. Copies of the filing also will be available for inspection and copying at the Office of the Secretary of the Committee, currently located at the Pacific Exchange, Inc. and Archipelago Exchange L.L.C., 100 South Wacker Drive, Suite 2000, Chicago, IL 60606. 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 S7–24–89 and should be submitted on or before January 4, 2006.

V. Conclusion

It is therefore ordered, pursuant to Sections 12(f) and 11A of the Act [23] and paragraph (b)(4) of Rule 608 thereunder,[24] that the operation of the Plan, as modified by all changes previously approved, be, and hereby is, extended, and that certain exemptive relief also be extended, both for a period not to exceed 120 days from the date of publication of this Date Extension in the **Federal Register**.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[25]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–7329 Filed 12–13–05; 8:45 am]

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[23] 15 U.S.C. 78(f) and 15 U.S.C. 78k–1.

[24] 17 CFR 242.608(b)(4).

[25] 17 CFR 200.30–3(a)(27).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52901; File No. SR–OPRA–2005–03]

Options Price Reporting Authority; Order Approving an Amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information To Provide That Classes of Foreign Currency Options Newly Introduced for Trading on the Philadelphia Stock Exchange Be Treated as Equity/Index Options During a Temporary Period Ending on December 31, 2007

December 6, 2005.

On October 21, 2005, the Options Price Reporting Authority (''OPRA'') submitted to the Securities and Exchange Commission (''Commission''), pursuant to Section 11A of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 608 thereunder,[2] an amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (''OPRA Plan'').[3] The proposed OPRA Plan amendment would provide that classes of Foreign Currency Options (''FCO Securities'' or ''FCO''), newly introduced for trading on the Phlx during a temporary period ending no later than December 31, 2007, will be treated by OPRA as Equity/Index Options (''EIO Securities'' or ''EIO'') to the extent described in the proposed amendment. Notice of the proposal was published in the **Federal Register** on November 7, 2005.[4] The Commission received no comment letters on the proposed OPRA Plan amendment. This order approves the proposal.

FCO Securities under the OPRA Plan are currently traded only on the Phlx, which processes these options on a separate computer platform from its EIO Securities. The FCO platform is a legacy system, which is in the process of being converted to a newer technology. The Phlx has advised OPRA that it expects to have this effort completed no later than December 31, 2007, and that, in the meanwhile, the Phlx does not intend to devote resources to expanding the soon to be replaced legacy platform. Because the legacy FCO platform does not have the capacity to handle additional classes of FCO Securities that may be introduced for trading by the Phlx while the new platform is being developed, the Phlx has proposed to temporarily process any such new classes of FCO Securities on its EIO platform, which does have the capacity to handle them, until the new FCO platform is available. According to OPRA, this would mean that, while these new FCO Securities are on the EIO platform, their quotes and trade reports would be disseminated to OPRA over EIO data lines and not over the FCO data line. In turn, this would require OPRA to treat these quotes and trade reports as if they were EIO Securities. Thus, quotes and trade reports covering these new FCO Securities would be included in OPRA's basic service and not in its FCO service, and revenues and expenses pertaining to market data regarding these new FCO Securities would be allocated to OPRA's basic accounting center and further allocated among the parties to the OPRA Plan as if these products were EIO Securities and not FCO Securities.

OPRA represents that all currently traded FCO products would continue to be disseminated on the current FCO data line, and would continue to be treated by OPRA as FCO Securities. Only newly traded FCO Securities would be treated as EIO Securities and only for a temporary period while the Phlx's upgraded FCO platform is being developed. The purpose of the proposed OPRA Plan amendment is to codify in the language of the OPRA Plan the above-described temporary treatment of the Phlx's newly traded FCO Securities.

After careful review, the Commission finds that the proposed OPRA Plan amendment is consistent with the requirements of the Act and the rules and regulations thereunder.[5] The Commission finds that the proposed OPRA Plan amendment is consistent with Section 11A of the Act [6] and Rule 608 thereunder [7] in that it is appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system. Specifically, the Commission finds that it is appropriate to clarify in the language of the OPRA Plan the temporary treatment of the Phlx's newly traded FCO Securities as EIO Securities and believes that the proposed language is a reasonable accommodation by OPRA during the time the Phlx is upgrading its FCO platform.

It is therefore ordered, pursuant to Section 11A of the Act,[8] and Rule 608 thereunder,[9] that the proposed OPRA Plan amendment (SR–OPRA–2005–03) be, and it hereby is, approved on a temporary basis, until December 31, 2007.

[1] 15 U.S.C. 78k–1.

[2] 17 CFR 242.608.

[3] The OPRA Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 608 thereunder (formerly Rule 11Aa3–2). *See* Securities Exchange Act Release No. 17638 (March 18, 1981), 22 S.E.C. Docket 484 (March 31, 1981). The full text of the OPRA Plan is available at *http://www.opradata.com.*

The OPRA Plan provides for the collection and dissemination of last sale and quotation information on options that are traded on the participant exchanges. The six participants to the OPRA Plan are the American Stock Exchange LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Incorporated, the International Securities Exchange, Inc., the Pacific Exchange, Inc., and the Philadelphia Stock Exchange, Inc (''Phlx'').

[4] *See* Securities Exchange Act Release No. 52710 (November 1, 2005), 70 FR 67503.

[5] In approving this proposed OPRA Plan Amendment, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78k–1.

[7] 17 CFR 242.608.

[8] 15 U.S.C. 78k–1.

[9] 17 CFR 242.608.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–7301 Filed 12–13–05; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52900; File No. SR–OPRA–2005–04]

Options Price Reporting Authority; Order Approving an Amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (''OPRA Plan'') to Amend Guideline No. 1 of the Best Bid and Offer Guidelines Adopted Pursuant to the OPRA Plan

December 6, 2005.

On October 31, 2005, the Options Price Reporting Authority (''OPRA'') submitted to the Securities and Exchange Commission (''Commission''), pursuant to section 11A of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 608 thereunder,[2] an amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (''OPRA Plan'').[3] The proposed amendment would amend Guideline No. 1 of the Best Bid and Offer Guidelines (''BBO Guidelines'') previously adopted by OPRA under section II (o) of the OPRA Plan and make a minor editorial correction to the introductory paragraph of the BBO Guidelines. Notice of the proposal was published in the **Federal Register** on November 7, 2005.[4] The Commission received no comment letters on the proposed OPRA Plan amendment. This order approves the proposal.

The purpose of the proposed amendment is to amend Guideline No. 1 of OPRA's BBO Guidelines to reduce from five cents to one cent the minimum price differential by which a bid or offer must improve a current quote in order to displace the current quote in the consolidated BBO. In addition, the proposed amendment will revise the introductory paragraph of the BBO Guidelines to correctly refer to the section of the OPRA Plan where the definition of ''BBO'' is set forth.

Under the current rules of the exchanges that are parties to the OPRA Plan, the minimum quoting increment for options is five cents (ten cents for options quoted at $3 or higher), and no exchange currently quotes options in penny increments. In the absence of this amendment, if penny quoting were to be introduced on one or more exchange and if an exchange were to improve the current best quote on another exchange by less than five cents, the original quote and not the improved quote would continue to be disseminated over OPRA's BBO service as the ''best'' even though a better quote would in fact be available. This amendment would assure that, in the event penny quoting is introduced in the options markets, OPRA's BBO service would disseminate the actual best-priced bids and offers at any given point in time.

After careful review, the Commission finds that the proposed OPRA Plan amendment is consistent with the requirements of the Act and the rules and regulations thereunder.[5] The Commission finds that the proposed OPRA Plan amendment is consistent with section 11A of the Act[6] and Rule 608 thereunder[7] in that it is appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of, a national market system. Specifically, the Commission finds that it is reasonable and appropriate to amend the BBO Guidelines at this time to ensure that, should the options exchanges receive Commission approval to quote options in penny increments, OPRA would be able to disseminate the actual best-priced bids and offers through its BBO service.

It Is therefore ordered, pursuant to section 11A of the Act,[8] and Rule 608 thereunder,[9] that the proposed OPRA Plan amendment (SR–OPRA–2005–04) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–7304 Filed 12–13–05; 8:45 am]

BILLING CODE 8010–01–P

[10] 17 CFR 200.30–3(a)(29).

[1] 15 U.S.C. 78k–1.

[2] 17 CFR 242.608.

[3] The OPRA Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 608 thereunder (formerly Rule 11Aa3–2). *See* Securities Exchange Act Release No. 17638 (March 18, 1981), 22 S.E.C. Docket 484 (March 31, 1981). The full text of the OPRA Plan is available at *http://www.opradata.com.*

The OPRA Plan provides for the collection and dissemination of last sale and quotation information on options that are traded on the participant exchanges. The six participants to the OPRA Plan are the American Stock Exchange LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Incorporated, the International Securities Exchange, Inc., the Pacific Exchange, Inc., and the Philadelphia Stock Exchange, Inc.

[4] *See* Securities Exchange Act Release No. 52714 (November 1, 2005), 70 FR 67501.

[5] In approving this proposed OPRA Plan Amendment, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78k–1.

[7] 17 CFR 242.608.

[8] 15 U.S.C. 78k–1.

[9] 17 CFR 242.608.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52904; File No. SR–Amex–2005–092]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change and Amendment No. 1 Thereto Relating to the Trading Pursuant to Unlisted Trading Privileges of the iShares S&P Global 100 Fund

December 7, 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 September 13, 2005, the American Stock Exchange LLC (''Amex'' or the ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. On November 22, 2005, Amex filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons and approving the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to trade shares (the ''Fund Shares'' or ''Shares'') of the iShares S&P Global 100 Fund (ticker symbol: IOO) (the ''Global 100 Fund'' or ''Fund'') pursuant to unlisted trading privileges (''UTP'').

The text of the proposed rule change is available on the Exchange's Web site at (*http://www.amex.com*) at the principal office of the Exchange, and at

[10] 17 CFR 200.30–3(a)(29).

[1] 15 U.S.C 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1, the Exchange clarified and supplemented certain aspects of its proposal. Amendment No. 1 supplements the information provided in various sections, as indicated, of the Exchange's Form 19b–4.

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 Amex 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 III 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade Fund Shares which are Index Fund Shares under Amex Rules 1000A *et seq.*, pursuant to UTP. The Commission previously approved the original listing and trading of the Fund Shares on the New York Stock Exchange, Inc. (''NYSE'').[4] The Fund is a separate series of the iShares Trust (the ''Trust''). Standard & Poor's Corporation, a division of The McGraw-Hill Companies, Inc. (''S&P''), calculates and maintains the S&P Global 100 Index (the ''Index'' or ''Underlying Index'') in cooperation with the NYSE. The Underlying Index is governed and maintained by S&P through an Index Committee drawn from professionals at S&P. Additional information about the Funds is also available at *http://www.ishares.com.*

The investment objective of the Fund is to provide investment results that correspond generally to the performance of the Underlying Index. The Underlying Index seeks results that correspond generally to the price and yield performance, before fees and expenses, of 100 multinational, blue chip companies of major importance in the global equity markets as defined by the Index. The Index includes 100 large-cap companies drawn from the S&P 1200 Index, whose businesses are global in nature and derive a substantial portion of their operating income, assets and employees from multiple countries.[5] The Index description, including any changes thereto, may be found on the S&P Global Web site at *http://www.spglobal.com.*

(a) Dissemination of Information About the Fund Shares

Quotations for and last sale information regarding the Fund is disseminated through the Consolidated Tape Association (''CTA''). The net asset value (''NAV'') of the Fund is calculated each business day, normally at the close of regular trading of the NYSE, and is published in a number of places, including *http://www.iShares.com* and through the facilities of CTA. According to the Funds' prospectus, Investors Bank & Trust Company, the administrator, custodian and transfer agent for the Fund, determines the NAV for the Funds as of the close of regular trading on the NYSE (ordinarily 4 p.m., Eastern time) on each day that the NYSE is open for trading.[6] The Funds and the index calculation methodology for the Index is both described in more detail in the NYSE Order.

In order to provide updated information relating to the Funds for use by investors, professionals, and persons wishing to create or redeem Fund Shares in creation unit aggregation (''Creation Units''), the NYSE disseminates, through the facilities of CTA, the indicative optimized portfolio value (''IOPV''), calculated by Bloomberg, L.P., every fifteen (15) seconds during the trading hours for the Shares of 9:30 a.m. to 4:15 p.m. ET.

As described in the Funds' prospectus, dividends are accrued daily from net investment income and will be declared and paid to beneficial owners of record at least annually by the Funds. The process for payment of dividends and other distributions is described in more detail in the Funds' Prospectus and in the NYSE Order.

(b) Trading Rules

The Exchange deems the Fund Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. The trading hours for the Funds on the Exchange will be 9:30 a.m. to 4:15 p.m. Eastern Time (''ET''). Shares trade with a minimum price variation of $0.01.

Amex Rule 190 generally precludes certain business relationships between an issuer and the specialist in the issuer's securities. Exceptions in the rule permit specialists in Fund Shares to enter into Creation Unit transactions to facilitate the maintenance of a fair and orderly market. Commentary .04 to Amex Rule 190 specifically applies to Index Fund Shares listed on the Exchange, including the Shares. Commentary .04 states that nothing in Amex Rule 190(a) should be construed to restrict a specialist registered in a security issued by an investment company from purchasing and redeeming the listed security, or securities that can be subdivided or converted into the listed security, from the issuer as appropriate to facilitate the maintenance of a fair and orderly market.

Amex Rule 154, Commentary .04(c) provides that stop and stop limit orders to buy or sell a security (other than an option, which is covered by Rule 950(f) and Commentary thereto) the price of which is derivatively priced based upon another security or index of securities, may with the prior approval of a Floor Official, be elected by a quotation, as set forth in Commentary .04(c)(i–v). The Exchange has designated Index Fund Shares, including the Funds Shares, as eligible for this treatment.

The rules of the Exchange require its members to deliver a prospectus or product description to investors purchasing Shares of the Fund prior to or concurrently with the confirmation of a transaction in such Shares. The Exchange notes, however, that although Exchange Rule 1000A provides for delivery of written descriptions to customers of Funds that have received an exemption from section 24(d) of the Investment Company Act of 1940 and the Trust has received such an exemption, there is at this time no written description available for these Funds. The Exchange will advise its members and member organizations that delivery of a prospectus in lieu of a written description would satisfy the requirements of Rule 1000A.

The Amex will cease trading in the Fund Shares if (a) the primary market stops trading the Fund Shares because of a regulatory halt akin to a halt based on Amex Rule 117 and/or a halt because dissemination of the indicative optimized portfolio value (''IOPV'') and/or underlying index value has ceased or (b) the primary market delists the Fund Shares.

(c) Surveillance

The Exchange notes that the Underlying Index is broad-based and has components with significant market

[4] *See* Securities Exchange Act Release No. 43658 (December 1, 2000), 65 FR 77408 (December 11, 2000) (SR–NYSE–00–53) (''NYSE Order''). The Fund commenced trading on the NYSE on December 8, 2000.

[5] A global company is defined as a corporation that has production facilities and/or other fixed assets in at least one nation other than its home country and makes its major management decisions in a global context. The degree to which sales are executed outside the home country is a factor in determining a company's global reach.

[6] The Web site for the Trust, *http://www.iShares.com,* makes available a variety of other relevant information about the Shares.

capitalizations and liquidity.[7] Nevertheless, the Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the Shares. Specifically, the Amex will rely on its existing surveillance procedures governing Index Fund Shares, which have been deemed adequate under the Act.

(d) Information Circular

In connection with the trading of the Shares, the Amex will inform its members in an Information Circular of the special characteristics and risks associated with trading of the Shares, such as, a description of the Fund and associated Shares, how the Fund Shares are created and redeemed in Creation Units (*e.g.*, that Fund Shares are not individually redeemable), foreign currency risks, foreign securities characteristics, applicable foreign country laws and restrictions, applicable Exchange rules, dissemination information, trading information, the applicability of suitability rules and a discussion of any relief provided by the Commission or the staff from any rules under the Act. Additionally, in the Information Circular, the Exchange will advise its members to deliver a prospectus to investors purchasing Shares of the Fund prior to or concurrently with the confirmation of a transaction in such Shares. The Information Circular will also discuss the information that will be publicly available about the Shares.

The Information Circular will also remind members of their suitability obligations, including Amex Rule 411, which impose a duty of the due diligence on its members and member firms to learn the essential facts relating to every customer prior to trading the Shares.[8]

2. Statutory Basis

The proposed rule change, as amended, is consistent with section 6(b) of the Act[9] in general and furthers the objectives of section 6(b)(5)[10] 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 transaction in securities, and, in general to protect investors and the public interest. In addition, the Exchange believes that the proposal is consistent with Rule 12f–5 under the Act[11] because it deems the Fund Shares to be equity securities, thus rendering the Shares subject to the Exchange's existing rules governing the trading of equity securities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed rule change, as amended, will impose no burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. 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–2005–092 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–Amex–2005–092. 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 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 publicly available. All submissions should refer to File Number SR–Amex–2005–092 and should be submitted on or before January 4, 2006.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change, as amended, 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 finds that the proposed rule change is consistent with section 6(b)(5) of the Act,[13] which requires that an exchange have rules designed, among other things, 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.

In addition, the Commission finds that the proposal is consistent with section 12(f) of the Act,[14] which permits an exchange to trade, pursuant to UTP, a security that is listed and registered on another exchange.[15] The Commission notes that it previously approved the listing and trading of the Shares on the NYSE.[16] The Commission also finds that the proposal is consistent with Rule

[7] Telephone conversation between Florence Harmon, Senior Special Counsel, Division of Market Regulation, Commission, and Jeffrey Burns, Associate General Counsel, Amex, on December 6, 2005.

[8] Telephone conversation between Florence Harmon, Senior Special Counsel, Division of Market Regulation, Commission, and Jeffrey Burns, Associate General Counsel, Amex, on December 6, 2005.

[9] 15 U.S.C. 78s(b).

[10] 15 U.S.C. 78s(b)(5).

[11] 17 CFR 240.12f–5.

[12] In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 15 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78*l*(f).

[15] Section 12(a) of the Act, 15 U.S.C. 78l(a), generally prohibits a broker-dealer from trading a security on a national securities exchange unless the security is registered on that exchange pursuant to section 12 of the Act. Section 12(f) of the Act excludes from this restriction trading in any security to which an exchange ''extends UTP.'' When an exchange extends UTP to a security, it allows its members to trade the security as if it were listed and registered on the exchange even though it is not so listed and registered.

[16] *See* NYSE Order, *supra* note 4.

12f–5 under the Act,[17] which provides that an exchange shall not extend UTP to a security unless the exchange has in effect a rule or rules providing for transactions in the class or type of security to which the exchange extends UTP. Amex rules deem the Shares to be equity securities, thus trading in the Shares will be subject to the Exchange's existing rules governing the trading of equity securities.[18]

The Commission further believes that the proposal is consistent with Section 11A(a)(1)(C)(iii) of the Act,[19] which sets forth Congress's finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Quotations for and last sale information regarding the Shares are disseminated through the Consolidated Quotation System. Furthermore, the NYSE disseminates through the facilities of CTA an updated IOPV for the Shares at least every 15 seconds from 9:30 a.m. to 4:15 p.m. E.T.

The Exchange will cease trading in the Shares if (a) the primary market stops trading the Shares because of a regulatory halt similar to a halt based on Amex Rule 117 and/or a halt because dissemination of the IOPV and/or underlying index value has ceased or (b) the primary market delists the Shares.

In support of this proposed rule change, the Exchange has made the following representations:

1. Amex has appropriate rules to facilitate transactions in this type of security.

2. Amex surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange.

3. Amex will distribute an Information Circular to its members prior to the commencement of trading of the Shares on the Exchange that explains the terms, characteristics, and risks of trading such shares.

4. Amex will require a member with a customer that purchases the Shares on the Exchange to provide that customer with a product prospectus and will note this prospectus delivery requirement in the Information Circular.

5. Amex will cease trading in the Shares if (a) the primary market stops trading the Shares because of a regulatory halt similar to a halt based on Amex Rule 117 and/or a halt because dissemination of the IOPV and/or underlying index value has ceased or (b) the primary market delists the Shares.

This approval order is conditioned on Amex's adherence to these representations.

The Commission finds good cause for approving this proposed rule change, as amended, before the thirtieth day after the publication of notice thereof in the **Federal Register**. As noted previously, the Commission previously found that the listing and trading of these Shares on the NYSE is consistent with the Act.[20] The Commission presently is not aware of any issue that would cause it to revisit that earlier finding or preclude the trading of these funds on the Exchange pursuant to UTP. Therefore, accelerating approval of this proposed rule change should benefit investors by creating, without undue delay, additional competition in the market for these Shares.

V. Conclusion

It Is therefore ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule change (SR–Amex–2005–092), is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[21]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–7296 Filed 12–13–05; 8:45 am]

BILLING CODE 8010–01–P

[17] 17 CFR 240.12f–5.

[18] The Commission notes that Commentary .04 to existing Amex Rule 190 will permit a specialist in the Shares to create or redeem creation units of these funds to facilitate the maintenance of a fair and orderly market. The Commission previously has found Commentary .04 to Amex Rule 190 to be consistent with the Act. *See* Securities Exchange Act Release No. 36947 (March 8, 1996), 61 FR 10606, 10612 (March 14, 1996) (SR–Amex–95–43).

[19] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[20] *See* NYSE Order, *supra* note 4.

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52925; File No. SR–Amex–2005–126]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt an Options Licensing Fee for Options on Certain PowerShares Exchange-Traded Funds

December 8, 2005.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 5, 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 Exchange. Amex has designated this proposal as one establishing or changing a due, fee, or other charge imposed by a self-regulatory organization pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Amex proposes to modify its Options Fee Schedule by adopting a per-contract license fee for the orders of specialists, registered options traders, firms, non-member market makers, and broker-dealers (collectively, ''Market Participants'') in connection with options transactions in two (2) new PowerShares exchange-traded funds (''ETFs'').

The text of the proposed rule change is available on the Exchange's Internet Web site (*http://www.amex.com*), at the Exchange's principal office, 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 Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange has entered into numerous agreements with various index providers for the purpose of trading options on certain ETFs. As a result, the Exchange is required to pay index license fees to third parties as a condition to the listing and trading of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2).

these ETF options. In many cases, the Exchange is required to pay a significant licensing fee to the index provider that may not be reimbursed. In an effort to recoup the costs associated with certain index licenses, the Exchange has recently established per-contract licensing fees for orders of Market Participants that are collected on each option transaction in certain designated products in which such Market Participant is a party.[5]

The purpose of the proposal is to charge an options licensing fee in connection with options on the PowerShares Value Line Timeliness Select Portfolio (symbol: PIV) and the PowerShares Water Resources Portfolio (symbol: PHO) (collectively, ''PowerShares ETF options''). Specifically, Amex seeks to charge an options licensing fee of $0.10 per contract side for each PowerShares ETF option for the orders of Market Participants executed on the Exchange. In all cases, the fee would be charged only to the Exchange member through whom such order is placed.

Amex represents that the proposed options licensing fee would allow the Exchange to recoup its costs in connection with the index license fees for the trading of the PowerShares ETF options. The fee would be collected on every Market Participant order executed on the Exchange. The Exchange believes that requiring the payment of a per-contract licensing fee in connection with the PowerShares ETF options by those Market Participants that benefit from the index license agreements is justified and consistent with the rules of the Exchange.

The Exchange notes that, in recent years, it has revised a number of its fees to better align Amex fees with the actual cost of delivering services and reduce Amex's subsidization of such services.[6] The Exchange represents that the implementation of this proposal is consistent with the reduction and/or elimination of these subsidies. Amex believes that this fee will help to allocate to those Market Participants engaging in transactions in PowerShares ETF options a fair share of the related costs of offering such options for trading.

The Exchange asserts that the proposal provides for an equitable allocation of fees as required by section 6(b)(4) of the Act.[7] In connection with the adoption of an options licensing fee for the PowerShares ETF options, the Exchange notes that charging the options licensing fee, where applicable, to all Market Participant orders, except for customer orders, is reasonable given the competitive pressures in the industry. Accordingly, the Exchange seeks, through this proposal, to better align its transaction charges with the cost of providing trading products.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act[8] in general, and furthers the objectives of section 6(b)(4) of the Act[9] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act[10] and Rule 19b–4(f)(2)[11] thereunder because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of 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 No. SR–Amex–2005–126 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–Amex–2005–126. 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 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–2005–126 and should be submitted on or before January 4, 2006.

[5] *See, e.g.*, Securities Exchange Act Release No. 52493 (September 22, 2005), 70 FR 56941 (September 29, 2005).

[6] *See, e.g.*, Securities Exchange Act Release No. 45360 (January 29, 2002), 67 FR 5626 (February 6, 2002); Securities Exchange Act Release No. 44286 (May 9, 2001), 66 FR 27187 (May 16, 2001).

[7] Section 6(b)(4) of the Act states that the rules of a national securities exchange must ''provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.'' 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

[11] 17 CFR 19b–4(f)(2).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–7307 Filed 12–13–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52914; File No. SR–CBOE–2005–98]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Revisions to the Series 9/10 Examination Program

December 7, 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 November 16, 2005, the Pacific Exchange, Inc. (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. CBOE has designated the proposed rule change as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization pursuant to Section 19(b)(3)(A)(i) of the Act[3] and Rule 19b–4(f)(1) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE is filing revisions to the study outline and selection specifications for the Limited Principal—General Securities Sales Supervisor (Series 9/10) examination program. The proposed revisions update the material to reflect changes to the laws, rules, and regulations covered by the examination, as well as modify the content of the examination program to track more closely the functional workflow of a Series 9/10 limited principal. CBOE is not proposing any textual changes to the Constitution or Rules of CBOE.

The revised study outline is attached as Exhibit 3a. However, CBOE has omitted the Series 9/10 selection specifications from this filing and has submitted the specifications under separate cover to the Commission with a request for confidential treatment pursuant to the Commission's confidential treatment procedures under the Freedom of Information Act.[5] The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com*), at the Exchange's Office of the Secretary, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE 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. CBOE 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

CBOE Rule 9.2 states that no member organization shall be approved to transact options business with the public until those persons associated with it who are designated as Options Principals have been approved by and registered with the Exchange. CBOE Rule 9.2 further requires successful completion of an examination prescribed by the Exchange in order to qualify for registration as an Options Principal. The Series 9/10 examination, an industry-wide examination, has been designed for this purpose. The Series 9/10 examination tests a candidate's knowledge of securities industry rules and regulations and certain statutory provisions pertinent to the supervision of sales activities.

The Series 9/10 examination program is shared by CBOE and the following SROs: The American Stock Exchange LLC, the National Association of Securities Dealers, Inc. (''NASD''), the Municipal Securities Rule Making Board (''MSRB''), the New York Stock Exchange, Inc. (''NYSE''), the Pacific Exchange, Inc., and the Philadelphia Stock Exchange, Inc.

A committee of industry representatives, together with the staff of CBOE and the other SROs, recently undertook a periodic review of the Series 9/10 examination program. As a result of this review, CBOE is proposing to update the content of the examination to cover Regulation S–P,[6] MSRB Rules G–37/G–38, SRO research analyst and anti-money laundering rules, municipal fund securities (*e.g.*, 529 college savings plans), and exchange traded funds. CBOE is further proposing revisions to the study outline to reflect the SEC short sale requirements. In addition, as part of an ongoing effort to align the examination more closely to the supervisory duties of a Series 9/10 limited principal, CBOE is proposing to modify the content of the examination to track the functional workflow of a Series 9/10 limited principal. Also, CBOE is proposing to include questions related to parallel rules of NASD, the options exchanges, the MSRB and the NYSE in the same section of the exam.

As a result of the revisions, CBOE is proposing to modify the main section headings and the number of questions on each section of the Series 9/10 study outline as follows: Section 1—Hiring, Qualifications, and Continuing Education, 9 questions; Section 2—Supervision of Accounts and Sales Activities, 94 questions; Section 3—Conduct of Associated Persons, 14 questions; Section 4—Recordkeeping Requirements, 8 questions; Section 5—Municipal Securities Regulation, 20 questions; Section 6—Options Regulation, 55 questions. Sections 1 through 5 constitute the Series 10 portion of the examination. Section 6 constitutes the Series 9 portion of the examination. Series 10 covers general securities and municipal securities, and Series 9 covers options. The revised examination continues to cover the areas of knowledge required for the supervision of sales activities.

CBOE is proposing these changes to the entire content of the Series 9/10 examination, including the selection specifications and question bank. The number of questions on the Series 9/10 examination will remain at 200, and candidates will continue to have 4 hours to complete the Series 10 portion and 1½ hours to complete the Series 9 portion. Also, each question will continue to count one point, and each candidate must correctly answer 70 percent of the questions on each series, 9 and 10, to receive a passing grade.

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(i).

[4] 17 CFR 240.19b–4(f)(1).

[5] 17 C.F.R. 200.83.

[6] 17 CFR 248.1–18; 17 CFR 248.30; and 17 CFR 248, Appendix A.

CBOE understands that the other SROs also will file with the Commission similar revisions to the Series 9/10 examination program.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(1)[8] of the Act in particular, in that it is designed to enforce compliance by Exchange members and persons associated with its members with the rules of the Exchange. The Exchange also believes the proposed rule change furthers the objectives of Section 6(c)(3)[9] of the Act, which authorizes CBOE to prescribe standards of training, experience and competence for persons associated with CBOE members.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(i) of the Act[10] and Rule 19b–4(f)(1) thereunder,[11] in that the proposed rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization. CBOE will announce the implementation date in a Regulatory Circular to be published no later than 60 days after SEC Notice of this filing.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(1).

[9] 15 U.S.C. 78f(c)(3).

[10] 15 U.S.C. 78s(b)(3)(A)(i).

[11] 17 CFR 240.19b–4(f)(1).

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–CBOE–2005–98 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–CBOE–2005–98. 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 CBOE. 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–CBOE–2005–98 submitted on or before January 4, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–7337 Filed 12–13–05; 8:45 am]

BILLING CODE 8010–01–P

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52913; File No. SR–CBOE–2005–97]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Revisions to the Series 4 Examination Program

December 7, 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 November 15, 2005, the Pacific Exchange, Inc. (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by CBOE. CBOE has designated the proposed rule change as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization pursuant to Section 19(b)(3)(A)(i) of the Act[3] and Rule 19b–4(f)(1) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE is filing revisions to the study outline and selection specifications for the Limited Principal—Registered Options (Series 4) examination program. The proposed revisions update the material to reflect changes to the laws, rules, and regulations covered by the examination, as well as modify the content of the examination program to track more closely the functional workflow of a Series 4 limited principal. CBOE is not proposing any textual changes to the Constitution or Rules of CBOE.

The revised study outline is attached as Exhibit 3a. However, CBOE has omitted the Series 4 selection specifications from this filing and has submitted the specifications under separate cover to the Commission with a request for confidential treatment pursuant to the Commission's confidential treatment procedures under

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(i).

[4] 17 CFR 240.19b–4(f)(1).

the Freedom of Information Act.[5] The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com*), at the Exchange's Office of the Secretary, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE 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. CBOE 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

CBOE Rule 9.2 states that no member organization shall be approved to transact options business with the public until those persons associated with it who are designated as Options Principals have been approved by and registered with the Exchange. CBOE Rule 9.2 further requires successful completion of an examination prescribed by the Exchange in order to qualify for registration as an Options Principal. The Series 4 examination, an industry-wide examination, has been designed for this purpose, and tests a candidate's knowledge of options trading generally, the industry rules applicable to trading of option contracts, and the rules of registered clearing agencies for options. The Series 4 examination covers, among other things, equity options, foreign currency options, index options, and options on government and mortgage-backed securities.

The Series 4 examination program is shared by CBOE and the following SROs: the American Stock Exchange LLC, the National Association of Securities Dealers, Inc., the New York Stock Exchange, Inc., the Pacific Exchange, Inc., and the Philadelphia Stock Exchange, Inc.

A committee of industry representatives, together with the staff of CBOE and the other SROs, recently undertook a periodic review of the Series 4 examination program. As a result of this review and as part of an ongoing effort to align the examination more closely to the supervisory duties of a Series 4 limited principal, CBOE is proposing to modify the content of the examination to track the functional workflow of a Series 4 limited principal. More specifically, CBOE is proposing to revise the main section headings and the number of questions on each section of the Series 4 study outline as follows: Options Investment Strategies, decreased from 35 to 34 questions; Supervision of Sales Activities and Trading Practices, increased from 71 to 75 questions; and Supervision of Employees, Business Conduct, and Recordkeeping and Reporting Requirements, decreased from 19 to 16 questions. CBOE is further proposing revisions to the study outline to reflect the SEC short sale requirements. The revised examination continues to cover the areas of knowledge required to supervise options activities.

CBOE is proposing these changes to the entire content of the Series 4 examination, including the selection specifications and question bank. The number of questions on the Series 4 examination will remain at 125, and candidates will continue to have three hours to complete the exam. Also, each question will continue to count one point, and each candidate must correctly answer 70 percent of the questions to receive a passing grade.

CBOE understands that the other SROs also will file with the Commission similar revisions to the Series 4 examination program.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Section 6(b)(1)[7] of the Act in particular, in that it is designed to enforce compliance by Exchange members and persons associated with its members with the rules of the Exchange. The Exchange also believes the proposed rule change furthers the objectives of Section 6(c)(3)[8] of the Act, which authorizes CBOE to prescribe standards of training, experience and competence for persons associated with CBOE members.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(i) of the Act[9] and Rule 19b–4(f)(1) thereunder,[10] in that the proposed rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization. CBOE will announce the implementation date in a Regulatory Circular to be published no later than 60 days after SEC Notice of this filing.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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–CBOE–2005–97 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–CBOE–2005–97. 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

[5] 17 C.F.R. 200.83.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78(b)(1).

[8] 15 U.S.C. 78(c)(3).

[9] 15 U.S.C. 78f(b)(3)(A)(i).

[10] 17 CFR 240.19b–(f)(l).

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 CBOE. 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–CBOE–2005–97 and should be submitted on or before January 4, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–7338 Filed 12–13–05; 8:45 am]

BILLING CODE 8010–01–P

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52922; File Nos. SR–DTC–2005–16, SR–FICC–2005–19, and SR–NSCC–2005–14]

Self-Regulatory Organizations; The Depository Trust Company, Fixed Income Clearing Corporation, and National Securities Clearing Corporation; Order Approving Proposed Rule Changes to Require Members to Purchase Shares of the Common Stock of The Depository Trust & Clearing Corporation

December 7, 2005.

I. Introduction

On October 4, 2005, The Depository Trust Company (''DTC''), the Fixed Income Clearing Corporation (''FICC''), and the National Securities Clearing Corporation filed with the Securities and Exchange Commission (''Commission'') proposed rule changes SR–DTC–2005–16, SR–FICC–2005–19, and SR–NSCC–2005–14 pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'').[1] Notices of the proposals were published in the **Federal Register** on October 31, 2005.[2] The Commission received one comment letter in response to the proposed rule change filed by DTC[3] and one comment letter in response to the proposed rule change filed by FICC.[4] For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description

The Depository Trust & Clearing Corporation (''DTCC'') is a holding company parent of DTC, FICC, and NSCC. Pursuant to DTCC's current Shareholders Agreement (''Shareholders Agreement''), substantially all members and participants of DTC, FICC, and NSCC (collectively ''Participants'') are entitled but are not required to purchase DTCC common shares. Participants are allocated an entitlement to purchase DTCC common shares on the basis of their relative use of the services of DTC, FICC, and NSCC. As of the last periodic allocation of share entitlements in 2003, approximately 1,100 Participants had a right to purchase DTCC common shares; however, only 190 Participants currently own any DTCC common shares and of these only 86 own DTCC common shares up to the full amounts of their share entitlements.

DTCC has obtained the consent of its common shareholders to amend the Shareholders Agreement pursuant to which Participants of DTC, FICC, and NSCC that make full use of the services of one or more of these clearing agency subsidiaries of DTCC would be required to purchase DTCC common shares (''Mandatory Purchaser Participants'')[5] in accordance with the terms of the amended Shareholders Agreement while preserving the right but not the obligation of other Participants that make only limited use of the services of one or more of the clearing agencies to purchase DTCC common shares (''Voluntary Purchaser Participants'').[6]

Holders of DTCC common shares are entitled to elect all of the directors of DTCC other than two directors that DTCC preferred shareholders are entitled to elect.[7] DTCC common shareholders are entitled to vote on all other matters submitted to a vote of DTCC shareholders, and each DTCC common shareholder is entitled to one vote per DTCC common share. DTCC common shareholders are entitled to cumulative voting in the election of directors. In addition, DTCC common shareholders are entitled to receive out of the assets of DTCC, when and if declared by the Board of Directors of DTCC, dividends payable in cash or stock or otherwise. However, since DTC, FICC, and NSCC provide their services to their Participants on a cost-basis with revenues in excess of expenses and necessary reserves rebated or provide their services on a discounted basis, as a matter of policy and practice DTCC does not pay any dividends on DTCC common shares. The amendments to the Shareholders Agreement will have no effect on these rights of DTCC common shareholders and preferred shareholders.

Pursuant to certain covenants in the Shareholders Agreement, a person elected as a director of DTCC also serves as a director of DTC, FICC, and NSCC. The amendments to the Shareholders Agreement will have no effect on these covenants.

The system for allocating entitlements to purchase shares in the Shareholders Agreement was first implemented by DTC with respect to DTC common shares in 1973. At that time, the bank users of DTC's services purchased their DTC common shares, but for logistical and other reasons the NYSE, the NASD, and the American Stock Exchange (''AMEX'') (collectively ''Self-Regulatory

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release Nos. 52665 (October 25, 2005), 70 FR 62357 [SR–DTC–2005–16]; 52663 (October 25, 2005), 70 FR 62359 [SR–FICC–2005–19]; and 52664 (October 25, 2005), 70 FR 62364 [SR–NSCC–2005–14].

[3] Letter from Stewart A. Levin, Ph.D., Geophysics Research Fellow, Landmark Graphics Corp. (Oct. 29, 2005).

[4] Letter from Kelly S. McEntire, Retired State of Utah Administrator, (Dec. 6, 2005).

[5] Pursuant to the amendments to the Shareholders Agreement, a Mandatory Purchaser Participant that is a Participant in more than one clearing agency will be required to purchase DTCC common shares based upon its relative use of the services of all clearing agencies of which it is a Participant. For DTC, a Mandatory Purchaser Participant includes all participants of DTC other than Limited Participants. For FICC, this term includes Netting Members of FICC's Government Securities Division. For NSCC, this term includes all Members other than Mutual Fund/Insurance Services Members.

[6] The DTCC Shareholders Agreement marked to show the proposed amendments is attached to the proposed rule change as Exhibit 3 and is available on DTC's Web site at *http://www.dtc.org/impNtc/mor/index.html*, FICC's Web site at *http://www.ficc.com/gov/gov.docs.jsp?NS-query=*, and NSCC's Web site at *www.nscc.com/legal*.

[7] In connection with the 1999 integration of DTC and NSCC and formation of DTCC, the New York Stock Exchange (''NYSE'') and the National Association of Securities Dealers (''NASD''), the then coowners of NSCC, each received 10,000 DTCC preferred shares in exchange for their NSCC common stock. DTCC preferred shareholders have no right to vote on any matters submitted to a vote of DTCC shareholders except that each of the two DTCC preferred shareholders are entitled to elect one director. DTCC preferred shareholders have no right to receive any dividends. In the event of any liquidation, dissolution or winding up of the affairs of DTCC, DTCC preferred shareholders are entitled to a liquidation preference of $300 per share of DTCC preferred stock.

Organizations'') purchased the DTC common shares allocated to the broker-dealer users of DTC services that were their members. It was anticipated that over time as broker-dealers exercised their right to purchase DTC common shares, the number of DTC common shares held by broker-dealers directly would increase, and the number of DTC common shares held by the Self-Regulatory Organizations would correspondingly decrease, potentially to zero, since the share entitlements of the Self-Regulatory Organizations were a function of the unexercised share entitlements of their members.

Notwithstanding the passage of time and the opportunity afforded broker-dealer Participants to purchase DTCC common shares, the Self-Regulatory Organizations continue to hold a significant block of DTCC common shares. NYSE holds approximately 29% of the outstanding DTCC common shares, and the NASD and the AMEX each holds approximately 3.7%. It is also the case that a significant number of Participants other than broker-dealers have not purchased any DTCC common shares or have not purchased DTCC common shares commensurate with their share entitlements. Accordingly, a total of approximately 36.4% of the outstanding DTCC common shares are not held by Participants but rather are held by the Self-Regulatory Organizations. Ownership of DTCC common shares (and previously ownership of DTC common shares) is not a financial investment but instead is a vehicle for supporting each registered clearing agency and influencing its policies and operations through the election of directors.

By providing that all DTCC common shares are owned by Participants, DTC, FICC, and NSCC believe that the proposed rule changes [8] and the proposed amendments to the Shareholders Agreement will guarantee that Participants continue to govern and to control the activities of DTC, FICC, and NSCC, including the services provided and the service fees charged. In particular, Participants will be in a position to assure that DTC, FICC, and NSCC continue the practices of establishing fees that are cost-based and use-based and of returning to Participants in the form of cash rebates or discounts revenues in excess of expenses and necessary reserves. Finally, because they introduce the greatest risks to the clearing agencies and obtain the greatest benefits from clearing agency services, it is appropriate to require those Participants making full use of the services of DTC, FICC, and NSCC to contribute to DTCC's capital through the purchase of its common shares.

III. Comment Letters

The Commission received two comment letters.[9] Both commenters opposed the proposed rule change. One commenter stated that if DTC needed to raise capital it should offer the shares to the general public or participants in DTC's Direct Registration System. The commenter also suggested that share ownership by DTC participants provides a financial disincentive for such participants to share information with the Commission and other regulators regarding criminal or unethical practices. The other commentator suggested that requiring participants to purchase common shares in DTCC could be used as a means to separate small investors from large investors based on their net assets and subject smaller investors to potential abuse.

IV. Discussion

Section 17A(b)(3)(C) of the Act requires that the rules of a clearing agency be designed to assure fair representation in the selection of its directors and the administration of its affairs.[10] The Commission finds that DTC, FICC, and NSCC's proposed rule changes are consistent with this requirement because the proposed changes serve to increase the number of Participants that have input in the selection of DTCC's board of directors and thus the boards of directors of DTC, FICC, and NSCC. This increased participation of Participants should help DTC, FICC, and NSCC assure that their Participants have fair representation in the selection of its directors and the administration of their affairs.

The purpose of the proposed rule changes are not to raise capital for DTC, FICC, and NSCC as suggested by one of the commenters, but rather to redistribute common share ownership from having a significant portion held by the Self-Regulatory Organizations to having all shares held by the Participants in order to increase Participants' role in the selection of directors and the administration of DTC, FICC, and NSCC's affairs. With respect to the other commenter's fear that some ''investors'' would not be able to purchase DTCC common shares, neither DTC, FICC, nor NSCC have been informed by any of their Participants that they would have difficulty or be unable to pay for the allocation of shares.

V. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule changes are 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,[11] that the proposed rule changes (File Nos. SR–DTC–2005–16, SR–FICC–2005–19, and SR–NSCC–2005–14) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[12]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–7305 Filed 12–13–05; 8:45 am]

BILLING CODE 8010–01–P

[8] The proposals add a new provision to each of DTC, FICC, and NSCC's rules that requires Mandatory Purchaser Participants to purchase and own DTCC common shares in accordance with the terms of the Shareholders Agreement. The new provisions are DTC Rule 31, NSCC Rule 64, FICC's Government Securities Division Rule 49, and FICC's Mortgage-Backed Securities Division Article V, Rule 18.

[9] *Supra* notes 3 and 4.

[10] 15 U.S.C. 78q–1(b)(3)(C).

[11] 15 U.S.C. 78s(b)(2).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52910; File No. SR–ISE–2005–052]

Self-Regulatory Organizations; International Securities Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Requirements for Continued Approval of Securities that Underlie Options Traded on the Exchange

December 7, 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 November 21, 2005, the International Securities Exchange, Inc. (''ISE'' 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 ISE.[3] The ISE filed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In one part of the proposal, ISE Rule 504(d)(6) is erroneously referenced, instead of current ISE Rule 503(b)(6). The staff corrected this reference, as per telephone conversation between Samir Patel, Assistant General Counsel, ISE, and Christopher Chow, Attorney, Division of Market Regulation, Commission, December 5, 2005.

the proposal pursuant to Section 19(b)(3)(A) of the Act,[4] and Rule 19b–4(f)(6) thereunder,[5] which renders the proposal effective upon filing with the Commission. 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 ISE proposes to amend certain of its rules governing the requirements for and the withdrawal of approval of securities underlying options traded on the Exchange. The text of the proposed rule change is below. Proposed new language is in *italics;* proposed deletions are in [brackets].

Rule 502. Criteria for Underlying Securities

(a) Underlying securities with respect to which put or call options contracts are approved for listing and trading on the Exchange must meet the following criteria:

(1) The security must be registered and *be an ''NMS stock'' as defined in Rule 600 of Regulation NMS under the Exchange Act* [(i) listed on a national securities exchange; or (ii) traded through the facilities of a national securities association and reported as a ''national market system'' (''NMS'') security as set forth in Rule 11Aa3–1 under the Exchange Act]; and

(2) No change.

(b)–(j) No change.

Rule 503. Withdrawal of Approval of Underlying Securities

(a) No change.

(b) Absent exceptional circumstances, an underlying security will not be deemed to meet the Exchange's requirements for continued approval whenever any of the following occur:

(1)–(4) No change.

[(5) The issuer has failed to make timely reports as required by applicable requirements of the Exchange Act, and such failure has not been corrected within thirty (30) days after the date the report was due to be filed.]

[(6)] *(5) The underlying security ceases to be an ''NMS stock'' as defined in Rule 600 of Regulation NMS under the Exchange Act.* [The issuer, in the case of an underlying security that is principally traded on a national securities exchange, is delisted from trading on that exchange and neither meets NMS criteria nor is traded through the facilities of a national securities association, or the issue, in the case of an underlying security that is principally traded through the facilities of a national securities association, is no longer designated as an NMS security.] [(7)] *(6)* If an underlying security is approved for options listing and trading under the provisions of Rule 502(c), the trading volume and price history of the Original Security (as therein defined) prior to but not after the commencement of trading in the Restructure Security (as therein defined), including ''when-issued'' trading, may be taken into account in determining whether the trading volume and market price requirements of (3) and (4) of this paragraph (b) are satisfied.

(c)–(j) No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the ISE 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 ISE 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 proposes to eliminate ISE Rule 503(b)(5) pertaining to the continued approval of securities that underlie options traded on the Exchange. ISE Rule 503(b) sets forth various situations under which an underlying security previously approved for options trading will in usual circumstances be deemed to no longer meet Exchange requirements for the continuance of such approval. In such circumstances, ISE Rule 503(a) provides that the Exchange will not open for trading any additional series of options in that class and may also limit any new opening transactions in those options series that have already been opened.

Currently, ISE Rule 503(b)(5) provides that an underlying security will no longer be approved for options trading on the Exchange when:

''(5) The issuer has failed to make timely reports as required by applicable requirements of the Exchange Act, and such failure has not been corrected within thirty (30) days after the date the report was due to be filed.''

The Exchange proposes to eliminate this provision because (i) it limits investors' ability to use options to hedge existing equity positions in such securities, and (ii) it is not necessary in the context of the rest of ISE Rule 503(b).

First, ISE Rule 503(b)(5) can and does impact investors' interests by preventing investors from using new options series to hedge positions that they may hold in the underlying security of companies that fail to make timely reports required by the Act. ISE believes such a restriction is inconsistent with the rules and regulations in the markets for the underlying securities because no similar trading restriction is placed upon the trading of the underlying security itself. Thus, ISE Rule 503(b)(5) only serves to limit the abilities of shareholders in such companies who may wish to hedge their positions with new options series, at a time when the ability to hedge may be particularly important.

ISE believes that ISE Rule 503(b)(5) has outlived any usefulness and now serves to unnecessarily burden and confuse the investing public. ISE believes this provision was appropriate when it was first implemented in or around 1976 when the listing and trading of standardized options was still in its infancy and information pertaining to public companies was not readily available to the general investing public. The Exchange believes that today's listed options market, however, is a mature one with investors who have access to a significant amount of real-time market information to assist them in making informed investment decisions, including information as to whether companies have timely filed reports as required by the Exchange Act, and if not, why not. Therefore, ISE believes that there is no reason to continue limiting investors' ability to trade in options classes, including new series within those classes, simply because a company is not timely in filing its reports. The Exchange further states that this restriction is further misplaced, considering that investors are not similarly restricted from buying or selling shares of the underlying security in the equity markets.

Moreover, the Exchange believes that ISE Rule 503(b)(5) limits an investor's ability to hedge his underlying stock positions at a time when he may be in most need to protect his investment. The failure of a public company to comply with its reporting requirements under the Act could cause a significant movement in the price of that

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(6).

company's stock. Restricting the Exchange from opening new options series may leave investors without means to hedge their positions with options contracts at strike prices that more accurately reflect the contemporaneous price trends of the underlying stock.

The ISE states that new options series on a security should not be permitted to be opened if the underlying security ceases to be an ''NMS stock'' within the meaning of Rule 600(b)(47) of Regulation NMS.[6] Typically, the Exchange becomes aware of issues that may impact the continued listing of a security well before that security is delisted from its primary market. Exchange staff routinely monitors daily press releases and informational releases disseminated by various entities, such as, the primary listing market of a security and private news services, in an effort to monitor the activities and news items pertaining to the issuers of securities that underlie options traded on the Exchange. In many cases, when an issuer fails to comply with its reporting requirements under the Act, the issuer is given a substantial amount of time to cure this deficiency before the primary listing market actually delists the issuer's security. Many times, the issuer is able to comply without its security ever being delisted. During this period, ISE staff continually monitors the status of the issuer's compliance with its reporting requirements to determine whether the security may be delisted. Finally, the primary listing market typically issues a press release well in advance of delisting an issuer's security to give investors and other market participants adequate notice.

Given the availability of data and information relating to public issuers of securities in today's markets, and in light of the extensive amount of additional continued listing standards under ISE Rule 503(b), waiting until a security is actually delisted by its primary listing market is the appropriate point at which to restrict the issuance of new options series in an options class. Accordingly, the Exchange hereby proposes to eliminate ISE Rule 503(b)(5).

Additionally, as a matter of ''housekeeping,'' the Exchange also proposes to clarify the texts of ISE Rules 502(a)(1) and 503(b)(6),[7] which govern the criteria for the initial and continued listing of options on a particular security, respectively. Both of these provisions include as part of the criteria, a requirement that the underlying security must be a national market system security (''NMS security''). As part of the recently adopted Regulation NMS,[8] among other things, the Commission revised the definition of an NMS security. Specifically, Rule 600(b)(46) under Regulation NMS defines an NMS security as ''any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.'' As such, each of these ISE Rules will be amended to reflect these new terms.

2. Statutory Basis

The ISE believes that the basis under the Act for this proposed rule change is found in Section 6(b)(5), in that the elimination of ISE Rule 503(b)(5), which is both burdensome to investors and unnecessary for their protection, will serve to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The ISE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in the 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 ISE has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing 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) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with 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 5 business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

The ISE has asked the Commission to waive the 5-day pre-filing notice requirement and the 30-day operative delay. The Commission waives the 5-day pre-filing notice requirement. Additionally, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because the proposed rule change is based upon a recently approved rule change by the Chicago Board Options Exchange, Incorporated (''CBOE''),[9] which was published for notice and comment.[10] For this reason, the Commission designates that the proposal has become effective and operative immediately upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[11]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[6] 17 CFR 242.600(b)(47).

[7] ISE Rule 503(b)(6) would become ISE Rule 503(b)(5) to correspond with the elimination of current ISE Rule 503(b)(5), as discussed above.

[8] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

[9] *See* Securities Exchange Act Release Nos. 52562 (October 4, 2005), 70 FR 59382 (October 12, 2005) (notice for SR–CBOE–2004–037) and 52779 (November 16, 2005), 70 FR 70902 (November 23, 2005) (approval order for SR–CBOE–2004–037).

[10] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[11] *See* Rule 19b–4(f)(6)(iii), 17 CFR 240.19b–4(f)(6)(iii).

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 No. SR–ISE–2005–052 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–0903.

All submissions should refer to File No. SR–ISE–2005–052. 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 will also 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 No. SR–ISE–2005–052 and should be submitted on or before January 4, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–7303 Filed 12–13–05; 8:45 am]

BILLING CODE 8010–01–P

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52896; File No. SR-NASD–2005–116]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change To Modify Nasdaq's Auditor Peer Review Requirement

December 6, 2005.

On September 29, 2005, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission''), 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 modify NASD Rule 4350(k), regarding the oversight of accountants that audit listed issuers.[3] The proposed rule change was published for comment in the **Federal Register** on October 26, 2005.[4] The Commission received no comments on the proposal. This order approves the proposed rule change.

Current NASD Rule 4350(k) requires each issuer listed on Nasdaq to be audited by an independent accountant that has received an external quality control review by another independent public accountant (a ''peer review'') or is enrolled in an acceptable peer review program. The proposed rule change would replace this requirement with a provision that requires each listed issuer to be audited by an independent accountant that is registered as a public accounting firm with the Public Company Accounting Oversight Board (''PCAOB''), as provided for in the Sarbanes-Oxley Act of 2002 (the ''Sarbanes-Oxley Act'').[5] The PCAOB is charged, among other things, with conducting a continuing program of inspections of registered public accounting firms.[6]

The Commission finds that the proposed rule change is consistent with the requirements of Section 15A(b) of the Act[7] and the rules and regulations thereunder applicable to a national securities association,[8] and in particular, with Section 15A(b)(6) of the Act.[9] The Commission believes that the proposed rule change will align Nasdaq's requirements with the auditor oversight requirements of the Sarbanes-Oxley Act and eliminate the redundancy of Nasdaq's current rule.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change (SR–NASD–2005–116) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–7333 Filed 12–13–05; 8:45 am]

BILLING CODE 8010–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The proposed rule change would also make a conforming amendment to the language of NASD Rule 4200(a).

[4] Securities Exchange Act Release No. 52645 (Oct. 20, 2005), 70 FR 61864.

[5] *See* Section 102 of the Sarbanes-Oxley Act, 15 U.S.C. 7212.

[6] *See* Section 104 of the Sarbanes-Oxley Act, 15 U.S.C. 7214.

[7] 15 U.S.C. 78o–3(b).

[8] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. *See* 15 U.S.C. 78c(f).

[9] 15 U.S.C. 78o–3(b)(6).

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52915; File No. SR–NYSE–2005–85]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Revisions to the Study Outline and Selection Specifications for the Limited Principal—General Securities Sales Supervisor (Series 9/10) Examination Program

December 7, 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 November 30, 2005, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization pursuant to Section 19(b)(3)(A)(i) of the Act[3] and Rule 19b–4(f)(1) thereunder,[4] which renders the proposal effective upon filing with the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(i).

[4] 17 CFR 240.19b–4(f)(1).

Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission revisions to the study outline and selection specifications for the Limited Principal—General Securities Sales Supervisor (Series 9/10) examination program. The proposed revisions update the material to reflect changes to the laws, rules, and regulations covered by the examination, as well as modify the content of the examination program to track more closely the functional workflow of a Series 9/10 Limited Principal.

The revised study outline is available on the Exchange's Web site (*http://www.nyse.com*), at the NYSE, and at the Commission. However, the Exchange has omitted the Series 9/10 selection specifications from this filing and has submitted the specifications under separate cover to the Commission with a request for confidential treatment pursuant to Rule 24b–2 [5] under the Act. The Exchange will announce the proposed rule change and the implementation date to its members and member organizations in an Information Memo to be published no later than 30 days after SEC Notice of this filing.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Pursuant to Section 6(c)(3)(B) [6] of the Act, which requires the Exchange to prescribe standards of training, experience, and competence for persons associated with Exchange members and member organizations, the Exchange has developed examinations, and administers examinations developed by other self-regulatory organizations (''SROs''), that are designed to establish that persons associated with Exchange members and member organizations have attained specified levels of competence and knowledge. The Exchange periodically reviews the content of the examinations to determine whether revisions are necessary or appropriate in view of changes pertaining to the subject matter covered by the examinations.

NYSE Rule 345 (''Employees-Registration, Approval, Records'') requires member firms to register with the NYSE any individuals who regularly perform duties customarily performed by a direct supervisor of a registered representative. Under NYSE Rule 342 (''Offices-Approval, Supervision, and Control'') member firms are required to supervise themselves. Specifically, NYSE Rule 342.13 requires individuals who supervise general trading activities to have a creditable three-year record as a registered representative or equivalent experience and to pass the General Securities Sales Supervisor Qualification Examination (Series 9/10) or another examination acceptable to the Exchange that demonstrates competency relevant to assigned responsibilities.[7]

The Series 9/10 examination, an industry-wide examination, qualifies an individual to function as a General Securities Sales Supervisor. It tests a candidate's knowledge of securities industry rules and regulations and certain statutory provisions pertinent to the supervision of sales activities. The Series 9/10 examination is primarily geared towards individuals who will act as the Branch Managers/Sales Supervisor of the firm's branch office locations. The Branch Manager is generally responsible for reviewing the activities of registered persons at the branch location and is also responsible for the review and approval of customer accounts that are opened through a registered representative at a branch.

The Series 9/10 examination program is shared by NYSE and the following SROs: the American Stock Exchange LLC, the Chicago Board Options Exchange, Inc., the Municipal Securities Rule Making Board (''MSRB''), the National Association of Securities Dealers, Inc. (''NASD''), the Pacific Exchange, Inc., and the Philadelphia Stock Exchange, Inc. NYSE understands that the other SROs also will file with the Commission similar revisions to the Series 9/10 examination program.

A committee of industry representatives, together with the staff of NYSE and the other SROs, recently undertook a periodic review of the Series 9/10 examination program. As a result of this review, NYSE is proposing to update the content of the examination to cover Regulation S–P,[8] MSRB Rules G–37/G–38, SRO research analyst and anti-money laundering rules, municipal fund securities (*e.g.*, 529 college savings plans), and exchange traded funds. The study outline also reflects the new SEC short sale rule requirements. In addition, as part of an ongoing effort to align the examination more closely to the supervisory duties of a Series 9/10 Limited Principal, NYSE is proposing to modify the content of the examination to track the functional workflow of a Series 9/10 Limited Principal. Also, NYSE is proposing to include questions related to the rules of the options exchanges and the MSRB and parallel NYSE and NASD rules in the same section of the exam.

As a result of the revisions, the main section headings and the number of questions on each section of the Series 9/10 study outline were modified as follows: Section 1—Hiring, Qualifications, and Continuing Education, 9 questions; Section 2—Supervision of Accounts and Sales Activities, 94 questions; Section 3—Conduct of Associated Persons, 14 questions; Section 4—Record keeping Requirements, 8 questions; Section 5—Municipal Securities Regulation, 20 questions; Section 6—Options Regulation, 55 questions. Sections 1 through 5 constitute the Series 10 portion of the examination. Section 6 constitutes the Series 9 portion of the examination. Series 10 covers general securities and municipal securities and Series 9 covers options. The revised examination continues to cover the areas of knowledge required for the supervision of sales activities.

NYSE is proposing similar changes to the corresponding sections of the Series 9/10 selection specifications and question bank. The number of questions on the Series 9/10 examination will remain at 200 and candidates will have four hours to complete the Series 10 portion and one and half hour to complete the Series 9 portion. Also, each candidate must correctly answer 70 percent of the questions on each

[5] 17 CFR 240.24b–2.

[6] 15 U.S.C. 78f(c)(3)(B).

[7] NYSE Rule 342.13 provides that the General Securities Principal Examination (Series 24), if taken and passed after July 1, 2001, is an acceptable alternative for persons whose duties do not include the supervision of options or municipal securities sales activity. The examination requirement may be waived at the discretion of the Exchange.

[8] 17 CFR. 248.1–18; 17 CFR.249.30; and 17 CFR.248, Appendix A.

series, 9 and 10, to receive a passing grade.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(c)(3)(B) [9] of the Act, in that it provides for the prescription by NYSE of standards of training, experience, and competence for persons associated with NYSE members and member organizations.

B. Self-Regulatory Organization's Statement on Burden on Competition

NYSE does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(i) [10] of the Act and Rule 19b–4(f)(1) thereunder,[11] in that the proposed rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization. The Exchange will announce the implementation date to its members and member organizations in an Information Memo to be published no later than 30 days after SEC Notice of this filing.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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–2005–85 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–NYSE–2005–85. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2005–85 and should be submitted on or before January 4, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–7327 Filed 12–13–05; 8:45 am]

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[9] 15 U.S.C. 78f(c)(3)(B).

[10] 15 U.S.C. 78s(b)(3)(A)(i).

[11] 17 CFR 240.19b–4(f)(1).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52918; File No. SR–PCX–2005–113]

Self-Regulatory Organizations; Pacific Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto Relating to Revisions to the Series 9/10 Examination Program

December 7, 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 November 17, 2005, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by PCX. On November 22, 2005, PCX filed Amendment No. 1 to the proposed rule change. PCX has designated the proposed rule change as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization pursuant to Section 19(b)(3)(A)(i) of the Act [3] and Rule 19b–4(f)(1) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

PCX is filing revisions to the study outline and selection specifications for the Limited Principal—General Securities Sales Supervisor (Series 9/10) examination program. The proposed revisions update the material to reflect changes to the laws, rules, and regulations covered by the examination, as well as modify the content of the examination program to track more closely the functional workflow of a Series 9/10 limited principal. PCX is not proposing any textual changes to the existing PCX rules.

The revised study outline is available on PCX's Web site *(http://www.pacificex.com),* at PCX, and at the Commission. However, PCX has omitted the Series 9/10 selection specifications from this filing and has submitted the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(i).

[4] 17 CFR 240.19b–4(f)(1).

specifications under separate cover to the Commission with a request for confidential treatment pursuant to Rule 24b–2 under the Act.[5]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, PCX 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. PCX has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Pursuant to Section 6(c)(3) of the Act,[6] which allows PCX to examine and verify the standards of training, experience, and competence for persons associated with Equities Trading Permit (''ETP'') Holders, PCX has developed examinations, and requires satisfaction of examinations developed by other SROs, that are designed to establish that persons associated with ETP Holders have attained specified levels of competence and knowledge. PCX periodically reviews the content of examinations to determine whether revisions are necessary or appropriate in view of changes pertaining to the subject matter covered by the examinations.

PCXE Rule 6.18(d) states that if an ETP Holder does business with the public, the person (or persons) designated to direct day-to-day compliance activity and each other person directly supervising ten or more persons engaged in compliance activity must pass the General Securities Sales Supervisor Qualification Examination (Series 9/10). A General Securities Sales Supervisor is precluded from performing any of the following activities: supervision of the origination and structuring of underwritings; supervision of market making commitments; final approval of advertisements as these are defined in NASD Rule 2210; supervision of the custody of firm or customer funds and/or securities for purposes of Rule 15c3–3[7] under the Act; or supervision of overall compliance with financial responsibility rules for broker-dealers promulgated pursuant to the provisions of the Act. The Series 9/10 examination, an industry-wide examination, qualifies an individual to function as a General Securities Sales Supervisor. The Series 9/10 examination tests a candidate's knowledge of securities industry rules and regulations and certain statutory provisions pertinent to the supervision of sales activities.

The Series 9/10 examination program is shared by PCX and the following SROs: the American Stock Exchange LLC, the Chicago Board Options Exchange, Inc., the Municipal Securities Rule Making Board (''MSRB''), the New York Stock Exchange, Inc. (''NYSE''), the National Association of Securities Dealers, Inc. (''NASD''), and the Philadelphia Stock Exchange, Inc.

A committee of industry representatives, together with the staff of PCX and the other SROs, recently undertook a periodic review of the Series 9/10 examination program. As a result of this review, PCX is proposing to update the content of the examination to cover Regulation S–P,[8] MSRB Rules G–37/G–38, SRO research analyst and anti-money laundering rules, municipal fund securities (*e.g.*, 529 college savings plans), and exchange traded funds. PCX is further proposing revisions to the study outline to reflect the SEC short sale requirements. In addition, as part of an ongoing effort to align the examination more closely to the supervisory duties of a Series 9/10 limited principal, PCX is proposing to modify the content of the examination to track the functional workflow of a Series 9/10 limited principal. Also, PCX is proposing to include questions related to parallel rules of NASD, the options exchanges, the MSRB, and the NYSE in the same section of the exam.

As a result of the revisions, PCX is proposing to modify the main section headings and the number of questions on each section of the Series 9/10 study outline as follows: Section 1—Hiring, Qualifications, and Continuing Education, 9 questions; Section 2—Supervision of Accounts and Sales Activities, 94 questions; Section 3—Conduct of Associated Persons, 14 questions; Section 4—Recordkeeping Requirements, 8 questions; Section 5—Municipal Securities Regulation, 20 questions; Section 6—Options Regulation, 55 questions. Sections 1 through 5 constitute the Series 10 portion of the examination. Section 6 constitutes the Series 9 portion of the examination. Series 10 covers general securities and municipal securities, and Series 9 covers options. The revised examination continues to cover the areas of knowledge required for the supervision of sales activities.

PCX is proposing these changes to the entire content of the Series 9/10 examination, including the selection specifications and question bank. The number of questions on the Series 9/10 examination will remain at 200, and candidates will continue to have four hours to complete the Series 10 portion and one and one-half hours to complete the Series 9 portion. Also, each question will continue to count one point, and each candidate must correctly answer 70 percent of the questions on each series, 9 and 10, to receive a passing grade.

As noted below, PCX understands that the other SROs also will file with the Commission similar proposed rule changes reflecting the revisions to the Series 9/10 examination program.

2. Statutory Basis

PCX believes that the proposed revisions to the Series 9/10 examination program are consistent with Section 6(b) of the Act,[9] in general, and further the objectives of Section 6(b)(1)[10] in particular, in that it is designed to enforce compliance by ETP Holders and persons associated with the rules of the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

PCX does not believe that the proposed rule change, as amended, will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change, as amended, has become effective pursuant to Section 19(b)(3)(A)(i) of the Act[11] and Rule 19b-4(f)(1) thereunder,[12] in that the proposed rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an

[5] 17 CFR 240.24b–2.

[6] 15 U.S.C. 78f(c)(3).

[7] 17 CFR 240.15c3–3.

[8] 17 CFR 248.1–18; 17 CFR 248.30; and 17 CFR 248, Appendix A.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(1).

[11] 15 U.S.C. 78s(b)(3)(A)(i).

[12] 17 CFR 240.19b–4(f)(1).

existing rule of the self-regulatory organization. PCX will announce the implementation date in a Rule Adoption Notice to be published no later than 7 days after Notice of this filing.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[13]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *(http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–PCX–2005–113 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR-PCX–2005–113. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the PCX. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PCX–2005–113 and should be submitted on or before January 4, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–7325 Filed 12–13–05; 8:45 am]

BILLING CODE 8010–01–P

[13] The effective date of the original proposed rule is November 17, 2005. The effective date of Amendment No. 1 is November 22, 2005. For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on November 22, 2005, the date on which PCX submitted Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52911; File No. SR–PCX–2005–129]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. and Amendment No. 1 Thereto Relating to the Approval of Securities That Underlie Options Traded on the Exchange

December 7, 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 November 23, 2005, the Pacific Exchange, Inc. (''PCX'' 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 self-regulatory organization. On December 7, 2005, PCX filed Amendment No. 1 to the proposed rule change.[3] PCX filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act,[4] and Rule 19b–4(f)(6) thereunder,[5] which renders the proposal, as amended, effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes changes to PCX rules pertaining to the approval of securities that underlie options traded on the Exchange. Specifically, the Exchange proposes to eliminate Rule 5.6(b)(5) and amend Rule 5.6(b)(6) and Rule 5.3(b). A copy of the proposed rule change is available on the PCX Web site, (*www.pacificex.com*), at the PCX'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 self-regulatory organization 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 self-regulatory organization 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 this Amendment No. 1 is to make clarifying changes and correct typographical errors in the original filing. This Amendment No. 1 replaces the original rule filing in its entirety. The Exchange proposes changes to PCX rules pertaining to the approval of securities that underlie options traded on the Exchange. Specifically, the Exchange proposes to eliminate Rule 5.6(b)(5) and amend Rule 5.6(b)(6) and Rule 5.3(b).

PCX Rule 5.6(b) sets forth various situations under which an underlying security previously approved for options trading will in usual circumstances be deemed to no longer meet Exchange requirements for the continuance of such approval. In such circumstances, Rule 5.6(b)(5) provides that the Exchange will not open for trading any additional series of options in that class and may also limit any new opening transactions in those options series that have already been opened. The Exchange proposes to eliminate this provision because (1) it limits investors' ability to use options to hedge existing

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Form 19b–4 dated December 7, 2005 which replaced the original filing in its entirety (''Amendment No. 1''). Amendment No. 1 made clarifying changes and corrected typographical errors in the original filing.

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(6).

equity positions in such securities, and (2) it is not necessary in the context of the rest of Rule 5.6(b).

First, Rule PCX 5.6(b)(5) can and does impact investors' interests by preventing them from using new options series to hedge positions that may hold in the underlying security of companies that fail to make timely reports required by the Act. The Exchange states that such a restriction is inconsistent with the rules and regulations in the markets for the underlying securities because no similar trading restriction is placed upon the trading of the underlying security itself. Thus, Rule 5.6(b)(5) only serves to limit the abilities of shareholders in such companies who may wish to hedge their positions with new options series, at a time when the ability to hedge may be particularly important.

The PCX believes that Rule 5.6(b)(5) has outlived any usefulness and now serves to unnecessarily burden and confuse the investing public. This provision was appropriate when it was first implemented when the listing and trading of standardized options was still in its infancy and information pertaining to public companies was not readily available to the general investing public. The Exchange believes that today's listed options market, however, is a mature one with investors who have access to a significant amount of real-time market information to assist them in making informed investment decisions, including information as to whether companies have timely filed reports as required by the Act, and if not, why not. Therefore, the Exchange states that there is no reason to continue limiting investors' ability to trade in options classes, including new series within those classes, simply because a company is not timely in filing its reports. The Exchange further believes that this restriction is further misplaced, considering that investors are not similarly restricted from buying or selling shares of the underlying security in the equity markets.

Moreover, the Exchange believes that Rule 5.6(b)(5) limits an investor's ability to hedge his underlying stock positions at a time when he may be in most need to protect his investment. The failure of a public company to comply with its reporting requirements under the Act could cause a significant movement in the price of that company's stock. Restricting the Exchange from opening new options series may leave investors without means to hedge their positions with options contracts at strike prices that more accurately reflect the contemporaneous price trends of the underlying stock.

Clearly, new options series on a security should not be permitted to be opened if the underlying security ceases to be an NMS stock. Typically, the Exchange becomes aware of issues that may impact the continued listing of a security well before that security is delisted from its primary market. Exchange staff routinely monitors daily press releases and informational releases disseminated by various entities, such as, the primary listing market of a security and private news services, in an effort to monitor the activities and news items pertaining to the issuers of securities that underlie options traded on the Exchange. In many cases, when an issuer fails to comply with its reporting requirements under the Act, the issuer is given a substantial amount of time to cure this deficiency before the primary listing market actually delists the issuer's security. Many times, the issuer is able to comply without its security ever being delisted. During this period, PCX staff continually monitors the status of the issuer's compliance with its reporting requirements to determine whether the security may be delisted. Finally, the primary listing market typically issues a press release well in advance of delisting an issuer's security to give investors and other market participants adequate notice.

Given the availability of data and information relating to public issuers of securities in today's markets, and in light of the extensive amount of additional continued listing standards under Rule 5.6(b), waiting until a security is actually delisted by its primary listing market is the appropriate point at which to restrict the issuance of new options series in an options class. Accordingly, the Exchange hereby proposes to eliminate PCX Rule 5.6(b)(5).

Additionally, as a matter of ''housekeeping,'' the Exchange also proposes to clarify Exchange Rule 5.3(b) and Rule 5.6(b)(6), which govern the criteria for the initial and continued listing of options on a particular security, respectively. Both of these provisions include as part of the criteria, a requirement that the underlying security must be a national market system security (''NMS security''). As part of the recently adopted Regulation NMS, among other things, the Commission revised the definition of an NMS security.[6] Specifically, Rule 600(b)(46) under Regulation NMS defines an NMS security as ''any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.'' Rule 600(b)(47) also defines an ''NMS stock'' as any NMS security other than an option. As such, PCX Rule 5.3(b) and Rule 5.6(b)(5) will be amended to reflect these new terms.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)[7] of the Act, in general, and furthers the objectives of Section 6(b)(5),[8] in particular, in that it is designed to facilitate transactions in securities, to promote just and equitable principles of trade, to enhance competition, and to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has designated the proposed rule change as one that: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate. Therefore, the foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10] At any time within 60 days after the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission 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.

[6] *See* Securities Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).

Pursuant to Rule 19b–4(f)(6)(iii) under the Act,[11] the proposal does not become operative for 30 days after the date of its filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. The PCX has asked the Commission to waive the 30-day operative delay and the five day pre-filing notice requirement. Because the proposed rule change is based upon a recently approved rule change by the Chicago Board Options Exchange, Incorporated (''CBOE''),[12] and the CBOE's proposed rule change was published for public notice and comment, the Commission believes that waiving the 30-day operative delay, as well as the five day pre-filing notice requirement, is consistent with the protection of investors and the public interest. Accordingly, the Commission designates the proposal to be effective and operative upon filing with the Commission.[13]

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–PCX–2005–129 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–PCX–2005–129. 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 offices 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–2005–129 and should be submitted on or before January 4, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–7328 Filed 12–13–05; 8:45 am]

BILLING CODE 8010–01–P

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] *See* Securities Exchange Act Release Nos. 52562 (October 4, 2005), 70 FR 59382 (October 12, 2005) (notice for SR–CBOE–2004–37) and 52779 (November 16, 2005), 70 FR 70902 (November 23, 2005) (approval order for SR–CBOE–2004–37).

[13] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52920; File No. SR–PCX–2005–112]

Self-Regulatory Organizations; Pacific Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto Relating to Revisions to the Series 4 Examination Program

December 7, 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 November 3, 2005, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by PCX. On November 22, 2005, PCX filed Amendment No. 1 to the proposed rule change. PCX has designated the proposed rule change as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization pursuant to Section 19(b)(3)(A)(i) of the Act[3] and Rule 19b–4(f)(1) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

PCX is filing revisions to the study outline and selection specifications for the Limited Principal—Registered Options (Series 4) examination program. The proposed revisions update the material to reflect changes to the laws, rules, and regulations covered by the examination, as well as modify the content of the examination program to track more closely the functional workflow of a Series 4 limited principal. PCX is not proposing any textual changes to the PCX Rules. The revisions that PCX is submitting with this filing supersede all prior revisions to the Series 4 examination program submitted by PCX.

The revised study outline is available on PCX's Web site (*http://www.pacificex.com*), at PCX, and at the Commission. However, PCX has omitted the Series 4 selection specifications from this filing and has submitted the specifications under separate cover to the Commission with a request for confidential treatment pursuant to Rule 24b–2 under the Act.[5]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, PCX 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. PCX has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(i).

[4] 17 CFR 240.19b–4(f)(1).

[5] 17 CFR 240.24b–2.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Pursuant to Section 6(c)(3) of the Act,[6] which allows PCX to examine and verify the standards of training, experience, and competence for persons associated with PCX Options Trading Permit (''OTP'') Holders or OTP Firms, PCX has developed examinations, and requires satisfaction of examinations developed by other SROs, that are designed to establish that persons associated with PCX OTP Holders or OTP Firms have attained specified levels of competence and knowledge. PCX periodically reviews the content of examinations to determine whether revisions are necessary or appropriate in view of changes pertaining to the subject matter covered by the examinations.

PCX Rule 9.18 states that no OTP Firm or OTP Holder shall be approved to transact business with the public in options contracts, unless those persons associated with the OTP Firm or OTP Holder who are designated as Options Principals or who are designated as Registered Representatives have been approved by and registered with the Exchange. The Series 4 examination, an industry-wide examination, qualifies an individual to function as a Registered Options and Security Futures Principal, but only for purposes of supervising an OTP Holder's or OTP Firm's options activities.[7] The Series 4 examination tests a candidate's knowledge of options trading generally, the industry rules applicable to trading of option contracts, and the rules of registered clearing agencies for options. The Series 4 examination covers, among other things, equity options, foreign currency options, index options, and options on government and mortgage-backed securities.

The Series 4 examination program is shared by PCX and the following SROs: the American Stock Exchange LLC, the Chicago Board Options Exchange, Inc., the New York Stock Exchange, Inc., the National Association of Securities Dealers, Inc., and the Philadelphia Stock Exchange, Inc.

A committee of industry representatives, together with the staff of the PCX and the other SROs, recently undertook a periodic review of the Series 4 examination program. As a result of this review and as part of an ongoing effort to align the examination more closely to the supervisory duties of a Series 4 limited principal, PCX is proposing to modify the content of the examination to track the functional workflow of a Series 4 limited principal. More specifically, PCX is proposing to revise the main section headings and the number of questions on each section of the Series 4 study outline as follows: Options Investment Strategies, decreased from 35 to 34 questions; Supervision of Sales Activities and Trading Practices, increased from 71 to 75 questions; and Supervision of Employees, Business Conduct, and Recordkeeping and Reporting Requirements, decreased from 19 to 16 questions. PCX is further proposing revisions to the study outline to reflect the SEC short sale requirements. The revised examination continues to cover the areas of knowledge required to supervise options activities.

PCX is proposing these changes to the entire content of the Series 4 examination, including the selection specifications and question bank. The number of questions on the Series 4 examination will remain at 125, and candidates will continue to have three hours to complete the exam. Also, each question will continue to count one point, and each candidate must correctly answer 70 percent of the questions to receive a passing grade.

2. Statutory Basis

PCX believes that the proposed revisions to the Series 4 examination program are consistent with Section 6(b) of the Act,[8] in general, and further the objectives of Section 6(b)(1)[9] in particular, in that it is designed to enforce compliance by OTP Holders and OTP Firms and persons associated with the rules of the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

PCX does not believe that the proposed rule change, as amended, will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change, as amended, has become effective pursuant to Section 19(b)(3)(A)(i) of the Act[10] and Rule 19b–4(f)(1) thereunder,[11] in that the proposed rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization. PCX will announce the implementation date in a Rule Adoption Notice to be published no later than 7 days after Notice of this filing.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[12]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–PCX–2005–112 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–PCX–2005–112. 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

[6] 15 U.S.C. 78f(c)(3).

[7] A Registered Options and Security Futures Principal also must complete a firm-element continuing education program that addresses security futures and a principal's responsibilities for security futures before such person can supervise security futures activities.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(1).

[10] 15 U.S.C. 78s(b)(3)(A)(i).

[11] 17 CFR 240.19b–4(f)(1).

[12] The effective date of the original proposed rule is November 3, 2005. The effective date of Amendment No. 1 is November 22, 2005. For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on November 22, 2005, the date on which PCX submitted Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

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 PCX. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PCX–2005–112 and should be submitted on or before January 4, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–7330 Filed 12–13–05; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52903; File No. SR–Phlx–2005–67]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to the Maintenance, Retention and Furnishing of Books, Records and Other Information Regarding Payment For Order Flow

December 7, 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 November 3, 2005, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On November 22, 2005, the Phlx submitted Amendment No. 1 to the proposed rule change.[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 Phlx proposes to amend Phlx Rule 760, Maintenance, Retention and Furnishing of Books, Records and Other Information, to incorporate recent changes to the Exchange's payment for order flow program.

The Exchange recently amended its payment for order flow program for trades settling on or after October 1, 2005 (''October program'').[4] Registered Options Traders who receive electronically-delivered orders directed to them (''Directed ROTs'') may, pursuant to the October program, direct the Exchange to make payments to order flow providers on their behalf.[5] Thus, the Exchange proposes to amend Phlx Rule 760 to clarify that these Directed ROTs would now be required to retain records relating to payment for order flow arrangements.[6]

The text of Rule Phlx 760, as proposed to be amended, is set forth below with new language in *italics* and deletions in [brackets].

Rule 760

Maintenance, Retention and Furnishing of Books, Records and Other Information

Every member and member organization shall make, keep current and preserve such books and records as the Exchange may prescribe and as may be prescribed by the Securities Exchange Act of 1934 and the rules and regulations thereunder. No member or member organization shall refuse to make available to the Exchange such books, records or other information as may be called for under the rules or as may be requested in connection with an investigation by the Exchange.

Supplementary Material: * * *

.01 Without limiting the general provisions of Rule 760, such Rule requires *Registered Options Traders who receive electronically-delivered orders directed to them*, Specialists [or] *and* Specialist Units who request *that payments be made* [funds, or who make payments] to order flow providers as part of the Exchange's payment for order flow program, to make, keep current and preserve all books and records relating to payment for order flow arrangements, including but not limited to all records pertaining to the identity of the order flow providers, [and] the [origin, use, transfer, distribution and] *rates, and the basis for the* amounts *they have directed the Exchange to pay to order flow providers* [of all payments] (whether on a per contract or flat fee basis). [Such records should be maintained in such a fashion as to permit the Exchange to track payments to order flow providers on an option by option basis.] Such books and records shall be made available as may be requested by the Exchange.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange states that the purpose of this proposal is to update Phlx Rule 760 to reflect recent changes to the Exchange's payment for order flow program, specifically including that Directed ROTs must now retain records relating to payment for order flow arrangements. The Exchange proposes to amend the Supplementary Material to Phlx Rule 760 because the Exchange's current payment for order flow program no longer tracks payments to order flow providers on an option by option basis. In addition, the Exchange notes that specialists and specialist units no longer need to maintain records relating to the use, transfer, and distribution of payment for order flow funds because

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[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 provided clarifying language to Phlx Rule 760 and the purpose section of the filing.

[4] The October program is in effect as a pilot program that is scheduled to expire on May 27, 2006. *See* Securities Exchange Act Release No. 52568 (October 6, 2005), 70 FR 60120 (October 14, 2005) (SR–Phlx–2005–58).

[5] The Exchange represents that under previous payment for order flow programs, specialist units requested reimbursement from the Exchange for monies they paid to order flow providers. Pursuant to the October program, the available payment for order flow funds would be disbursed by the Exchange according to the instructions of the specialist units and Directed ROTs.

[6] The Exchange represents that specialists/specialist units are already specifically required to maintain these books and records.

they will now direct the Exchange to make on their behalf those payment for order flow payments to the order flow providers. The Exchange also proposes to specifically request that books and records regarding the rate (for example, $0.25 per contract or a flat monthly rate) that is paid to order flow providers and the basis for the amount that Directed ROTs, specialists, and specialist units direct the Exchange to pay to order flow providers be maintained.

2. Statutory Basis

The Exchange believes the proposal is consistent with section 6(b) of the Act[7], in general, and furthers the objectives of section 6(b)(1) of the Act,[8] in particular, in that it assist the Exchange in determining and enforcing compliance with its rules assist the Exchange in determining an enforcing compliance with its rules (i.e., the specific terms of the Exchange's payment for order flow program). By enabling the Exchange to verify that the payment for order flow program is being administered in accordance with the terms thereof as approved by the Exchange and set forth in its filing with the Commission, this proposal also promotes just and equitable principles of trade consistent with section 6(b)(1) of the Act.[9]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received by the Exchange on this proposal.

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 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, 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–Phlx–2005–67 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–Phlx–2005–67. 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 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–Phlx–2005–67 and should be submitted on or before January 4, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–7299 Filed 12–13–05; 8:45 am]

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[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(1).

[9] 15 U.S.C. 78f(b)(1).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52916; File No. SR–Phlx–2005–71]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto Relating to Revisions to the Series 9/10 Examination Program

December 7, 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 November 16, 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, II, and III below, which Items have been prepared by the Phlx. On November 29, 2005, Phlx filed Amendment No. 1 to the proposed rule change. Phlx has designated the proposed rule change as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization pursuant to section 19(b)(3)(A)(i) of the Act[3] and Rule 19b–4(f)(1) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to file revisions to the study outline and selection specifications for the Limited Principal—General Securities Supervisor (Series 9/10) examination (''Series 9/10 Examination''), which is administered by the National Association of Securities Dealers, Inc. (''NASD''). The proposed revisions

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(i).

[4] 17 CFR 240.19b–4(f)(1).

update the material to reflect changes to the laws, rules, and regulations covered by the Series 9/10 Examination, as well as modify the content of the examination program to track more closely the functional workflow of a Series 9/10 limited principal. Phlx is not proposing any textual changes to its rules.

The revised Series 9/10 Examination study outline is available on Phlx's Web site (*http://www.phlx.com*), at the Phlx, and at the Commission.[5]

However, The Exchange has omitted the Series 9/10 Examination selection specifications from this filing and has submitted the specifications under separate cover to the Commission with a request for confidential treatment pursuant to Rule 24b–2 under the Act.[6]

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 Series 9/10 Examination tests a candidate's knowledge of securities industry rules and regulations and certain statutory provisions pertinent to the supervision of sales activities. The Series 9/10 Examination is shared by Phlx and the following SROs: The NASD, the American Stock Exchange LLC , the Chicago Board Options Exchange, Inc., the Municipal Securities Rule Making Board (''MSRB'') , the New York Stock Exchange, Inc. (''NYSE''), and the Pacific Exchange, Inc.

A committee of industry representatives, together with the staff of NASD and the other SROs, recently undertook a periodic review of the Series 9/10 examination program. As a result of this review, the NASD has filed a rule change proposal with the Commission[7] and Phlx is proposing a similar rule change to update the content of the examination to cover Regulation S–P,[8] MSRB Rules G–37/G–38, SRO research analyst and anti-money laundering rules, municipal fund securities (*e.g.*, 529 college savings plans), and exchange traded funds. Phlx is further proposing revisions to the study outline to reflect the Commission's short sale requirements. In addition, as part of an ongoing effort to align the examination more closely to the supervisory duties of a Series 9/10 limited principal, the proposal would modify the content of the examination to track the functional workflow of a Series 9/10 limited principal, and would include questions related to parallel rules of NASD, the options exchanges, the MSRB, and the NYSE in the same section of the exam.

As a result of the revisions, Phlx is proposing to modify the main section headings and the number of questions on each section of the Series 9/10 study outline as follows: Section 1—Hiring, Qualifications, and Continuing Education, 9 questions; section 2—Supervision of Accounts and Sales Activities, 94 questions; section 3—Conduct of Associated Persons, 14 questions; section 4—Recordkeeping Requirements, 8 questions; section 5—Municipal Securities Regulation, 20 questions; section 6—Options Regulation, 55 questions. Sections 1 through 5 constitute the Series 10 portion of the examination. Section 6 constitutes the Series 9 portion of the examination. Series 10 covers general securities and municipal securities, and Series 9 covers options. The revised examination continues to cover the areas of knowledge required for the supervision of sales activities.

Phlx is proposing these changes to the entire content of the Series 9/10 examination, including the selection specifications and question bank. The number of questions on the Series 9/10 examination will remain at 200, and candidates will continue to have four hours to complete the Series 10 portion and one and one-half hours to complete the Series 9 portion. Also, each question will continue to count one point, and each candidate must correctly answer 70 percent of the questions on each series, 9 and 10, to receive a passing grade. Phlx believes that the other SROs are filing similar proposals.

As further discussed below, the Exchange is filing the proposed rule change for immediate effectiveness. The Exchange will announce the proposed revisions in a *Notice to Members* to be published prior to the implementation date.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act__[9] in general and furthers the objectives of section 6(c)(3),[10] which authorize Phlx to prescribe standards of training, experience and competence for members of the Exchange or persons associated with them.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Phlx does not believe that the proposed rule change, as amended, will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

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, as amended, has become effective pursuant to section 19(b)(3)(A)(i)[11] of the Act and Rule 19b-4(f)(1) thereunder,[12] in that the proposed rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[13]

[5] The Series 9/10 Examination study outline is also available on NASD's Web site (*http://www.nasd.com*).

[6] 17 CFR 240.24b–2.

[7] *See* Securities Exchange Act Release No. 52548 (September 30, 2005), 70 FR 59111 (October 11, 2005) (SR-NASD–2005–111). In the filing, the NASD proposes an implementation date of no later than November 30, 2005.

[8] 17 CFR 248.1–18; 17 CFR 248.30; and 17 CFR 248, Appendix A.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(c)(3).

[11] 15 U.S.C. 78s(b)(3)(A)(i).

[12] 17 CFR 240.19b–4(f)(1).

[13] The effective date of the original proposed rule is November 16, 2005. The effective date of Amendment No. 1 is November 29, 2005. For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under section 19(b)(3)(C) of the Act, the Commission considers the period to commence on November 29, 2005, the date on which Phlx submitted Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

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-Phlx-2005–71 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR-Phlx-2005–71. 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 Phlx.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2005–71 and should be submitted on or before January 4, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–7306 Filed 12–13–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52919; File No. SR–Phlx–2005–66]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto Relating to Revisions to the Series 4 Examination Program

December 7, 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 November 9, 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, II, and III below, which Items have been prepared by Phlx. On November 28, 2005, Phlx filed Amendment No. 1 to the proposed rule change. Phlx has designated the proposed rule change as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization pursuant to Section 19(b)(3)(A)(i) of the Act[3] and Rule 19b–4(f)(1) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Phlx is filing revisions to the study outline and selection specifications for the Limited Principal—Registered Options (Series 4) examination program (''Series 4 Examination''), which is administered by the National Association of Securities Dealers, Inc. (''NASD''). The proposed revisions update the material to reflect changes to the laws, rules, and regulations covered by the Series 4 Examination, as well as to modify the content of the examination program to track more closely the functional workflow of a Series 4 limited principal. Phlx is not proposing any textual changes to its rules.

The revised Series 4 Examination study outline is available on Phlx's Web site *(http://www.phlx.com),* at the Phlx, and at the Commission. However, the Exchange has omitted the Series 4 Examination selection specifications from this filing and has submitted the specifications under separate cover to the Commission with a request for confidential treatment pursuant to Rule 24b–2 under the Act.[5]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, 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. 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

Phlx Rule 1024 states that a member organization shall not transact any business with the public in option contracts unless those persons engaged in the management of the member organization's business pertaining to option contracts are registered with and approved by the Exchange as Options Principals. Additionally, the rule states that no individual member shall transact any business directly with the public in option contracts unless he is registered with and approved by the Exchange as an Options Principal. The Series 4 examination, an industry-wide examination, qualifies an individual to function as a Registered Options and Security Futures Principal, but only for purposes of supervising a member firm's options activities.[6]

The Series 4 Examination tests a candidate's knowledge of options

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[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(i).

[4] 17 CFR 240.19b–4(f)(1).

[5] 17 CFR 240.24b–2.

[6] A Registered Options and Security Futures Principal must complete an additional continuing education program before such person can supervise security futures activities.

trading generally, the Phlx rules applicable to the trading of option contracts, and the rules of registered clearing agencies for options. The Series 4 Examination covers, among other things, equity options, foreign currency options, index options, and options on government and mortgage-backed securities.

The Series 4 Examination is shared by Phlx and the following SROs: the NASD, the American Stock Exchange LLC, the Chicago Board Options Exchange, Inc., the New York Stock Exchange, Inc., and the Pacific Exchange, Inc. NASD has filed with the Commission similar revisions to the study outline and selection specifications for the Series 4 Examination.[7] Phlx believes that the other SROs are filing similar proposals.

A committee of industry representatives, together with the staff of Phlx and the other SROs, recently undertook a periodic review of the Series 4 Examination and study outline and selection specifications. As a result of this review and as part of an ongoing effort to align the Series 4 Examination more closely to the supervisory duties of a Series 4 principal, Phlx is proposing to modify the content of the Series 4 Examination to track the functional workflow of a Series 4 principal. More specifically, Phlx is proposing to revise the main section headings and the number of questions on each section of the Series 4 study outline as follows: Options Investment Strategies, decreased from 35 to 34 questions; Supervision of Sales Activities and Trading Practices, increased from 71 to 75 questions; and Supervision of Employees, Business Conduct, and Recordkeeping and Reporting Requirements, decreased from 19 to 16 questions. Phlx is further proposing revisions to the study outline to reflect the SEC short sale requirements. The revised examination continues to cover the areas of knowledge required to supervise options activities.

Phlx is proposing similar changes to the corresponding sections of the Series 4 Examination selection specifications and question bank. The number of questions on the Series 4 Examination will remain at 125, and candidates will have three hours to complete the exam. Also, each question will continue to count as one point and candidates must correctly answer 70 percent of the questions to receive a passing grade.

As further discussed below, the Exchange is filing the proposed rule change for immediate effectiveness. The Exchange will announce the proposed revisions in a *Notice to Members* to be published prior to the implementation date.

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(c)(3),[9] which authorize Phlx to prescribe standards of training, experience and competence for members of the Exchange or persons associated with them.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Phlx does not believe that the proposed rule change, as amended, will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

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, as amended, has become effective pursuant to Section 19(b)(3)(A)(i)[10] of the Act and Rule 19b–4(f)(1) thereunder,[11] in that the proposed rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the Exchange.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[12]

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-Phlx-2005–66 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR-Phlx-2005–66. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2005–66 and should be submitted on or before January 4, 2006.

[7] *See* Securities Exchange Act Release Nos. 51216 (February 16, 2005), 70 FR 8866 (February 23, 2005) (SR–NASD–2005–25) and 52546 (September 30, 2005), 70 FR 59109 (October 11, 2005) (SR–NASD–2005–109) (extending the implementation date of the revisions to no later than November 30, 2005).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(c)(3).

[10] 15 U.S.C. 78s(b)(3)(A)(i).

[11] 17 CFR 240.19b–4(f)(1).

[12] The effective date of the original proposed rule is November 9, 2005. The effective date of Amendment No. 1 is November 28, 2005. For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on November 28, 2005, the date on which Phlx submitted Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–7326 Filed 12–13–05; 8:45 am]

BILLING CODE 8010–01–P

[13] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 5246]

Culturally Significant Objects Imported for Exhibition Determinations: ''Rubens and His Age: Masterpieces From the Hermitage''

AGENCY: Department of State

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition ''Rubens and His Age: Masterpieces from the Hermitage'', imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners. I also determine that the exhibition or display of the exhibit objects at the Guggenheim-Hermitage Museum, Las Vegas, Nevada, from on or about January 30, 2006, until on or about August 30, 2006, and at possible additional venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Richard Lahne, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/453–8058). The address is U.S. Department of State, SA–44, 301 4th Street, SW. Room 700, Washington, DC 20547–0001.

Dated: December 9, 2005.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 05–24065 Filed 12–12–05; 1:01 pm]

BILLING CODE 4710–08–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. OST–2001–8696]

Policy Guidance Concerning Recipients' Responsibilities to Limited English Proficient (LEP) Persons

AGENCY: Office of the Secretary (OST), U.S. Department of Transportation (DOT).

ACTION: Notice of guidance with request for comments.

SUMMARY: The United States Department of Transportation (DOT) is publishing guidance concerning services and policies by recipients of Federal financial assistance from the Department of Transportation related to persons with limited English proficiency. The guidance is based on the prohibition against national origin discrimination in Title VI of the Civil Rights Act of 1964, as it affects limited English proficient persons.

DATES: This guidance is effective immediately. Comments must be received on or before January 13, 2006. Late-filed comments will be considered to the extent practicable. DOT will review all comments and will determine what modifications to the guidance, if any, are necessary. This guidance supplants existing guidance on the same subject originally published at 66 FR 6733 (January 22, 2001).

ADDRESSES: You may submit comments, identified by the docket number [OST–2001–8696], by any of the following methods:

- *Web Site: http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax:* (202) 493–2251.
- *Mail:* Docket Management System; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- *Hand Delivery:* To the Docket Management System; Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Instructions: You must include the agency name and docket number [OST–2001–8696] or the Regulatory Identification Number (RIN) for this notice at the beginning of your comment. Note that all comments received will be posted without change to *http://dms.dot.gov*, including any personal information provided.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov*.

Docket: You may view the public docket through the Internet at *http://dms.dot.gov* or in person at the Docket Management System office at the above address.

FOR FURTHER INFORMATION CONTACT: Joseph Austin, Chief, External Policy and Program Development Division, Departmental Office of Civil Rights, Telephone: (202) 366–5992, TTY: (202) 366–9696, E-mail: *joseph.austin@dot.gov*; or Bonnie Angermann, Attorney-Advisor, Office of General Law, Office of the General Counsel, Telephone: (202) 366–9166, E-mail: *bonnie.angermann@dot.gov*. Arrangements to receive the policy guidance in an alternative format may be made by contacting the named individuals.

SUPPLEMENTARY INFORMATION: Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, *et seq.*, and its implementing regulations provide that no person shall be subjected to discrimination on the basis of race, color, or national origin under any program or activity that receives Federal financial assistance. The purpose of this limited English proficiency policy guidance is to clarify the responsibilities of recipients of Federal financial assistance from the U.S. Department of Transportation (DOT) (''recipients''), and assist them in fulfilling their responsibilities to limited English proficient (LEP) persons, pursuant to Title VI of the Civil Rights Act of 1964 and implementing regulations.

Executive Order 13166, ''Improving Access to Services for Persons With Limited English Proficiency,'' reprinted at 65 FR 50121 (August 16, 2000), directs each Federal agency that is subject to the requirements of Title VI to publish guidance for its respective recipients clarifying that obligation.

Executive Order 13166 further directs that all such guidance documents be consistent with the compliance standards and framework detailed in the Department of Justice's (DOJ's) Policy Guidance entitled ''Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency.'' *See* 65 FR 50123 (August 16, 2000) (DOJ's General LEP Guidance).

DOT published its initial guidance regarding its recipients' obligations to take reasonable steps to ensure access by LEP persons on January 22, 2001, and requested public comment on the guidance. *See* 66 FR 6733. DOT received 21 comments in response to its January 22, 2001, policy guidance. The comments reflected the views of individuals, organizations serving LEP populations, organizations favoring the use of the English language, and recipient agencies. While many comments identified areas for improvement and/or revision, the majority of the comments on the DOT LEP Guidance expressed agreement with its overall goal of ensuring access of LEP individuals to recipients' services. DOT worked closely with DOJ to ensure that recipients' comments were addressed in a consistent fashion.

In the order most often raised, the common areas of comment regarded: cost considerations, especially for smaller recipients serving few LEP persons; increased litigation risk and liability for recipients as a result of the guidance; and use of interpreters and the definition of ''qualified interpreter.''

A large number of comments focused on cost considerations and suggested that the Department address them as part of its evaluation of the language assistance needs of LEP persons. Particularly, this concern was expressed by state agencies that at the time received Coast Guard grants to administer safe boating courses.[1] But this policy guidance does not require DOT recipients to translate all courses or materials in every circumstance or to take unreasonable or burdensome steps in providing LEP persons access. We have clarified the guidance to better convey its flexibility, based on the four-factor analysis set forth in DOJ's General LEP Guidance.

Several recipients commented that they serve few if any LEP persons and that the cost of interpreting all of their courses and materials would be excessive and unnecessary. While none urged that costs be excluded from consideration altogether, at least one comment expressed concern that a recipient could use cost as a basis for avoiding otherwise reasonable and necessary language assistance to LEP persons. In contrast, a few comments suggested that the flexible fact-dependent compliance standard set forth in the guidance, when combined with the desire of most recipients to avoid the risk of noncompliance, could lead some large recipients to incur unnecessary or inappropriate fiscal burdens in the face of already strained program budgets. The Department is mindful that cost considerations could be inappropriately used to avoid providing otherwise reasonable and necessary language assistance. Similarly, cost considerations could be ignored or minimized to justify the provision of a particular level or type of language service even though effective alternatives exist at a minimal cost. The Department also is aware of the possibility that satisfying the need for language services might be quite costly for certain types of recipients, particularly if they have not updated their programs and activities to the changing needs of the populations they serve.

The potential for some recipients to assert adverse cost impacts in order to avoid Title VI obligations does not, in the Department's view, justify eliminating cost as a factor in all cases when determining the necessary scope of reasonable language assistance services under DOT's guidance. The Department continues to believe that costs are a legitimate consideration in identifying the reasonableness of particular language assistance measures, and the DOJ Recipient LEP Guidance identifies the appropriate framework through which costs are to be considered. *See* Department of Justice Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 FR 41455 (June 18, 2002).

The second most common category of comments DOT received expressed concern over increased litigation risk and liability for recipients as a result of the LEP Guidance. As is addressed below in the Introduction, *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), holds principally that there is no private right of action to enforce Title VI disparate impact regulations. The LEP Guidance is based on Title VI and DOT's Title VI regulations at 49 CFR part 21 and does not provide any private right of action beyond that which exists in those laws. Thus, the LEP Guidance does not increase the risk of recipients' legal liability to private plaintiffs. However, the Department does not dismiss the possibility that individuals may continue to initiate such legal actions.

The third most numerous category of comments DOT received regarded the definition of ''qualified interpreter'' and expressed commentators' concern with recipients' responsibility to make interpreters available, especially for recipients who serve populations with extremely diverse language needs. Set forth below in section VI are practices to help recipients ascertain that their interpreters are both competent and effective. This section should enable recipients to assess the qualifications of the interpreters they use and identify any improvements that need to be addressed.

Three of the comments urged withdrawal of the guidance, arguing it is unsupported by law. In response, the Department notes that its commitment to implementing Title VI and its regulations to address language barriers is longstanding and is unaffected by recent judicial action precluding individuals from successfully maintaining suits to enforce agencies' Title VI disparate impact regulations. This guidance clarifies existing statutory and regulatory provisions by describing the factors recipients should consider in fulfilling their responsibilities to LEP persons.

The remaining 18 comments were generally supportive of the guidance and DOT's leadership in this area. One recipient commented that constraining LEP persons' access to services may actually hinder their ability to become more proficient in the English language, therefore justifying increased programs for LEP persons. Several comments received addressed areas unique to the provision of transportation services to LEP persons. One recipient discussed the inconsistency between the Federal Motor Carrier Safety Administration's (FMCSA's) regulations requiring all drivers to speak and understand a certain amount of English, and the guidance's requirement that the FMCSA division offices provide information and services in other languages to accommodate LEP persons. Pursuant to 49 CFR 391.11(b)(2), a person is qualified to drive a motor vehicle if he or she ''[c]an read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records.'' In 1997, following an

[1] This guidance does not address the extent to which Executive Order 13166 requires language access services in the provision of boating safety courses funded by the Coast Guard, because that agency is no longer a component of the Department of Transportation.

American Civil Liberties Union (ACLU) legal challenge to this requirement, DOT issued an advance notice of proposed rulemaking (ANPRM) to address this issue. On July 24, 2003, FMCSA withdrew this ANPRM, concluding that the information introduced in response to the notice ''does not establish that the current regulation requires an unnecessarily high level of English fluency that has resulted in a discriminatory impact or effect based upon national origin, color, or ethnicity.'' FMCSA determined the regulation ''as written and properly enforced effectively balances issues of civil rights and highway safety.'' 68 FR 43890.

Another recipient, who works with community-based organizations concerned with transportation practices and policies, suggested mandatory LEP Access Assessments be attached to the standard financial assistance Assurance Forms that recipients must execute, to serve as a basis for disqualifying recipients submitting inaccurate or substantially incomplete assessments from Federal grant funding. While providing LEP persons with meaningful access is the law and should be given high priority, DOT advocates a flexible approach in ensuring such access, as outlined below in section V, in order to suit the varying needs of its recipients, and therefore has not adopted this suggestion. As discussed in section VIII, DOT seeks to promote voluntary compliance to meet Title VI's goal of ensuring that Federal funds are not used in a manner that discriminates on the basis of race, color, or national origin. DOT will work with recipients to meet this goal, and will resort to more intrusive administrative remedies only if voluntary compliance cannot be secured and stronger measures become necessary to ensure LEP persons have meaningful access to services from recipients of DOT financial assistance.

This document has been modified based on careful consideration of public comments received by DOT, and the approach DOJ adopted after analyzing the public comments it received following its initial guidance published at 66 FR 3834 (January 16, 2001). This guidance is consistent with: Title VI, implementing regulations, Executive Order 13166, the DOJ General LEP Guidance, and the model DOJ Recipient Guidance issued on June 18, 2002.

With particular emphasis on the concerns mentioned above, the Department proposes this ''Limited English Proficiency Guidance for Department of Transportation Recipients.'' The text of this guidance document appears below.

Because this guidance must adhere to the Federal-wide compliance standards and framework detailed in the model DOJ Recipient Guidance issued on June 18, 2002, DOT specifically solicits comments on the nature, scope, and appropriateness of the DOT-specific examples set out in this guidance explaining and/or highlighting how those consistent Federal-wide compliance standards are applicable to recipients of Federal financial assistance from DOT. This guidance supplants the existing guidance on the same subject published at 66 FR 6733 (January 22, 2001). This guidance does not constitute a regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. 553.

Dated: December 7, 2005.

J. Michael Trujillo,

Director, Departmental Office of Civil Rights.

Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons

I. Introduction

Most individuals living in the United States read, write, speak, and understand English. There are many individuals, however, for whom English is not their primary language. For instance, based on the 2000 census, regarding individuals older than age 5, over 26 million individuals speak Spanish and almost 7 million individuals speak an Asian or Pacific Island language at home. If these individuals have a limited ability to read, write, speak, or understand English, they are limited English proficient, or ''LEP.''

In a 2001 Supplementary Survey by the U.S. Census Bureau, [2] 33% of Spanish speakers and 22.4% of all Asian and Pacific Island language speakers aged 18–64 reported that they spoke English either ''not well'' or ''not at all.''

Language for LEP individuals can be a barrier to accessing important benefits or services, understanding and exercising important rights, complying with applicable responsibilities, or understanding other information provided by federally funded programs and activities. The Federal Government funds an array of services that can be made meaningfully accessible to otherwise eligible LEP persons. The Federal Government is committed to improving the accessibility of these programs and activities to eligible LEP persons, a goal that reinforces its equally important commitment to promoting programs and activities designed to help individuals learn English. Recipients of Federal financial assistance have an obligation to reduce language barriers that can preclude meaningful access by LEP persons to important government services.[3]

In certain circumstances, failure to ensure that LEP persons can effectively participate in or benefit from federally assisted programs and activities may violate the prohibition under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and Title VI regulations against national origin discrimination. The purpose of this policy guidance is to assist recipients in fulfilling their responsibilities to provide meaningful access to LEP persons under existing law. This guidance clarifies existing legal requirements for LEP persons by describing the factors recipients should consider in fulfilling their responsibilities to LEP persons.[4] These are the same criteria DOT will use in evaluating whether recipients are complying with Title VI and Title VI regulations.

Executive Order 13166 charges DOJ with the responsibility for providing LEP Guidance to other Federal agencies, such as DOT, and for ensuring consistency among each agency-specific guidance. Consistency among Federal Government agencies is particularly important. Inconsistent or contradictory guidance could confuse recipients of Federal funds and needlessly increase costs without facilitating the meaningful access for LEP persons that this policy guidance is designed to address. As with most government initiatives, this requires balancing several principles.

[2] PO35. *Age by Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over.* Cens. Summ. File 3, 2001 Supp. Survey Summ. Tables (SF 3) (based on 12 monthly samples during 2001) Washington: U.S. Dep't of Comm., Bur. of the Census. Viewed 14 September 2004, available at: *http://factfinder.census.gov/servlet/DTTable?_bm=y&-geo_id=D&-ds_name=D&-_lang=en&-redoLog=false&-mt_name=DSS_2001_EST_G2000_P035.*

[3] DOT recognizes that many recipients had language assistance programs in place prior to the issuance of Executive Order 13166. This policy guidance provides a uniform framework for a recipient to integrate, formalize, and assess the continued vitality of these existing and possibly additional reasonable efforts based on the nature of its programs and activities, the current needs of the LEP populations it encounters, and its prior experience in providing language services in the community it serves.

[4] This policy guidance is not a regulation but rather a guide. Title VI and its implementing regulations require that recipients take responsible steps to ensure meaningful access by LEP persons. Recipients should use the guidance to determine how best to comply with statutory and regulatory obligations to provide meaningful access to the benefits, services, information, and other important portions of their programs and activities for individuals who are LEP.

While this guidance discusses that balance in some detail, it is important to note the basic principles behind that balance. First, we must ensure that federally assisted programs and activities aimed at the American public do not leave individuals behind simply because they face challenges communicating in English. This is of particular importance because, in many cases, LEP individuals form a substantial portion of those who particularly benefit from federally assisted programs and activities. Second, we must achieve this goal while finding constructive methods to reduce the costs of LEP requirements on small businesses, small local governments, or small nonprofit organizations that receive Federal financial assistance. There are many productive steps that the Federal Government, either collectively or as individual agencies, can take to help recipients reduce the costs of language services without sacrificing meaningful access for LEP persons. Without these steps, certain smaller recipients may choose not to participate in federally assisted programs or activities, threatening the critical functions that the programs or activities strive to assist. To that end, DOT plans to continue to work with DOJ and other Federal agencies to provide ongoing assistance and guidance in this important area. In addition, DOT plans to work with recipients of Federal financial assistance—for example, with motor vehicle departments, transit authorities, state departments of transportation, and other transportation service providers—and LEP persons, to identify and share model plans, examples of best practices, and cost-saving approaches. Moreover, DOT intends to explore how language assistance measures and cost-containment approaches developed with respect to its own federally conducted programs and activities can be effectively shared or otherwise made available to recipients, particularly small businesses, small local governments, and small nonprofit organizations. An interagency working group on LEP has developed a Web site, *http://www.lep.gov,* to assist in disseminating this information to recipients, Federal agencies, and the communities being served.

Many commentators have noted that some have interpreted the case of *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), as impliedly striking down the regulations promulgated under Title VI that form the basis for the part of Executive Order 13166 that applies to federally assisted programs and activities. We have taken the position that this is not the case, and will continue to do so. Accordingly, we will strive to ensure that federally assisted programs and activities work in a way that is effective for all eligible beneficiaries, including those with limited English proficiency.

II. Legal Authority

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, provides that no person shall ''on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.'' Section 602 authorizes and directs Federal agencies that are empowered to extend Federal financial assistance to any program or activity ''to effectuate the provisions of [section 601] * * * by issuing rules, regulations, or orders of general applicability.'' 42 U.S.C. 2000d–1.

Department of Justice regulations promulgated pursuant to section 602 forbid recipients from ''utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.'' 28 CFR 42.104(b)(2). DOT's Title VI regulations include almost identical language in this regard. *See* 49 CFR 21.5(b)(vii)(2) (portions of these regulations are provided in Appendix A).

The Supreme Court, in *Lau* v. *Nichols*, 414 U.S. 563 (1974), interpreted regulations promulgated by the former Department of Health, Education, and Welfare, including a regulation similar to that of DOJ, 45 CFR 80.3(b)(2), to hold that Title VI prohibits conduct that has a disproportionate effect on LEP persons because such conduct constitutes national origin discrimination. In *Lau*, a San Francisco school district that had a significant number of non-English-speaking students of Chinese origin was required to take reasonable steps to provide them with a meaningful opportunity to participate in federally funded educational programs.

On August 11, 2000, Executive Order 13166 was issued. ''Improving Access to Services for Persons With Limited English Proficiency,'' 65 FR 50121 (August 16, 2000). Under that order, every Federal agency that provides financial assistance to non-Federal entities must publish guidance on how its recipients can provide meaningful access to LEP persons and thus comply with Title VI regulations forbidding recipients from ''restrict[ing] an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program'' or from ''utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.''

On that same day, DOJ issued a general guidance document addressed to ''Executive Agency Civil Rights Officers'' setting forth general principles for agencies to apply in developing guidance documents for recipients pursuant to the Executive Order. ''Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency,'' 65 FR 50123 (August 16, 2000) (DOJ's General LEP Guidance).

Subsequently, Federal agencies raised questions regarding the requirements of the Executive Order, especially in light of the Supreme Court's decision in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). On October 26, 2001, the Assistant Attorney General for Civil Rights issued a memorandum for ''Heads of Departments and Agencies, General Counsels and Civil Rights Directors.'' This memorandum clarified and reaffirmed the DOJ LEP Guidance in light of *Sandoval*. The Assistant Attorney General stated that because *Sandoval* did not invalidate any Title VI regulations that proscribe conduct that has a disparate impact on covered groups—the types of regulations that form the legal basis for the part of Executive Order 13166 that applies to federally assisted programs and activities—the Executive Order remains in force.[5]

[5] The memorandum noted that some commentators have interpreted *Sandoval* as impliedly striking down the disparate impact regulations promulgated under Title VI that form the basis for the part of Executive Order 13166 that applies to federally assisted programs and activities. *See, e.g., Sandoval*, 532 U.S. at 286, 286 n.6 (''[W]e assume for purposes of this decision that section 602 confers the authority to promulgate disparate-impact regulations; * * * We cannot help observing, however, how strange it is to say that disparate-impact regulations are 'inspired by, at the service of, and inseparably intertwined with' Sec. 601 * * * when Sec. 601 permits the very behavior that the regulations forbid''). The memorandum, however, made clear that DOJ disagreed with the commentators' interpretation. *Sandoval* holds principally that there is no private right of action

Pursuant to Executive Order 13166, DOT developed its own guidance document for recipients and initially issued it on January 22, 2001. ''DOT Guidance to Recipients on Special Language Services to Limited English Proficient (LEP) Beneficiaries.'' However, in light of the public comments received and the Assistant Attorney General's October 26, 2001, clarifying memorandum, DOT has revised its LEP guidance to ensure greater consistency with DOJ's revised LEP guidance, published June 18, 2002, and other agencies' revised LEP guidance. 67 FR 117 (June 18, 2002).

III. Who Is Covered?

Pursuant to Executive Order 13166, the meaningful access requirement of Title VI, the Title VI regulations, and the four-factor analysis set forth in the DOJ's revised LEP Guidance, 67 FR 117 (June 18, 2002), apply to the programs and activities of Federal agencies, including DOT. Federal financial assistance includes grants, cooperative agreements, training, use of equipment, donations of surplus property, and other assistance. Recipients of DOT assistance include, for example:

- State departments of transportation.
- State motor vehicle administrations.
- Airport operators.
- State highway safety programs.
- Metropolitan planning organizations.
- Regional transportation agencies.
- Regional, state, and local transit operators.
- Public safety agencies.[6]
- Hazardous materials transporters and other first responders.
- State and local agencies with emergency transportation responsibilities, for example, the transportation of supplies for natural disasters, planning for evacuations, quarantines, and other similar action.

Subrecipients likewise are covered when Federal funds are passed through from one recipient to a subrecipient.

Coverage extends to a recipient's entire program or activity, i.e., to all parts of a recipient's operations. This is true even if only one part of the recipient receives the Federal assistance.

Example: DOT provides assistance to a state department of transportation to rehabilitate a particular highway on the National Highway System. All of the operations of the entire state department of transportation—not just the particular highway program—are covered by the DOT guidance.

Finally, some recipients operate in jurisdictions in which English has been declared the official language. Nonetheless, these recipients continue to be subject to Federal nondiscrimination requirements, including those applicable to the provision of federally assisted services to persons with limited English proficiency.

IV. Who Is a Limited English Proficient Individual?

Individuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English can be limited English proficient, or ''LEP,'' and, therefore, are entitled to language assistance under Title VI of the Civil Rights Act of 1964 with respect to a particular type of service, benefit, or encounter. However, if a Federal agency were to decide to terminate Federal funds based on noncompliance with Title VI or its regulations, only funds directed to the particular program or activity that is out of compliance would be terminated. 42 U.S.C. 2000d–1.

Examples of populations likely to include LEP persons who are served or encountered by DOT recipients and should be considered when planning language services include, but are not limited to:

- Public transportation passengers.
- Persons who apply for a driver's license at a state department of motor vehicles.
- Persons subject to the control of state or local transportation enforcement authorities, including, for example, commercial motor vehicle drivers.
- Persons served by emergency transportation response programs.
- Persons living in areas affected or potentially affected by transportation projects.
- Business owners who apply to participate in DOT's Disadvantaged Business Enterprise program.

V. How Does a Recipient Determine the Extent of Its Obligation to Provide LEP Services?

Recipients are required to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons. While designed to be a flexible and fact-dependent standard, the starting point is an individualized assessment that balances the following four factors: (1) The number or proportion of LEP persons eligible to be served or likely to be encountered by a program, activity, or service of the recipient or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the recipient to people's lives; and (4) the resources available to the recipient and costs. As indicated above, the intent of this policy guidance is to suggest a balance that ensures meaningful access by LEP persons to critical services while not imposing undue burdens on small businesses, small local governments, or small nonprofit organizations.

After applying the above four-factor analysis to the various kinds of contacts a recipient has with the public, the recipient may conclude that different language assistance measures are sufficient to ensure meaningful access to the different types of programs or activities in which it engages. For instance, some of a recipient's activities will have a greater impact on or contact with LEP persons than others, and thus may require more in the way of language assistance. The flexibility that recipients have in addressing the needs of the LEP populations they serve does not diminish, and should not be used to minimize, the obligation that those needs be addressed. DOT recipients should apply the following four factors to the various kinds of contacts that they have with the public to assess language needs and decide what reasonable steps they should take to ensure meaningful access for LEP persons.

(1) The Number or Proportion of LEP Persons Served or Encountered in the Eligible Service Population

The greater the number or proportion of LEP persons from a particular language group served or encountered in the eligible service population, the more likely language services are needed. Ordinarily, persons ''eligible to be served, or likely to be directly affected, by'' a recipient's programs or activities are those who are in fact, served or encountered in the eligible service population. This population will be program-specific, and includes persons who are in the geographic area that is part of the recipient's service area. However, where, for instance, a motor vehicle office serves a large LEP population, the appropriate service area is that served by the office, and not the entire population served by the department. Where no service area has previously been approved, the relevant service area may be that which is approved by state or local authorities or designated by the recipient itself,

to enforce Title VI disparate impact regulations. It did not address the validity of those regulations or Executive Order 13166 or otherwise limit the authority and responsibility of Federal agencies to enforce their own Title VI regulations.

[6] Recipients should review DOJ's LEP Guidance for specific examples of how the four-factor analysis applies to interactions between funded law enforcement authorities and first responders.

provided that these designations do not themselves discriminatorily exclude certain populations. When considering the number or proportion of LEP individuals in a service area, recipients should consider LEP parent(s) whose English proficient or LEP minor children and dependents encounter the services of DOT recipients.

Recipients should first examine their prior experiences with LEP individuals and determine the breadth and scope of language services that are needed. In conducting this analysis, it is important to: Include language minority populations that are eligible beneficiaries of recipients' programs, activities, or services but may be underserved because of existing language barriers; and consult additional data, for example, from the census, school systems and community organizations, and data from state and local governments, community agencies, school systems, religious organizations, and legal aid entities.[7]

(2) The Frequency With Which LEP Individuals Come in Contact With the Program, Activity, or Service

Recipients should assess, as accurately as possible, the frequency with which they have or should have contact with LEP individuals from different language groups seeking assistance, as the more frequent the contact, the more likely enhanced language services will be needed. The steps that are reasonable for a recipient that serves an LEP person on a one-time basis will be very different than those expected from a recipient that serves LEP persons daily. Recipients should also consider the frequency of different types of language contacts, as frequent contacts with Spanish-speaking people who are LEP may require certain assistance in Spanish, while less frequent contact with different language groups may suggest a different and/or less intensified solution. If an LEP individual accesses a program or service on a daily basis, a recipient has greater duties than if the same individual's program or activity contact is unpredictable or infrequent. However, even recipients that serve LEP persons on an unpredictable or infrequent basis should use this balancing analysis to determine what to do if an LEP individual seeks services under the program in question. This plan need not be intricate. It may be as simple as being prepared to use a commercial telephonic interpretation service to obtain immediate interpreter services. Additionally, in applying this standard, recipients should consider whether appropriate outreach to LEP persons could increase the frequency of contact with LEP language groups.

(3) The Nature and Importance of the Program, Activity, or Service Provided by the Program

The more important the activity, information, service, or program, or the greater the possible consequences of the contact to the LEP individuals, the more likely language services are needed. The obligations to communicate rights to an LEP person who needs public transportation differ, for example, from those to provide recreational programming. A recipient needs to determine whether denial or delay of access to services or information could have serious or even life-threatening implications for the LEP individual. Decisions by a Federal, state, or local entity to make an activity compulsory, such as requiring a driver to have a license, can serve as strong evidence of the importance of the program or activity.

(4) The Resources Available to the Recipient and Costs

A recipient's level of resources and the costs imposed may have an impact on the nature of the steps it should take in providing meaningful access for LEP persons. Smaller recipients with more limited budgets are not expected to provide the same level of language services as larger recipients with larger budgets. In addition, ''reasonable steps'' may cease to be reasonable where the costs imposed substantially exceed the benefits. Recipients should carefully explore the most cost-effective means of delivering competent and accurate language services before limiting services due to resource concerns.

Resource and cost issues, however, can often be reduced by technological advances, reasonable business practices, and the sharing of language assistance materials and services among and between recipients, advocacy groups, affected populations, and Federal agencies. For example, the following practices may reduce resource and cost issues where appropriate:

- Training bilingual staff to act as interpreters and translators.
- Information sharing through industry groups.
- Telephonic and video conferencing interpretation services.
- Translating vital documents posted on Web sites.
- Pooling resources and standardizing documents to reduce translation needs.
- Using qualified translators and interpreters to ensure that documents need not be ''fixed'' later and that inaccurate interpretations do not cause delay or other costs.
- Centralizing interpreter and translator services to achieve economies of scale.[8]
- Formalized use of qualified community volunteers.

Large entities and those entities serving a significant number or proportion of LEP persons should ensure that their resource limitations are well substantiated before using this factor as a reason to limit language assistance. Such recipients may find it useful to be able to articulate, through documentation or in some other reasonable manner, their process for determining that language services would be limited based on resources or costs.

This four-factor analysis necessarily implicates the ''mix'' of LEP services required. Recipients have two main ways to provide language services: Oral interpretation either in person or via telephone interpretation service (hereinafter ''interpretation'') and written translation (hereinafter ''translation''). Oral interpretation can range from on-site interpreters for critical services provided to a high volume of LEP persons to access through commercially available telephonic interpretation services. Written translation, likewise, can range from translation of an entire document to translation of a short description of the document. In some cases, language services should be made available on an expedited basis while in others the LEP individual may be referred to another office of the recipient for language assistance.

The correct mix should be based on what is both necessary and reasonable in light of the four-factor analysis. For instance, a motor vehicle department or an emergency hazardous material clean-up team in a largely Hispanic neighborhood may need immediate oral interpreters available and should give serious consideration to hiring bilingual staff (of course, many such departments have already made these arrangements). Additionally, providing public

[7] The focus of the analysis is on lack of English proficiency, not the ability to speak more than one language. Note that demographic data may indicate the most frequently spoken languages other than English and the percentage of people who speak that language but speak or understand English less than well. People who are also proficient in English may speak some of the most commonly spoken languages other than English.

[8] Small recipients with limited resources may find that entering into a bulk telephonic interpretation service contract will prove cost effective.

transportation access to LEP persons is crucial. An LEP person's inability to utilize effectively public transportation may adversely affect his or her ability to obtain health care, or education, or access to employment. In contrast, there may be circumstances where the importance and nature of the activity and number or proportion and frequency of contact with LEP persons may be low and the costs and resources needed to provide language services may be high—such as in the case of a voluntary general public tour of an airport or train station—in which pre-arranged language services for the particular service may not be necessary. Regardless of the type of language services provided, quality and accuracy of those services can be critical. Recipients have substantial flexibility in determining the appropriate mix.

VI. Selecting Language Assistance Services

Recipients may provide language services in either oral or written form. Quality and accuracy of the language service is critical in order to avoid potential serious consequences to the LEP person and to the recipient.

A. Oral Language Services (Interpretation)

Interpretation is the act of listening to something in one language (source language) and orally translating it into another language (target language). Where interpretation is needed and is reasonable, recipients should consider some or all of the options below for providing competent interpreters in a timely manner.

Competence of Interpreters. When providing oral assistance, recipients should ensure competency of the language service provider, no matter which of the strategies outlined below are used. Competency requires more than self-identification as bilingual. Some bilingual staff and community volunteers, for instance, may be able to communicate effectively in a different language when communicating information directly in that language, but not be competent to interpret into and out of English. Likewise, they may not be able to do written translations.

Competency to interpret, however, does not necessarily mean formal certification as an interpreter, although certification is helpful. When using interpreters, recipients should ensure that they:

- Demonstrate proficiency in and ability to communicate information accurately in both English and in the other language and identify and employ the appropriate mode of interpreting (e.g., consecutive, simultaneous, summarization, or sight translation).
- Have knowledge in both languages of any specialized terms or concepts peculiar to the recipient's program or activity and of any particularized vocabulary and phraseology used by the LEP person;[9] and understand and follow confidentiality and impartiality rules to the same extent as the recipient employee for whom they are interpreting and/or to the extent their position requires.
- Understand and adhere to their role as interpreters without deviating into a role as counselor, legal advisor, or other roles.

Additionally, some recipients may have their own requirements for interpreters, as individual rights may depend on precise, complete, and accurate interpretations or translations. In some cases, interpreters may be required to demonstrate that their involvement in a matter would not create a conflict of interest.

While quality and accuracy of language services are critical, they are nonetheless part of the appropriate mix of LEP services required. The quality and accuracy of language services as part of disaster relief programs, or in the provision of emergency supplies and services, for example, must be extraordinarily high, while the quality and accuracy of language services in a bicycle safety course need not meet the same exacting standards.

Finally, when interpretation is needed and is reasonable, it should be provided in a timely manner in order to be effective. Generally, to be ''timely,'' the recipient should provide language assistance at a time and place that avoids the effective denial of the service, benefit, or right at issue or the imposition of an undue burden on or delay in important rights, benefits, or services to the LEP person. For example, when the timeliness of services is important, such as when an LEP person needs access to public transportation, a DOT recipient does not provide meaningful LEP access when it has only one bilingual staff member available one day a week to provide the service.

Hiring Bilingual Staff. When particular languages are encountered often, hiring bilingual staff offers one of the best, and often most economical, options. Recipients can, for example, fill public contact positions, such as transit station managers, department of motor vehicle service representatives, security guards, or program directors, with staff that are bilingual and competent to communicate directly with LEP persons in their language. If bilingual staff members are also used to interpret between English speakers and LEP persons, or to orally interpret written documents from English into another language, they should be competent in the skill of interpreting, as discussed above. Effective management strategies, including any appropriate adjustments in assignments and protocols for using bilingual staff, can ensure that bilingual staff members are fully and appropriately utilized. When bilingual staff cannot meet all of the language service obligations of the recipient, the recipient should turn to other options.

Hiring Staff Interpreters. Hiring interpreters may be most helpful where there is a frequent need for interpreting services in one or more languages. Depending on the facts, sometimes it may be necessary and reasonable to provide on-site interpreters to facilitate accurate and meaningful communication with an LEP person.

Contracting for Interpreters. Contract interpreters may be a cost-effective option when there is no regular need for a particular language skill. In addition to commercial and other private providers, many community-based organizations and mutual assistance associations provide interpretation services for particular languages. Contracting with interpreters and providing training regarding the recipient's programs and processes to these organizations can be a cost-effective option for providing language services to LEP persons from those language groups.

Using Telephone Interpreter Lines. Telephone interpreter service lines often offer prompt interpreting assistance in many different languages. They may be particularly appropriate where the mode of communicating with an English proficient person would also be over the phone. Although telephonic interpretation services are useful in many situations, it is important to ensure that, when using such services, the interpreters are competent to interpret any technical or legal terms specific to a particular program that may be important parts of the conversation. Nuances in language and non-verbal communication can often assist an

[9] Many languages have ''regionalisms,'' or differences in usage. For instance, a word that may be understood to mean something in Spanish for someone from Cuba may not be so understood by someone from Mexico. In addition, because there may be languages that do not have an appropriate direct interpretation of certain legal terms, the interpreter should be able to provide the most appropriate interpretation. The interpreter should make the recipient aware of the issue and the interpreter and recipient can then work to develop a consistent and appropriate set of descriptions of these terms in that language that can be used again, when appropriate.

interpreter and cannot be recognized over the phone. The issues discussed above regarding interpreter competency are also relevant to telephonic interpreters. Video teleconferencing and allowing interpreters to review relevant documents in advance may also be helpful.

Using Community Volunteers. In addition to consideration of bilingual staff, staff interpreters, or contract interpreters (either in-person or by telephone) as options to ensure meaningful access by LEP persons, use of recipient-coordinated community volunteers may provide a cost-effective supplemental language assistance strategy under appropriate circumstances. They may be particularly useful in providing language access for a recipient's less critical programs and activities. To the extent the recipient relies on community volunteers, it is often best to use volunteers who are trained in the information or services of the program and can communicate directly with LEP persons in their language. Just as with all interpreters, community volunteers used to interpret between English speakers and LEP persons, or to orally translate documents, should be competent in the skill of interpreting and knowledgeable about applicable confidentiality and impartiality rules. Recipients should consider formal arrangements with community-based organizations that provide volunteers to address these concerns and help ensure that services are available more regularly.

Use of Family Members, Friends, Other Customers/Passengers as Interpreters. Although recipients should not plan to rely on an LEP person's family members, friends, or other informal interpreters to provide meaningful access to important programs and activities, where LEP persons so desire, they should be permitted to use an interpreter of their choice at their own expense (whether a professional interpreter, family member, or friend) in place of or as a supplement to the free language services expressly offered by the recipient. LEP persons may feel more comfortable when a trusted family member or friend acts as an interpreter. In addition, in exigent circumstances that are not reasonably foreseeable, temporary use of interpreters not provided by the recipient may be necessary. However, with proper planning and implementation, recipients should be able to avoid most such situations.

Recipients, however, should take special care to ensure that family members, legal guardians, caretakers, and other informal interpreters are appropriate in light of the circumstances and subject matter of the program, service or activity, including protection of the recipient's own administrative, mission-related, or enforcement interest in accurate interpretation. In many circumstances, family members (especially children) or friends are not competent to provide quality and accurate interpretations. Issues of confidentiality, privacy, or conflict of interest may also arise. LEP individuals may feel uncomfortable revealing or describing sensitive or confidential information to a family member, friend, or member of the local community. In addition, such informal interpreters may have a personal connection to the LEP person or an undisclosed conflict of interest, such as the desire to obtain an LEP person's personal identification information, for example, in the case of an LEP person attempting to apply for a driver's license. Thus, DOT recipients should generally offer free interpreter services to the LEP person. This is particularly true in situations in which health, safety, or access to important benefits and services are at stake, or when credibility and accuracy are important to protect an individual's rights and access to important services.

An example of such a case is when no interpreters, or bilingual or symbolic signs are available in a state department of motor vehicles. In an effort to apply for a driver's license, vehicle registration, or parking permit, an LEP person may be forced to enlist the help of a stranger for translation. This practice may raise serious issues of competency or confidentiality and may compromise the personal security of the LEP person, as the stranger could have access to the LEP person's personal identification information, such as his or her name, phone number, address, social security number, driver's license number (if different from the social security number), and medical information. However, there are situations where proper application of the four factors would lead to a conclusion that recipient-provided services are not necessary. An example of this is a voluntary educational tour of an airport, or a train or bus station. There, the importance and nature of the activity may be relatively low and unlikely to implicate issues of confidentiality, conflict of interest, or the need for accuracy. In addition, the resources needed and costs of providing language services may be high. In such a setting, an LEP person's use of family, friends, or others to interpret may be appropriate.

If the LEP person voluntarily chooses to provide his or her own interpreter, a recipient should consider whether a record of that choice and of the recipient's offer of assistance is appropriate. Where precise, complete, and accurate interpretations or translations of information and/or testimony are critical, or where the competency of the LEP person's interpreter is not established, a recipient might decide to provide its own, independent interpreter, even if an LEP person wants to use his or her own interpreter as well. Extra caution should be exercised when the LEP person chooses to use a minor as the interpreter. While the LEP person's decision should be respected, there may be additional issues of competency, confidentiality, or conflict of interest when the choice involves using children as interpreters. The recipient should take care to ensure that the LEP person's choice is voluntary, that the LEP person is aware of the possible problems if the preferred interpreter is a minor child, and that the LEP person knows that a competent interpreter could be provided by the recipient at no cost.

B. Written Language Services (Translation)

Translation is the replacement of a written text from one language (source language) into an equivalent written text in another language (target language).

What Documents Should be Translated? After applying the four-factor analysis, a recipient may determine that an effective LEP plan for its particular program or activity includes the translation of vital written materials into the language of each frequently encountered LEP group eligible to be served and/or likely to be affected by the recipient's program. Such written materials could include, for example:

- Driver's license, automobile registration, and parking permit forms.
- Parking tickets, citation forms, and violation or deficiency notices, or pertinent portions thereof.
- Emergency transportation information.
- Markings, signs, and packaging for hazardous materials and substances.
- Signs in bus and train stations, and in airports.
- Notices of public hearings regarding recipients' proposed transportation plans, projects, or changes, and reduction, denial, or termination of services or benefits.
- Signs in waiting rooms, reception areas, and other initial points of entry.
- Notices advising LEP persons of free language assistance and language identification cards for staff (i.e., ''I speak'' cards).

• Statements about the services available and the right to free language assistance services in appropriate non-English languages, in brochures, booklets, outreach and recruitment information, and other materials routinely disseminated to the public.

• Written tests that do not assess English-language competency, but test competency for a particular license, job, or skill for which knowing English is not required.

• Applications, or instructions on how to participate in a recipient's program or activity or to receive recipient benefits or services.

• Consent forms.

Whether or not a document (or the information it solicits) is ''vital'' may depend upon the importance of the program, information, encounter, or service involved, and the consequence to the LEP person if the information in question is not accurate or timely. For instance, applications for bicycle safety courses should not generally be considered vital, whereas access to safe driving handbooks could be considered vital. Where appropriate, recipients are encouraged to create a plan for consistently determining, over time and across their various activities, what documents are ''vital'' to the meaningful access of the LEP populations they serve.

Classifying a document as vital or non-vital is sometimes difficult, especially in the case of outreach materials like brochures or other information on rights and services. Awareness of rights or services is an important part of ''meaningful access,'' as lack of awareness may effectively deny LEP individuals meaningful access. Thus, where a recipient is engaged in community outreach efforts in furtherance of its programs and activities, it should regularly assess the needs of the populations frequently encountered or affected by the program or activity to determine whether certain critical outreach materials should be translated. Community organizations may be helpful in determining what outreach materials may be most helpful to translate, and some such translations may be made more effective when done in tandem with other outreach methods, including utilizing the ethnic media, schools, and religious and community organizations to spread a message.

Sometimes a very large document may include both vital and non-vital information. This may also be the case when the title and a phone number for obtaining more information on the contents of the document in frequently encountered languages other than English is critical, but the document is sent out to the general public and cannot reasonably be translated into many languages. Thus, vital information may include, for instance, providing information in appropriate languages regarding where an LEP person might obtain an interpretation or translation of the document.

Into What Languages Should Documents be Translated? The extent of the recipient's obligation to provide written translations of documents should be determined by the recipient on a case-by-case basis, looking at the totality of the circumstances in light of the four-factor analysis. Because translation is a one-time expense, consideration should be given to whether the upfront cost of translating a document (as opposed to oral interpretation) should be amortized over the likely lifespan of the document when applying this four-factor analysis.

The languages spoken by the LEP individuals with whom the recipient has frequent contact determine the languages into which vital documents should be translated. However, because many DOT recipients serve communities in large cities or across an entire state and regularly serve areas with LEP populations that speak dozens and sometimes more than 100 languages, it would be unrealistic to translate all written materials into each language. Although recent technological advances have made it easier for recipients to store and share translated documents, such an undertaking would incur substantial costs and require substantial resources. However, well-substantiated claims of lack of resources to translate all such documents into dozens or more than 100 languages do not necessarily relieve the recipient of the obligation to translate vital documents into at least several of the more frequently encountered languages. The recipient should then set benchmarks for continued translations into the remaining languages over time.

Safe Harbor. Many recipients would like to ensure with greater certainty that they comply with their obligations to provide written translations in languages other than English. Paragraphs (a) and (b) below outline the circumstances that can provide a ''safe harbor'' for recipients regarding the requirements for translation of written materials. A ''safe harbor'' means that if a recipient provides written translations under these circumstances, such action will be considered strong evidence of compliance with the recipient's written-translation obligations under Title VI.

The failure to provide written translations under the circumstances outlined in paragraphs (a) and (b) does not mean there is noncompliance. Rather these paragraphs merely provide a guide for recipients that would like greater certainty of compliance than can be provided by a fact-intensive, four-factor analysis. For example, even if a safe harbor is not used, if written translation of a certain document(s) would be so burdensome as to defeat the legitimate objectives of its program, it is not necessary. Other ways of providing meaningful access, such as effective oral interpretation of certain vital documents, might be acceptable under such circumstances.

Safe Harbor. The following actions will be considered strong evidence of compliance with the recipient's written-translation obligations:

(a) The DOT recipient provides written translations of vital documents for each eligible LEP language group that constitutes 5% or 1,000, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered. Translation of other documents, if needed, can be provided orally; or

(b) If there are fewer than 50 persons in a language group that reaches the 5% trigger in (a), the recipient does not translate vital written materials but provides written notice in the primary language of the LEP language group of the right to receive competent oral interpretation of those written materials, free of cost.

These safe harbor provisions apply to the translation of written documents only. They do not affect the requirement to provide meaningful access to LEP individuals through competent oral interpreters where oral language services are needed and are reasonable.

Competence of Translators. As with oral interpreters, translators of written documents should be competent. Many of the same considerations apply. However, the skill of translating is very different from the skill of interpreting, and a person who is a competent interpreter may or may not be competent to translate, and vice versa.

Particularly where vital documents are being translated, competence can often be achieved by use of certified translators. Certification or accreditation may not always be possible or necessary.[10] Competence can often be ensured by having a second, independent translator check the work of the primary translator. Alternatively, one translator can translate the document, and a second, independent

[10] For those languages in which no formal accreditation exists, a particular level of membership in a professional translation association can provide some indicator of professional competence.

translator could translate it back into English to check that the appropriate meaning has been conveyed. This is called ''back translation.''

Translators should understand the expected reading level of the audience and, where appropriate, have fundamental knowledge about the target language group's vocabulary and phraseology. Sometimes direct translation of materials results in a translation that is written at a much more difficult level than the English-language version or has no relevant equivalent meaning.[11] Community organizations may be able to help consider whether a document is written at an appropriate level for the audience. Likewise, consistency in the words and phrases used to translate terms of art, legal, or other technical or programmatic terms helps avoid confusion by LEP individuals and may reduce costs. Creating or using already created glossaries of commonly used terms may be useful for LEP persons and translators and cost effective for the recipient. Providing translators with examples of previous accurate translations of similar material by other recipients or Federal agencies may also be helpful.

While quality and accuracy of translation services are critical, they are nonetheless part of the appropriate mix of LEP services required. For instance, documents that are simple and have no important consequences for LEP persons who rely on them may be translated by translators who are less skilled than important documents with legal or other information upon which reliance has important consequences (including, *e.g.*, driver's license written exams and documents regarding important benefits or services, or health, safety, or legal information). The permanent nature of written translations, however, imposes additional responsibility on the recipient to ensure that the quality and accuracy permit meaningful access by LEP persons.

VII. Elements of an Effective Implementation Plan on Language Assistance for LEP Persons

After completing the four-factor analysis and deciding what language assistance services are appropriate, a recipient should develop an implementation plan to address the identified needs of the LEP populations it serves. Although recipients have considerable flexibility in developing such a plan, maintaining a periodically updated written plan on language assistance for LEP persons (''LEP plan'') for use by recipient employees serving the public would be an appropriate and cost-effective means of documenting compliance and providing a framework for the provision of timely and reasonable language assistance. Such written plans may also provide additional benefits to a recipient's managers in the areas of training, administration, planning, and budgeting. Thus, recipients may choose to document the language assistance services in their plan, and how staff and LEP persons can access those services. Certain DOT recipients, such as those serving very few LEP persons or those with very limited resources, may choose not to develop a written LEP plan. However, the absence of a written LEP plan does not obviate the underlying obligation to ensure meaningful access by LEP persons to a recipient's program or activities. In that event, a recipient should consider alternative ways to reasonably articulate a plan for providing meaningful access. Early input from entities such as schools, religious organizations, community groups, and groups working with new immigrants can be helpful in forming this planning process. The following five steps may be helpful in designing an LEP plan and are typically part of effective implementation plans.

(1) Identifying LEP Individuals Who Need Language Assistance

There should be an assessment of the number or proportion of LEP individuals eligible to be served or encountered and the frequency of encounters pursuant to the first two factors in the four-factor analysis.

One way to determine the language of communication is to use language identification cards (or ''I speak cards''), which invite LEP persons to identify their language needs to staff. Such cards, for instance, might say, ''I speak Spanish'' in both Spanish and English, or ''I speak Vietnamese'' in both English and Vietnamese. To reduce costs of compliance, the Federal Government has made a set of these cards available on the Internet. The Census Bureau's ''I speak card'' can be found and downloaded at *http://www.usdoj.gov/crt/cor/13166.htm.*

When records are normally kept of past interactions with members of the public, the language of the LEP person can be included as part of the record. In addition to helping employees identify the language of LEP persons they encounter, this process will help in future applications of the first two factors of the four-factor analysis. In addition, posting notices in commonly encountered languages notifying LEP persons of language assistance will encourage them to self-identify.

(2) Language Assistance Measures

An effective LEP plan would likely include information about the ways in which language assistance will be provided. For instance, recipients may want to include information on at least the following:

- Types of language services available.
- How recipient staff can obtain those services.
- How to respond to LEP callers.
- How to respond to written communications from LEP persons.
- How to respond to LEP individuals who have in-person contact with recipient staff.
- How to ensure competency of interpreters and translation services.

(3) Training Staff

Staff members should know their obligations to provide meaningful access to information and services for LEP persons, and all employees in public contact positions should be properly trained. An effective LEP plan would likely include training to ensure that:

- Staff knows about LEP policies and procedures.
- Staff having contact with the public (or those in a recipient's custody) is trained to work effectively with in-person and telephone interpreters.

Recipients may want to include this training as part of the orientation for new employees. Recipients have flexibility in deciding the manner in which the training is provided, and the more frequent the contact with LEP persons, the greater the need will be for in-depth training. However, management staff, even if they do not interact regularly with LEP persons, should be fully aware of and understand the plan so they can reinforce its importance and ensure its implementation by staff.

(4) Providing Notice to LEP Persons

Once an agency has decided, based on the four factors, that it will provide language services, it is important that the recipient notify LEP persons of services available free of charge. Recipients should provide this notice in languages LEP persons would understand. Examples of notification that recipients should consider include:

[11] For instance, although there may be languages that do not have a direct translation of some legal, technical, or program-related terms, the translator should be able to provide an appropriate translation. The translator should likely also make the recipient aware of this. Recipients can then work with translators to develop a consistent and appropriate set of descriptions of those terms in that language that can be used again, when appropriate.

• Posting signs in intake areas and other entry points. This is important so that LEP persons can learn how to access those language services at initial points of contact. This is particularly true in areas with high volumes of LEP persons seeking access to certain transportation safety information, or other services and activities run by DOT recipients.[12]

• Stating in outreach documents that language services are available from the agency. Announcements could be in, for instance, brochures, booklets, and in outreach and recruitment information. These statements should be translated into the most common languages and could be ''tagged'' onto the front of common documents.

• Working with community-based organizations and other stakeholders to inform LEP individuals of the recipients' services, including the availability of language assistance services.

• Using an automated telephone voice mail attendant or menu system. The system could be in the most common languages encountered. It should provide information about available language assistance services and how to get them.

• Including notices in local newspapers in languages other than English.

• Providing notices on non-English-language radio and television stations about the available language assistance services and how to get them.

• Providing presentations and/or notices at schools and religious organizations.

(5) Monitoring and Updating the LEP Plan

Recipients should, where appropriate, have a process for determining, on an ongoing basis, whether new documents, programs, services, and activities need to be made accessible for LEP individuals, and they may want to provide notice of any changes in services to the LEP public and to employees.

In addition, recipients should consider whether changes in demographics, types of services, or other needs require annual reevaluation of their LEP plan. Less frequent reevaluation may be more appropriate where demographics, services, and needs are more static. One good way to evaluate the LEP plan is to seek feedback from the community.

In their reviews, recipients may want to consider assessing changes in:

• Current LEP populations in the service area or population affected or encountered.

• Frequency of encounters with LEP language groups.

• Nature and importance of activities to LEP persons.

• Availability of resources, including technological advances and sources of additional resources, and the costs imposed.

• Whether existing assistance is meeting the needs of LEP persons.

• Whether staff knows and understands the LEP plan and how to implement it.

• Whether identified sources for assistance are still available and viable.

In addition to these five elements, effective plans set clear goals, management accountability, and opportunities for community input and planning throughout the process.

VIII. Voluntary Compliance Effort

The goal for Title VI and Title VI regulatory enforcement is to achieve voluntary compliance. DOT enforces Title VI as it applies to recipients' responsibilities to LEP persons through the procedures provided for in DOT's Title VI regulations (49 CFR part 21, portions of which are provided in Appendix A).

The Title VI regulations provide that DOT will investigate whenever it receives a complaint, report, or other information that alleges or indicates possible noncompliance with Title VI or its regulations. If the investigation results in a finding of compliance, DOT will inform the recipient in writing of this determination, including the basis for the determination. DOT uses voluntary mediation to resolve most complaints. However, if a case is fully investigated and results in a finding of noncompliance, DOT must inform the recipient of the noncompliance through a Letter of Findings that sets out the areas of noncompliance and the steps that must be taken to correct the noncompliance. It must attempt to secure voluntary compliance through informal means. If the matter cannot be resolved informally, DOT must secure compliance through the termination of Federal assistance after the DOT recipient has been given an opportunity for an administrative hearing and/or by referring the matter to DOJ with a recommendation that appropriate proceedings be brought to enforce the laws of the United States. In engaging in voluntary compliance efforts, DOT proposes reasonable timetables for achieving compliance and consults with and assists recipients in exploring cost-effective ways of coming into compliance. In determining a recipient's compliance with the Title VI regulations, DOT's primary concern is to ensure that the recipient's policies and procedures provide meaningful access for LEP persons to the recipient's programs, activities, and services.

While all recipients must work toward building systems that will ensure access for LEP individuals, DOT acknowledges that the implementation of a comprehensive system to serve LEP individuals is a process and that a system will evolve over time as it is implemented and periodically reevaluated. As recipients take reasonable steps to provide meaningful access to federally assisted programs and activities for LEP persons, DOT will look favorably on intermediate steps recipients take that are consistent with this guidance, and that, as part of a broader implementation plan or schedule, move their service delivery system toward providing full access to LEP persons. This does not excuse noncompliance but instead recognizes that full compliance in all areas of a recipient's activities and for all potential language minority groups may reasonably require a series of implementing actions over a period of time. However, in developing any phased implementation schedule, DOT recipients should ensure that the provision of appropriate assistance for significant LEP populations or with respect to activities having a significant impact on the health, safety, legal rights, or livelihood of beneficiaries is addressed first. Recipients are encouraged to document their efforts to provide LEP persons with meaningful access to federally assisted programs and activities.

IX. Promising Practices

The following examples are provided as illustrations of the responses of some recipients to the need to provide services to LEP persons, and are meant to be interesting and useful examples of ways in which LEP recipients can provide language services. Recipients are responsible for ensuring meaningful access to all portions of their program or activity, not just the portions to which DOT assistance is targeted. So long as the language services are accurate, timely, and appropriate in the manner outlined in this guidance, the types of promising practices summarized below can assist recipients in moving toward

[12] For instance, signs in intake offices could state that free language assistance is available. The signs should be translated into the most common languages encountered and should explain how to get the necessary language assistance. The Social Security Administration has made such signs available at *http://www.ssa.gov/multilanguage/langlist1.htm*. DOT recipients could, for example, modify these signs for use in programs, activities, and services.

meeting the meaningful access requirements of Title VI and the Title VI regulations. These examples do not, however, constitute an endorsement by DOT, which will evaluate recipients' situations on a case-by-case basis using the factors described elsewhere in this guidance.

Language Banks. In several parts of the country, both urban and rural, community organizations and providers have created language banks that dispatch competent interpreters, at reasonable rates, to participating organizations, reducing the need to have on-staff interpreters for low-demand languages. This approach is particularly appropriate where there is a scarcity of language services or where there is a large variety of language needs but limited demand for any particular language.

Language Support Offices. A state social services agency has established an ''Office for Language Interpreter Services and Translation.'' This office tests and certifies all in-house and contract interpreters, provides agency-wide support for translation of forms, client mailings, publications, and other written materials into non-English languages, and monitors the policies of the agency and its vendors that affect LEP persons.

Some recipients have established working liaisons with local community colleges to educate the LEP community in transportation matters. One city formed a multilingual/multi-agency task force to address language barriers and the concerns of the affected communities. The task force completed a survey of city staff with multilingual skills in order to identify employees willing to serve as interpreters and is preparing lists of community and cultural organizations.

Use of Technology. Some recipients use their Internet and/or intranet capabilities to store translated documents online, which can be retrieved as needed and easily shared with other offices. For example, a multilanguage gateway on a Web page could be developed for LEP persons and the public to access documents translated into other languages.

Telephone Information Lines and Hotlines. Recipients have subscribed to telephone-based interpretation services and established telephone information lines in common languages to instruct callers on how to leave a recorded message that will be answered by someone who speaks the caller's language. For example, a recipient may choose to adopt a program similar to the National Highway Traffic Safety Administration's (NHTSA's) Auto Safety Hotline, which has four representatives who speak Spanish and are available during normal hotline business hours (Mon.–Fri., 8 a.m.–10 p.m. eastern time).[13]

Signage and Other Outreach. Recipients have provided information about services, benefits, eligibility requirements, and the availability of free language assistance, in appropriate languages by (a) posting signs and placards with this information in public places such as grocery stores, bus shelters, and subway stations; (b) putting notices in print media and on radio and television stations that serve LEP groups or broadcasting in languages other than English;[14] (c) airing videos and public service announcements for non-English-speaking residents; (d) placing flyers and signs in the offices of community-based organizations that serve large populations of LEP persons; (e) distributing information at places of worship, ethnic shopping areas, and other gathering places for LEP groups; (f) using posters with appropriate languages designed to reach potential beneficiaries; and (g) developing pictures, images, figures, or icons that could be understandable alternatives to written words.

DOT agencies and recipients have implemented numerous language access services:

- DOT's Pipeline and Hazardous Materials Safety Administration (formerly known as the Research and Special Programs Administration), at 49 CFR §§ 192.616 and 195.440, requires pipeline officers to establish a program for effective reporting by the public of gas pipeline emergencies to the operator or public officials, also providing that the program must be conducted in English and other common languages.[15] We recommend that recipients consider the appropriateness of such an approach to meet their individual service provision needs.
- DOT's National Highway Traffic Safety Administration (NHTSA) has translated the National Standardized Child Passenger Safety Training Program curriculum into Spanish. The course, designed to help communities work with parents and caregivers on the proper installation of child safety seats, has been pilot tested and is scheduled to be available to the public by early 2006 through many national Latino organizations and State Highway Safety Offices.
- DOT's Federal Motor Carrier Safety Administration (FMCSA) division offices in California, Arizona, New Mexico, Texas, and Puerto Rico employ personnel conversant in Spanish to communicate the agency's critical safety regulations.
- The Del Rio, Texas, Police Department implemented the El Protector program in Del Rio and developed public service broadcasts in Spanish about traffic safety issues such as loading and unloading school buses, drinking and driving, and pedestrian safety.
- Emergency Medical Services (EMS) staff in Los Angeles reported that their system is equipped to receive calls in more than 150 languages, although Spanish is the most frequent language used by 911 callers who do not speak English.
- District of Columbia DMV information, forms, and support material are available in German, Spanish, French, Russian, Dutch, and Portuguese and can be downloaded from the division's Web site. The DC DMV also provides a ''City Services Guide'' in Chinese, Korean, Spanish, and Vietnamese. DC's ''Click It or Ticket'' program material and information on child safety seat loaner programs and fitting station locations are available in Spanish.
- The New Jersey Department of Motor Vehicles administers driver's license tests in more than 15 languages, including Arabic, French, Greek, Korean, Portuguese, and Turkish.[16]
- In North Dakota, while the Traffic Safety Office acknowledges a limited minority population requiring assistance with translation, the Driver Licensing Unit offers the option of an oral test in Spanish.
- The Iowa Department of Transportation (IDOT) provides a Spanish version of the Commercial

[13] The evening hours permit people from the West Coast (where a significant number of LEP persons reside) to call after work, providing an option for instructions in Spanish, a separate queue, and Spanish-speaking operators.

[14] Notifications should be delivered in advance of scheduled meetings or events to allow time for persons to request accommodation and participate.

[15] ''Each [pipeline] operator shall establish a continuing educational program to enable customers, the public, appropriate government organizations, and persons engaged in excavation related activities to recognize a gas pipeline emergency for the purpose of reporting it to the operator or the appropriate public officials. The program and the media used should be as comprehensive as necessary to reach all areas in which the operator transports gas. The program must be conducted in English and in other languages commonly understood by a significant number and concentration of the non-English speaking population in the operator's area.'' 49 CFR § 192.616. Section 195.440 of title 49, Code of Federal Regulations, imposes similar requirements in the case of hazardous liquid or carbon dioxide pipeline emergencies.

[16] DOT recommends that state agencies share such information, to avoid the necessity of each agency performing every translation.

Driver's License knowledge test using a touch screen computer, and study guides of the Iowa Driver's Manual in Albanian, Bosnian, Russian, Vietnamese, and Korean. IDOT established a liaison with a local community college to provide education for Bosnian refugees concerning the Commercial Motor Vehicle driving course.[17]

• The Wisconsin DOT created a 3rd grade level study guide, the Motorist Study Manual Easy Reader, which was translated by the Janesville Literacy Council into Spanish. Wisconsin DOT also provides the regular 6th grade level version of the Reader in English, Spanish, and Hmong; a Motorcycle Study Manual in English and Spanish; and a CDL (Commercial Driver's License) Study Manual in English and Spanish. In addition, Knowledge and Highway Sign Tests are written in 13 languages other than English, recorded on audiocassette tapes in English and Spanish, or orally interpreted by bilingual staffers obtained from a roster of Wisconsin DOT employees who speak, read, or write foreign languages.

• The Idaho Office of Traffic and Highway Safety implemented a Spanish-language safety belt media campaign to educate its Hispanic community on the statewide ''Click It, Don't Risk It!'' program to boost seat belt use. Information appears in *Unido*, Idaho's largest Spanish-language newspaper, and warns all motorists to buckle up or risk receiving a safety belt citation.

• The New Mexico State Highway and Transportation Department, with Federal Highway Administration (FHWA) support, provides Spanish-language translations of its Right-of-Way Acquisition and Relocation brochures and also employs bilingual right-of-way agents to discuss project impacts in Spanish.

• The State of Oregon developed a report on multilingual services provided by state agencies. State agencies will use the final document to enhance their existing programs, including expanding communication efforts to serve and protect all Oregonians.

• The Texas DOT utilizes bilingual employees in its permit office to provide instruction and assistance to LEP Spanish-speaking truck drivers when providing permits to route overweight trucks through Texas. In its ''On the Job Training Supportive Services Program'' Texas DOT has used Spanish-language television to inform people who have difficulty reading English of opportunities in the construction industry.

• When the Virginia DOT (VDOT) became aware that several Disadvantaged Business Enterprise (DBE) firms were about to be removed from construction projects in Northern Virginia because they required certified concrete inspectors, and that they could not comply because the concrete inspection test was only offered in English, it used supportive services funding from the Federal Highway Administration to translate the training manual and test material into Spanish. VDOT also provides tutoring for the DBE firms. The Virginia State Police maintains a written list of interpreters available statewide to troopers through the Red Cross Language Bank, as well as universities and local police departments.

• The Colorado State Patrol produced safety brochures in Spanish for farmers and ranchers. It has also printed brochures in Spanish pertaining to regulatory requirements for trucking firms.

• In preparation of its 20-year planning document, the Transportation Concept Report, the California DOT (Caltrans) held a public meeting titled ''Planning the Future of Highway 1'' in the largely Hispanic city of Guadalupe, through which Highway 1 runs. The meeting was broadcast on the local public access channel since many of the Spanish-speaking residents potentially affected by Highway 1 projects rely on the channel to receive public affairs information. Caltrans provided a Spanish-language interpreter during the meeting and also made its Spanish-speaking public affairs officer available to meet with participants individually.

• During project planning for interstate improvements along Interstate 710 in California, engineers presented ''good'' alternatives to the affected communities; however, the proposed highway expansion would have removed low-income homes in communities that are 98% Spanish speaking. To ensure that their concerns were heard, California identified the affected communities and facilitated the establishment of Community Advisory Committees that held bilingual workshops between engineers and the public.

• The Minnesota DOT authored a manual detailing its requirements to provide access to all residents of Minnesota under environmental justice standards, which included ideas such as publishing notices in non-English newspapers, printing notices in appropriate languages, and providing interpreters at public meetings.

• In New Mexico, the Zuni Entrepreneurial Enterprises, Inc. (ZEE) Public Transportation Program designed the Zuni JOBLINKS program to develop, implement, and maintain a transportation system to link Native Americans and other traditionally unserved/underserved persons in the service area to needed vocational training and employment opportunities. Outreach for the program included radio announcements and posting of signs in English and Zuni that described ZEE's services and provided ZEE's phone number.

• Washington, DC's Metropolitan Area Transit Authority (WMATA) publishes pocket guides regarding its system in French, Spanish, German, and Japanese, and has a multilanguage website link.

• In North Dakota, Souris Basin Transportation (SBT) started using visual logos on the sides of the vehicles to help illiterate passengers identify the bus on which they were riding. Although the illiteracy rate has dropped among seniors, SBT kept the logos on its vehicles for use by the growing LEP population and also added volunteers who speak languages other than English (such as Spanish, German, Norwegian, Swedish, and French) available by phone to drivers and staff.

• New York City Transit MetroCard vending machines are located in every station and contain software that allows them to be programmed in three languages in addition to English, based upon area demographics. Currently, these machines are capable of providing information in Spanish, French, French Creole, Russian, Chinese, Japanese, Italian, Korean, Greek, and Polish.

• The Metropolitan Atlanta Rapid Transit Authority (MARTA) advertises upcoming service and fare changes in Spanish, Korean, Vietnamese, and Chinese language newspapers. MARTA also produces a bilingual (Spanish/English) service modifications booklet.

• The Fort-Worth Transportation Authority communicates information about service and fare changes in Spanish and English. It recruits Spanish-speaking customer service representatives and bus operators and has a community outreach liaison who is bilingual. The transit provider also provides a Spanish-language interpreter at all public meetings.

• The Salt Lake City International Airport maintains a list of 35 bilingual and multilingual employees who speak one of 19 languages (including three dialects of Chinese) and their contact information. The list is published in the

[17] DOT especially recommends the idea of working with local community colleges to educate the LEP community in transportation matters.

Airport Information Handbook and provided to all airport employees. The airport also contracts with a telephonic interpretation service to provide on-demand telephone interpretation services to beneficiaries.

• The Port of Seattle has 16 ''Pathfinders'' on staff who act as guides and information sources throughout the Seattle Tacoma International Airport. A key selection criterion for Pathfinders is multilingual ability. The Pathfinders collectively speak 15 languages and are often called on to act as interpreters for travelers who do not speak English. Pathfinders greet all international flights and are assigned to do so based on language skills.

• Seattle Tacoma International Airport's trains carry announcements in English, Japanese, and Korean. The Port of Seattle contributed $5,000 to the creation of the City of Tukwila's ''Newcomers Guide,'' which is published in six languages and includes information about the airport and Airport Jobs, a referral service for employment at the airport.

The following is a sample notice that would be useful for recipients to add to the publications or signs for their programs, services, or activities, in order to notify LEP individuals of the availability of materials and services in other languages.

Sample Notice of Availability of Materials and Services

FOR FURTHER INFORMATION CONTACT: For hearing-impaired individuals or non-English-speaking attendees wishing to arrange for a sign language or foreign language interpreter, please call or fax [name] of [organization] at Phone: xxx–yyy–zzzz, TTY: xxx–yyy–zzzz, or Fax: xxx–yyy–zzzz.'' [18]

Appendix A to DOT Guidance

DOT's Title VI regulation (49 CFR part 21) states the following, in relevant part:

Sec. 21.5 Discrimination prohibited.

(a) General. No person in the United States shall, on the grounds of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under, any program to which this part applies.

(b) Specific discriminatory actions prohibited:

(1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on the grounds of race, color, or national origin.

(i) Deny a person any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to a person which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject a person to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

(iv) Restrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

(vi) Deny a person an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program; or

(vii) Deny a person the opportunity to participate as a member of a planning, advisory, or similar body which is an integral part of the program.

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of person to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of persons to be afforded an opportunity to participate in any such program; may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.

* * * * *

(5) The enumeration of specific forms of prohibited discrimination in this paragraph does not limit the generality of the prohibition in paragraph (a) of this section.

* * * * *

(7) This part does not prohibit the consideration of race, color, or national origin if the purpose and effect are to remove or overcome the consequences of practices or impediments which have restricted the availability of, or participation in, the program or activity receiving Federal financial assistance, on the grounds of race, color, or national origin.

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BILLING CODE 4910–62–P

[18] If there is a known and substantial LEP population that may be served by the program discussed in the notice, the notice should be in the appropriate non-English language.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Opportunity for Public Comment on Surplus Property Release at Aiken Municipal Airport, Aiken, SC

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: Under the provisions of Title 49, U.S.C. 47153(c), notice is being given that the FAA is considering a request from the City of Aiken to waive the requirement that approximately 94 acres of surplus property, located at the Aiken Municipal Airport, be used for aeronautical purposes.

DATES: Comments must be received on or before January 13, 2006.

ADDRESSES: Comments on this notice may be mailed or delivered in triplicate to the FAA at the following address: Atlanta Airports District Office, Attn: Paul Lo, Program Manager, 1701 Columbia Ave., Suite 2–260, Atlanta, GA 30337–2747.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Larry G. Morris, P.E., Public Works Director of the City of Aiken at the following address: City of Aiken, Post Office Box 1177, Aiken, SC 29802.

FOR FURTHER INFORMATION CONTACT: Paul Lo, Program Manager, Atlanta Airports District Office, 1701 Columbia Ave., Suite 2–260, Atlanta, GA 30337–2747, (404) 305–7145. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA is reviewing a request by the City of Aiken to release approximately 94 acres of surplus property at the Aiken Municipal Airport. The property consists of several parcels roughly located East of Palmetto Farms Road, North of Reynolds Pond Road, and to the West of U.S. Highway 1. This property is currently shown on the approved Airport Layout Plan as aeronautical use land; however the property is currently not being used for aeronautical purposes and the proposed use of this property is compatible with airport operations. The City will ultimately sell lots on the property for future industrial and commercial use with proceeds of the sale providing funding for future airport development.

Any person may inspect the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT.** In addition, any person may, upon request, inspect the request, notice

and other documents germane to the request in person at the Aiken Municipal Airport.

Issued in Atlanta, Georgia on December 6, 2005.

Scott L. Seritt,

Manager, Atlanta Airports District Office, Southern Region.

[FR Doc. 05–24002 Filed 12–13–05; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Noise Exposure Map Notice

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its determination that the noise exposure maps submitted by the City of Cincinnati for the Cincinnati-Municipal Lunken Airport under the provisions of the Aviation Safety and Noise Abatement Act (Act), 49 U.S.C. 47501, *et seq.* and the Federal Aviation Regulations (FAR), 14 CFR part 150 (part 150) are in compliance with applicable requirements.

DATES: The effective date of the FAA's determination on the noise exposure maps is November 28, 2005.

FOR FURTHER INFORMATION CONTACT: Mr. Brad Davidson, Detroit Airports District Office, 11677 South Wayne Road, Suite 107, Romulus, Michigan 48174, 734–229–2900.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA finds that the noise exposure maps submitted for Cincinnati-Municipal Lunken Airport are in compliance with applicable requirements of part 150, effective November 28, 2005.

Under 49 U.S.C. 47503 of the Act, an airport operator may submit noise exposure maps to the FAA which meet applicable regulations and which depict non-compatible land uses as of the date of submission of such maps, a description of projected aircraft operations, and the ways in which such operations will affect such maps. The Act requires such maps to be developed in consultation with interested and affected parties in the local community, government agencies, and persons using the airport.

An airport operator who has submitted noise exposure maps that are found by FAA to be in compliance with the requirements of part 150, promulgated pursuant to the Act, may submit a noise compatibility program for FAA approval which sets forth the measures the operator has taken or proposes to take to reduce existing non-compatible uses and prevent the introduction of additional non-compatible uses.

The FAA has completed its review of the noise exposure maps and accompanying documentation submitted by the City of Cincinnati. The documentation that constitutes the ''noise exposure maps'' as defined in 14 CFR 150.7 includes: *Existing 2002 Noise Exposure Map (FAR part 150 Noise Compatibility Program, volume 1, exhibit 4.4–1) and Future Baseline 2007 Noise Exposure Map (FAR part 150 Noise Compatibility Program, volume 1, exhibit 5.3–1).* The FAA has determined that these noise exposure maps and accompanying documentation are in compliance with applicable requirements. This determination is effective on November 28, 2005. FAA's determination on an airport operator's noise exposure maps is limited to a finding that the maps were developed in accordance with the procedures contained in appendix A of part 150. Such determination does not constitute approval of the applicant's data, information or plans, or a commitment to approve a noise compatibility program or to fund the implementation of that program.

If questions arise concerning the precise relationship of specific properties to noise exposure contours depicted on a noise exposure map submitted under section 47503 of the Act, it should be noted that the FAA is not involved in any way in determining the relative locations of specific properties with regard to the depicted noise contours, or in interpreting the noise exposure maps to resolve questions concerning, for example, which properties should be covered by the provisions of section 47506 of the Act. These functions are inseparable from the ultimate land use control and planning responsibilities of local government. These local responsibilities are not changed in any way under part 150 or through FAA's review of noise exposure maps. Therefore, the responsibility for the detailed overlaying of noise exposure contours onto the map depicting properties on the surface rests exclusively with the airport operator that submitted those maps, or with those public agencies and planning agencies with which consultation is required under section 47503 of the Act. The FAA has relied on the certification by the airport operator, under section 150.21 of FAR part 150, that the statutorily required consultation has been accomplished.

Copies of the full noise exposure map documentation and of the FAA's evaluation of the maps are available for examination at the following locations:

Federal Aviation Administration Detroit Airports District Office, 11677 South Wayne Road, Suite 107, Romulus, Michigan 48174.

City of Cincinnati Department of Transportation and Engineering, 801 Plum Street, Room 405, City Hall, Cincinnati, Ohio 45202.

Questions may be directed to the individual named above under the heading **FOR FURTHER INFORMATION CONTACT.**

Issued in Romulus, Michigan, November 28, 2005.

Irene R. Porter,

Manager, Detroit Airport District Office, Great Lakes Region.

[FR Doc. 05–24001 Filed 12–13–05; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2005–64]

Petitions for Exemption; Summary of Petitions Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption part 11 of Title 14, Code of Federal Regulations (14 CFR), this notice contains a summary of certain petitions seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before January 3, 2006.

ADDRESSES: You may submit comments [identified by DOT DMS Docket Number FAA–2005–23084] by any of the following methods:

- Web site: *http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400

Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.

• *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

• *Docket:* For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Tim Adams (202) 267–8033, Sandy Buchanan-Sumter (202) 267–7271, or John Linsenmeyer (202) 267–5174, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85 and 11.91.

Issued in Washington, DC, on December 8, 2005.

Anthony F. Fazio,

Director, Office of Rulemaking.

Petitions For Exemption

Docket No.: FAA–2005–23084.

Petitioner: Shuttle America Corporation and Republic Airline, Inc.

Section of 14 CFR Affected: 14 CFR 121.415(a), 121.417, 121.421, and 121.805.

Description of Relief Sought: To allow the petitioners, Shuttle America Corporation and Republic Airline, Inc., to count initial training successfully accomplished by flight attendants employed, trained and qualified by the petitioner's sister company, Chautauqua Airlines, Inc., as if the training had been accomplished by Shuttle America Corporation and Republic Airline, Inc., without requiring the flight attendants to repeat 92 hours of initial training otherwise required for newly hired flight attendants under the applicable regulations.

[FR Doc. E5–7287 Filed 12–13–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Salt Lake County, UT

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Revised notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that the effort to prepare an Environmental Impact Statement (EIS) will be terminated for transportation improvements in the 3500 South Corridor in Salt Lake County, Utah.

FOR FURTHER INFORMATION CONTACT: Jeffrey Berna, Environmental Specialist, FHWA, Utah Division, 2520 West 4700 South, Suite 9A, Salt Lake City, UT 84118, Telephone (801) 963–0182; or Lisa Wilson, Utah Department of Transportation (UDOT), 2010 South 2760 West, Salt Lake City, UT 84104, Telephone (801) 887–3465.

SUPPLEMENTARY INFORMATION: The FHWA is cooperation with the UDOT have elected to terminate efforts to prepare an EIS for transportation improvements in the 3500 South corridor between Redwood Road and 8400 West in West Valley City and Salt Lake County, Utah. The original Notice of Intent was published on April 1, 2002, anticipating Utah Department of Transportation (UDOT) would request federal funding for project construction. The UDOT has recently elected to revise the scope of the project and fully fund the project with State funds. No federal funds or federal action will be required for the revised project. The UDOT will prepare a State Environmental Study for the project. If you have any questions regarding the revised 3500 South project or would like to provide scoping comments, please contact Lisa Wilson, UDOT Project Manger, at (801) 887–3465.

(Catalog of Federal and Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: December 8, 2005.

Jeffrey Berna,

Environmental Specialist, Utah Division, Federal Highway Administration, Salt Lake City, Utah.

[FR Doc. 05–24016 Filed 12–13–05; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket Nos. FMCSA–2001–10578, FMCSA–2003–14223, FMCSA–2003–15892]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemption; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 22 individuals. FMCSA has statutory authority to exempt individuals from vision standards if the exemptions granted will not compromise safety. The agency has concluded that granting these exemptions will provide a level of safety that will be equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective December 27, 2005. Comments from interested persons should be submitted by January 13, 2006.

ADDRESSES: You may submit comments by any of the following methods. Please label your comments with DOT DMS Docket Numbers FMCSA–2001–10578, FMCSA–2003–14223, FMCSA–2003–15892.

• Web Site: *http://dms.dot.gov*. Follow the instructions for submitting comments on the DOT electronic docket site.

• Fax: 1–202–493–2251.

• Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.

• Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

All submissions must include the agency name and docket numbers for this notice. Note that all comments received will be posted without change to *http://dms.dot.gov*, including any personal information provided. To read background documents or comments received, go to *http://dms.dot.gov* or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Office of Bus and Truck Standards and Operations, (202) 366–4001, FMCSA, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours are from 8 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Public Comments: The DMS is available 24 hours each day, except

when announced system maintenance requires a brief interruption in service. You can get electronic submission and retrieval help guidelines under the ''help'' section of the DMS Web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard. An acknowledgement page appears after submitting comments on-line and can be printed to document submission of comments.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov.*

Exemption Decision

Under 49 U.S.C. 31315 and 31136(e), the FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381. This notice addresses 22 individuals who have requested renewal of their exemptions in a timely manner. The FMCSA has evaluated these 22 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Anthony Brandano, Norman R. Lamy, John E. Rogstad, Ronald B. Brown, James A. Lenhart, John R. Snyder, Stanley E. Elliott, Dennis L. Lockhart, Sr., Rene R. Trachsel, Elmer E. Gockley, Jerry J. Lord, Thomas A. Valik, Jr., Glenn T. Hehner, Raymond P. Madron, John H. Voigts, Thomas T. Ingebretsen, Ronald S. Mallory, Kendle F. Waggle, Jr., Martin D. Keough, Charles J. Morman, Randall B. Laminack, Jack E. Potts, Jr.

These exemptions are extended subject to the following conditions: (1) That each individual have a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retain a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by the FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31315 and 31136(e).

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31315 and 31136(e), each of the 22 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (66 FR 53826; 66 FR 66966; 68 FR 69434; 68 FR 10301; 68 FR 19596; 68 FR 52811; 68 FR 61860). Each of these 22 applicants has requested timely renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the standard specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption standards. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, the FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Comments

The FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31315 and 31136(e). However, the FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by January 13, 2006.

In the past the FMCSA has received comments from Advocates for Highway and Auto Safety (Advocates) expressing continued opposition to the FMCSA's procedures for renewing exemptions from the vision requirement in 49 CFR 391.41(b)(10). Specifically, Advocates objects to the agency's extension of the exemptions without any opportunity for public comment prior to the decision to renew, and reliance on a summary statement of evidence to make its decision to extend the exemption of each driver.

The issues raised by Advocates were addressed at length in 69 FR 51346 (August 18, 2004). The FMCSA continues to find its exemption process appropriate to the statutory and regulatory requirements.

Issued on: December 7, 2005.

Larry W. Minor,

Director, Office of Bus and Truck, Standards and Operations.

[FR Doc. E5–7284 Filed 12–13–05; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration, DOT.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and its implementing regulations, the Federal Railroad Administration (FRA) hereby announces that it is seeking renewal of the following currently approved information collection activities. Before submitting these information collection requirements for clearance by the Office of Management and Budget (OMB), FRA is soliciting public comment on specific aspects of the activities identified below.

DATES: Comments must be received no later than February 13, 2006.

ADDRESSES: Submit written comments on any or all of the following proposed activities by mail to either: Mr. Robert Brogan, Office of Safety, Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 17, Washington, DC 20590, or Mr. Victor Angelo, Office of Support Systems, RAD–20, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 35, Washington, DC 20590. Commenters requesting FRA

to acknowledge receipt of their respective comments must include a self-addressed stamped postcard stating, ''Comments on OMB control number 2130–0500''. Alternatively, comments may be transmitted via facsimile to (202) 493–6265 or (202) 493–6170, or E-mail to Mr. Brogan at *robert.brogan@fra.dot.gov*, or to Mr. Angelo at *victor.angelo@fra.dot.gov.* Please refer to the assigned OMB control number in any correspondence submitted. FRA will summarize comments received in response to this notice in a subsequent notice and include them in its information collection submission to OMB for approval.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Brogan, Office of Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 17, Washington, DC 20590 (telephone: (202) 493–6292) or Victor Angelo, Office of Support Systems, RAD–20, RAD–20, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 35, Washington, DC 20590 (telephone: (202) 493–6470). (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Public Law No. 104–13, section 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR Part 1320, require Federal agencies to provide 60-days notice to the public for comment on information collection activities before seeking approval for reinstatement or renewal by OMB. 44 U.S.C. 3506(c)(2)(A); 5 CFR 1320.8(d)(1), 1320.10(e)(1), 1320.12(a). Specifically, FRA invites interested respondents to comment on the following summary of proposed information collection activities regarding (i) whether the information collection activities are necessary for FRA to properly execute its functions, including whether the activities will have practical utility; (ii) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (iii) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (iv) ways for FRA to minimize the burden of information collection activities on the public by automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.*, permitting electronic submission of responses). *See* 44 U.S.C. 3506(c)(2)(A)(i)–(iv); 5 CFR 1320.8(d)(1)(i)–(iv). FRA believes that soliciting public comment will promote its efforts to reduce the administrative and paperwork burdens associated with the collection of information mandated by Federal regulations. In summary, FRA reasons that comments received will advance three objectives: (i) Reduce reporting burdens; (ii) ensure that it organizes information collection requirements in a ''user friendly'' format to improve the use of such information; and (iii) accurately assess the resources expended to retrieve and produce information requested. *See* 44 U.S.C. 3501.

Below is a brief summary of currently approved information collection activities that FRA will submit for clearance by OMB as required under the PRA:

Title: Accident/Incident Reporting and Recordkeeping.

OMB Control Number: 2130–0500.

Abstract: The collection of information is due to the railroad accident reporting regulations set forth in 49 CFR part 225 which require railroads to submit monthly reports summarizing collisions, derailments, and certain other accidents/incidents involving damages above a periodically revised dollar threshold, as well as certain injuries to passengers, employees, and other persons on railroad property. Because the reporting requirements and the information needed regarding each category of accident/incident are unique, a different form is used for each category.

Form Number(s): FRA F 6180.54; 55; 55A; 56; 57; 78; 81; 97; 98; 99; 107.

Affected Public: Businesses.

Respondent Universe: 685 railroads.

Frequency of Submission: On occasion.

Reporting Burden:

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost (dollars)
225.9—Telephone Reports of Certain Accidents/Incidents and Other Events.	685 railroads	500 phone reports	15 minutes	125 hours	$4,750
225.11—Reporting of Rail Equipment Accidents/Incidents—Form FRA F 6180.54.	685 railroads	3,000 forms	2 hours	6,000 hours	228,000
225.12—Rail Equipment Accident/Incident Reports Alleging Human Factor as Cause—Form FRA F 6180.81.	685 railroads	1,000 forms	15 minutes	250 hours	9,500
Part I Form FRA F 6180.78 (Notices).	685 railroads	1,000 notices + 4,100 copies.	10 minutes + 3 minutes.	372 hours	14,136
Joint Operations	685 railroads	100 requests	20 minutes	33 hours	1,254
Late Identification	685 railroads	20 attachments + 20 notices.	15 minutes	10 hours	380
Employee Statement Supplementing Railroad Accident Report (Part II Form FRA 6180.78).	Railroad employees	75 statements	1.5 hours	113 hours	4,972
Employee Confidential Letter	Railroad employees	10 letters	2 hours	20 hours	880
225.13—Late Reports	685 railroads	50 amended rpts. + 40 copies.	1 hour + 3 minutes	52 hours	1,976
225.17—Doubtful Cases; Alcohol or Drug Involvement: Narrative Reports to FRA.	685 railroads	80 reports	30 minutes	40 hours	1,520
Appended reports required by § 219.209(b).	685 railroads	5 reports	30 minutes	3 hours	114
225.19—Rail-Highway Grade Crossing Accident/Incident Report—Form FRA F 6180.57.	685 railroads	3,000 forms	2 hours	6,000 hours	228,000

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost (dollars)
Death, Injury, or Occupational Illness (Form FRA F 6180.55a).	685 railroads	12,000 forms	20 minutes	4,000 hours	152,000
225.21—Railroad Injury and Illness Summary—Form FRA F 6180.55.	685 railroads	8,220 forms	10 minutes	1,370 hours	52,060
225.21—Annual Railroad Report of Employee Hours and Casualties, By State—Form FRA F 6180.56.	685 railroads	685 forms	15 minutes	171 hours	6,498
225.21/25—Railroad Employee Injury and/or Illness Record—Form FRA F 6180.98.	685 railroads	18,000 forms	60 minutes	18,000 hours	792,000
Copies of Forms to Employees	685 railroads	540 form copies	2 minutes	18 hours	792
225.21—Initial Rail Equipment Accident/Incident Record—Form FRA F 6180.97.	685 railroads	13,000 forms	30 minutes	6,500 hours	286,000
225.21—Alternative Record for Illnesses Claimed to Be Work Related—Form FRA F 6180.107.	685 railroads	300 forms	15 minutes	75 hours	2,850
225.25 (h)—Posting of Monthly Summary.	685 railroads	8,220 lists	16 minutes	2,192 hours	83,296
225.27—Retention of Records	685 railroads	1,900 records	2 minutes	63 hours	2,394
225.33—Internal Control Plans—Amendments.	685 railroads	25 amendments	14 hours	350 hours	13,300
225.35—Access to Records and Reports.	15 railroads	400 lists	20 minutes	133 hours	5,054
Subsequent Years	4 railroads	16 lists	20 minutes	5 hours	190
225.37—Magnetic Media Transfer and Electronic Submission.	8 railroads	96 transfers	10 minutes	16 hours	608
Electronic Submission: Batch Control Forms (6180.99) and Form FRA F 6180.55.	685 railroads	200 forms	3 minutes	10 hours	380

Total Responses: 76,602.

Estimated Total Annual Burden: 45,921 hours.

Status: Regular Review.

Pursuant to 44 U.S.C. 3507(a) and 5 CFR 1320.5(b), 1320.8(b)(3)(vi), FRA informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Authority: 44 U.S.C. 3501–3520.

Issued in Washington, DC on December 7, 2005.

D.J. Stadtler,

Director, Office of Budget, Federal Railroad Administration.

[FR Doc. E5–7288 Filed 12–13–05; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Petition for Exemption From the Federal Motor Vehicle Motor Theft Prevention Standard; General Motors Corporation

AGENCY: National Highway Traffic Safety Administration, Department of Transportation (DOT).

ACTION: Grant of petition for exemption.

SUMMARY: This document grants in full the petition of General Motors Corporation, (GM) for an exemption in accordance with § 543.9(c)(2) of 49 CFR part 543, *Exemption from the Theft Prevention Standard,* for the Chevrolet Malibu/Malibu Maxx vehicle line beginning with model year (MY) 2006. This petition is granted because the agency has determined that the antitheft device to be placed on the line as standard equipment is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard.

DATES: The exemption granted by this notice is effective beginning with model year (MY) 2006.

FOR FURTHER INFORMATION CONTACT: Ms. Carlita Ballard, Office of International Policy, Fuel Economy and Consumer Programs, NHTSA, 400 Seventh Street, SW., Washington, DC 20590. Ms. Ballard's phone number is (202) 366–5222. Her fax number is (202) 493–2290.

SUPPLEMENTARY INFORMATION: In a petition dated July 19, 2005, GM requested an exemption from the parts-marking requirements of the theft prevention standard (49 CFR part 541) for the Chevrolet Malibu/Malibu Maxx vehicle line beginning with MY 2006. The petition requested an exemption from parts-marking pursuant to 49 CFR 543, Exemption from Vehicle Theft Prevention Standard, based on the installation of an antitheft device as standard equipment for the entire vehicle line.

Under § 543.5(a), a manufacturer may petition NHTSA to grant exemptions for one line of its vehicle lines per year. In its petition, GM provided a detailed description and diagram of the identity, design, and location of the components of the antitheft device for the new vehicle line. The antitheft device is a transponder-based, electronic, immobilizer system. GM will install its antitheft device as standard equipment on its Chevrolet Malibu /Malibu Maxx vehicle line beginning with MY 2006. GM's submission is considered a complete petition as required by 49 CFR 543.7, in that it meets the general requirements contained in § 543.5 and the specific content requirements of § 543.6.

The antitheft device to be installed on the MY 2006 Chevrolet Malibu/Malibu Maxx is the PASS–Key III+. The PASS–Key III+ device is designed to be active at all times without direct intervention by the vehicle operator. The system is fully armed immediately after the ignition has been turned off and the key removed. The system will provide

protection against unauthorized starting and fueling of the vehicle engine. Components of the antitheft device include a special ignition key and decoder module. Before the vehicle can be operated, the key's electrical code must be sensed and properly decoded by the PASS–Key III+ control module. The ignition key contains electronics molded into the key head. These electronics receive energy and data from the control module. Upon receipt of the data, the key will calculate a response to the data using secret information and an internal encryption algorithm, and transmit the response back to the vehicle. The controller module translates the radio frequency signal received from the key into a digital signal and compares the received response to an internally calculated value. If the values match, the key is recognized as valid and the vehicle can be operated.

GM indicated that the theft rates, as reported by the Federal Bureau of Investigation's National Crime Information Center, are lower for GM models equipped with the ''PASS–Key''-like systems which have exemptions from the parts-marking requirements of 49 CFR part 541, than the theft rates for earlier, similarly-constructed models which were parts-marked. Based on the performance of the PASS–Key, PASS–Key II, and PASS–Key III systems on other GM models, and the advanced technology utilized by the modification, GM believes that the MY 2006 antitheft device will be more effective in deterring theft than the parts-marking requirements of 49 CFR part 541. Additionally, GM stated that the PASS–Key III+ system has been designed to enhance the functionality and theft protection provided by GM's first, second, and third generation PASS–Key, PASS–Key II, and PASS–Key III systems.

In addressing the specific content requirements of 543.6, GM provided information on the reliability and durability of the proposed device. To ensure reliability and durability of the device, GM conducted tests based on its own specified standards. GM provided a detailed list of the tests conducted on the components of its immobilizer device and believes that the device is reliable and durable since it complied with the specified requirements for each test. Specifically, GM stated that the components of the device were tested and met compliance in climatic, mechanical and chemical environments, and immunity to various electromagnetic radiation.

GM also stated that although its antitheft device provides protection against unauthorized starting and fueling of the vehicle, it does not provide any visible or audible indication of unauthorized entry by means of flashing vehicle lights or sounding of the horn. Since the system is fully operational once the vehicle has been turned off, specific visible or audible reminders beyond key removal reminders have not been provided.

Based on comparison of the reduction in the theft rates of GM vehicles using a passive theft deterrent device with an audible/visible alarm system to the reduction in theft rates for GM vehicle models equipped with a passive antitheft device without an alarm, GM finds that the lack of an alarm or attention attracting device does not compromise the theft deterrent performance of a system such as PASS–Key III+.

GM's proposed device, as well as other comparable devices that have received full exemptions from the parts-marking requirements, lack an audible or visible alarm. Therefore, these devices cannot perform one of the functions listed in 49 CFR part 543.6(a)(3), that is, to call attention to unauthorized attempts to enter or move the vehicle. However, theft data have indicated a decline in theft rates for vehicle lines that have been equipped with devices similar to that which GM proposes. In these instances, the agency has concluded that the lack of a visual or audio alarm has not prevented these antitheft devices from being effective protection against theft.

On the basis of this comparison, GM has concluded that the proposed antitheft device is no less effective than those devices installed on lines for which NHTSA has already granted full exemption from the parts-marking requirements.

Based on the evidence submitted by GM, the agency believes that the antitheft device for the GM vehicle line is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard (49 CFR part 541).

The agency concludes that the device will provide four of the five types of performance listed in § 543.6(a)(3): Promoting activation; preventing defeat or circumvention of the device by unauthorized persons; preventing operation of the vehicle by unauthorized entrants; and ensuring the reliability and durability of the device.

As required by 49 U.S.C. 33106 and 49 CFR part 543.6(a)(4) and (5), the agency finds that GM has provided adequate reasons for its belief that the antitheft device will reduce and deter theft. This conclusion is based on the information GM provided about its device.

For the foregoing reasons, the agency hereby grants in full GM's petition for exemption for the Chevrolet Malibu/Malibu Maxx vehicle line from the parts-marking requirements of 49 CFR part 541. The agency notes that 49 CFR part 541, Appendix A–1, identifies those lines that are exempted from the Theft Prevention Standard for a given model year. 49 CFR part 543.7(f) contains publication requirements incident to the disposition of all part 543 petitions. Advanced listing, including the release of future product nameplates, the beginning model year for which the petition is granted and a general description of the device is necessary in order to notify law enforcement agencies of new vehicle lines exempted from the parts marking requirements of the Theft Prevention Standard.

If GM decides not to use the exemption for this line, it should formally notify the agency. If such a decision is made, the line must be fully marked according to the requirements under 49 CFR parts 541.5 and 541.6 (marking of major component parts and replacement parts).

NHTSA notes that if GM wishes in the future to modify the device on which this exemption is based, the company may have to submit a petition to modify the exemption. Part 543.7(d) states that a part 543 exemption applies only to vehicles that belong to a line exempted under this part and equipped with the antitheft device on which the line's exemption is based. Further, part 543.9(c)(2) provides for the submission of petitions ''to modify an exemption to permit the use of an antitheft device similar to but differing from the one specified in that exemption.''

The agency wishes to minimize the administrative burden that part 543.9(c)(2) could place on exempted vehicle manufacturers and itself. The agency did not intend in drafting Part 543 to require the submission of a modification petition for every change to the components or design of an antitheft device. The significance of many such changes could be *de minimis*. Therefore, NHTSA suggests that if the manufacturer contemplates making any changes, the effects of which might be characterized as *de minimis*, it should consult the agency before preparing and submitting a petition to modify.

Authority: 49 U.S.C. 33106; delegation of authority at 49 CFR 1.50.

Issued on: December 7, 2005.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. E5–7285 Filed 12–13–05; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Petition for Exemption From the Federal Motor Vehicle Motor Theft Prevention Standard; General Motors Corporation

AGENCY: National Highway Traffic Safety Administration, Department of Transportation (DOT).

ACTION: Grant of petition for exemption.

SUMMARY: This document grants in full the petition of General Motors Corporation, (GM) for an exemption in accordance with § 543.9(c)(2) of 49 CFR part 543, *Exemption from the Theft Prevention Standard*, for the Pontiac G6 vehicle line beginning with model year (MY) 2007. This petition is granted because the agency has determined that the antitheft device to be placed on the line as standard equipment is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard.

DATES: The exemption granted by this notice is effective beginning with model year (MY) 2007.

FOR FURTHER INFORMATION CONTACT: Ms. Carlita Ballard, Office of International Policy, Fuel Economy and Consumer Programs, NHTSA, 400 Seventh Street, SW., Washington, DC 20590. Ms. Ballard's phone number is (202) 366–5222. Her fax number is (202) 493–2290.

SUPPLEMENTARY INFORMATION: In a petition dated July 19, 2005, GM requested an exemption from the parts-marking requirements of the theft prevention standard (49 CFR part 541) for the Pontiac G6 vehicle line beginning with MY 2007. The petition requested an exemption from parts-marking pursuant to 49 CFR 543, Exemption from Vehicle Theft Prevention Standard, based on the installation of an antitheft device as standard equipment for the entire vehicle line.

Under § 543.5(a), a manufacturer may petition NHTSA to grant exemptions for one line of its vehicle lines per year. In its petition, GM provided a detailed description and diagram of the identity, design, and location of the components of the antitheft device for the new vehicle line. The antitheft device is a transponder-based, electronic, immobilizer system. GM will install its antitheft device as standard equipment on its Pontiac G6 vehicle line beginning with MY 2007. GM's submission is considered a complete petition as required by 49 CFR 543.7, in that it meets the general requirements contained in § 543.5 and the specific content requirements of § 543.6.

The antitheft device to be installed on the MY 2007 Pontiac G6 is the PASS–Key III+. The PASS–Key III+ device is designed to be active at all times without direct intervention by the vehicle operator. The system is fully armed immediately after the ignition has been turned off and the key removed. The system will provide protection against unauthorized starting and fueling of the vehicle engine. Components of the antitheft device include a special ignition key and decoder module. Before the vehicle can be operated, the key's electrical code must be sensed and properly decoded by the PASS–Key III+ control module. The ignition key contains electronics molded into the key head. These electronics receive energy and data from the control module. Upon receipt of the data, the key will calculate a response to the data using secret information and an internal encryption algorithm, and transmit the response back to the vehicle. The controller module translates the radio frequency signal received from the key into a digital signal and compares the received response to an internally calculated value. If the values match, the key is recognized as valid and the vehicle can be operated.

GM indicated that the theft rates, as reported by the Federal Bureau of Investigation's National Crime Information Center, are lower for GM models equipped with the ''PASS–Key''-like systems which have exemptions from the parts-marking requirements of 49 CFR part 541, than the theft rates for earlier, similarly-constructed models which were parts-marked. Based on the performance of the PASS–Key, PASS–Key II, and PASS–Key III systems on other GM models, and the advanced technology utilized by the modification, GM believes that the MY 2007 antitheft device will be more effective in deterring theft than the parts-marking requirements of 49 CFR Part 541. Additionally, GM stated that the PASS–Key III+ system has been designed to enhance the functionality and theft protection provided by GM's first, second, and third generation PASS–Key, PASS–Key II, and PASS–Key III systems.

In addressing the specific content requirements of 543.6, GM provided information on the reliability and durability of the proposed device. To ensure reliability and durability of the device, GM conducted tests based on its own specified standards. GM provided a detailed list of the tests conducted on the components of its immobilizer device and believes that the device is reliable and durable since it complied with the specified requirements for each test. Specifically, GM stated that the components of the device were tested and met compliance in climatic, mechanical and chemical environments, and immunity to various electromagnetic radiation.

GM also stated that although its antitheft device provides protection against unauthorized starting and fueling of the vehicle, it does not provide any visible or audible indication of unauthorized entry by means of flashing vehicle lights or sounding of the horn. Since the system is fully operational once the vehicle has been turned off, specific visible or audible reminders beyond key removal reminders have not been provided.

Based on comparison of the reduction in the theft rates of GM vehicles using a passive theft deterrent device with an audible/visible alarm system to the reduction in theft rates for GM vehicle models equipped with a passive antitheft device without an alarm, GM finds that the lack of an alarm or attention attracting device does not compromise the theft deterrent performance of a system such as PASS–Key III+.

GM's proposed device, as well as other comparable devices that have received full exemptions from the parts-marking requirements, lack an audible or visible alarm. Therefore, these devices cannot perform one of the functions listed in 49 CFR part 543.6(a)(3), that is, to call attention to unauthorized attempts to enter or move the vehicle. However, theft data have indicated a decline in theft rates for vehicle lines that have been equipped with devices similar to that which GM proposes. In these instances, the agency has concluded that the lack of a visual or audio alarm has not prevented these antitheft devices from being effective protection against theft.

On the basis of this comparison, GM has concluded that the proposed antitheft device is no less effective than those devices installed on lines for which NHTSA has already granted full exemption from the parts-marking requirements.

Based on the evidence submitted by GM, the agency believes that the antitheft device for the GM vehicle line is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard (49 CFR 541).

The agency concludes that the device will provide four of the five types of performance listed in § 543.6(a)(3): Promoting activation; preventing defeat or circumvention of the device by unauthorized persons; preventing operation of the vehicle by unauthorized entrants; and ensuring the reliability and durability of the device.

As required by 49 U.S.C. 33106 and 49 CFR part 543.6(a)(4) and (5), the agency finds that GM has provided adequate reasons for its belief that the antitheft device will reduce and deter theft. This conclusion is based on the information GM provided about its device.

For the foregoing reasons, the agency hereby grants in full GM's petition for exemption for the Pontiac G6 vehicle line from the parts-marking requirements of 49 CFR part 541. The agency notes that 49 CFR Part 541, Appendix A–1, identifies those lines that are exempted from the Theft Prevention Standard for a given model year. 49 CFR part 543.7(f) contains publication requirements incident to the disposition of all part 543 petitions. Advanced listing, including the release of future product nameplates, the beginning model year for which the petition is granted and a general description of the antitheft device is necessary in order to notify law enforcement agencies of new vehicle lines exempted from the parts marking requirements of the Theft Prevention Standard.

If GM decides not to use the exemption for this line, it should formally notify the agency. If such a decision is made, the line must be fully marked according to the requirements under 49 CFR Parts 541.5 and 541.6 (marking of major component parts and replacement parts).

NHTSA notes that if GM wishes in the future to modify the device on which this exemption is based, the company may have to submit a petition to modify the exemption. Part 543.7(d) states that a Part 543 exemption applies only to vehicles that belong to a line exempted under this part and equipped with the antitheft device on which the line's exemption is based. Further, part 543.9(c)(2) provides for the submission of petitions ''to modify an exemption to permit the use of an antitheft device similar to but differing from the one specified in that exemption.''

The agency wishes to minimize the administrative burden that Part 543.9(c)(2) could place on exempted vehicle manufacturers and itself. The agency did not intend in drafting Part 543 to require the submission of a modification petition for every change to the components or design of an antitheft device. The significance of many such changes could be *de minimis*. Therefore, NHTSA suggests that if the manufacturer contemplates making any changes, the effects of which might be characterized as *de minimis*, it should consult the agency before preparing and submitting a petition to modify.

Authority: 49 U.S.C. 33106; delegation of authority at 49 CFR 1.50.

Issued on: December 7, 2005.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. E5–7286 Filed 12–13–05; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–6 (Sub–No. 434X)]

BNSF Railway Company—Abandonment Exemption—in Fergus County, MT

BNSF Railway Company (BNSF) has filed a notice of exemption under 49 CFR part 1152 subpart F—*Exempt Abandonments* to abandon a line of railroad between milepost 9.50 near Moore, MT, and milepost 28.35 near Lewiston, MT, the 1.30-mile Berg Lumber Spur (milepost 0.00–milepost 1.30), and the Heath Spur (milepost 0.00–milepost 1.10), a total distance of 21.25 miles in Fergus County, MT. The line traverses United States Postal Service Zip Codes 59457 and 59464.

BNSF has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic on the line can be rerouted over other lines; (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 report), 49 CFR 1105.8 (historic report), 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 January 13, 2006, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 U.S.C. 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29[3] must be filed by December 27, 2005. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by January 3, 2006, with: Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to BNSF's representative: Michael Smith, 311 S. Wacker Dr., Suite 3000, Chicago, IL 60606–6677.

If the verified notice contains false or misleading information, the exemption is void *ab initio*.

BNSF has filed an environmental and historic report which addresses the abandonment's effects, if any, on the environment and historic resources. SEA will issue an environmental assessment (EA) by December 19, 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 filed within 15 days

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[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).

[3] Each trail use request must be accompanied by the filing fee, which currently is set at $200. *See* 49 CFR 1002.2(f)(27).

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), BNSF shall file 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 BNSF's filing of a notice of consummation by December 14, 2006, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

On December 1, 2005, the Board of Commissioners of Fergus County, MT (Fergus County), filed an objection to the notice. Fergus County raises a number of concerns about the proposed abandonment, but provides no basis for the Board to reject the notice. However, should the County desire to seek a stay of the effectiveness of the exemption, it may do so, keeping in mind the deadline set forth in this notice. Also a petition to revoke the exemption under 49 U.S.C. 10502(d) after its effectiveness may be filed at any time.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: December 6, 2005.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 05–23959 Filed 12–13–05; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

December 8, 2005.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before January 13, 2006 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–0143.

Type of Review: Extension.

Title: Heavy Highway Vehicle Use Tax Return.

Form: IRS form 2290/SP/FR.

Description: Form 2290 is used to compute and report the tax imposed by section 4481 on the highway use of certain motor vehicles. The information is used to determine whether the taxpayer has paid the correct amount of tax.

Respondents: Business or other for-profit.

Estimated Total Burden Hours: 22,521,400 hours.

OMB Number: 1545–1686.

Type of Review: Extension.

Title: REG–103736–00 (Final) Requirement to Maintain List of Investors in Potentially Abusive Tax Shelters.

Description: The regulations provide guidance on the requirement under section 6112 to maintain a list of investors in potentially abusive tax shelters.

Respondents: Business or other for-profit, Individual or households.

Estimated Total Burden Hours: 50,000 hours.

OMB Number: 1545–1799.

Type of Review: Extension.

Title: Notice 2002–69, Interest Rates and Appropriate Foreign Loss Payment Patterns for Determining the Qualified Insurance Income of Certain Controlled Corporations under Section 954(i).

Description: This notice provide guidance on how to determine the foreign loss payment patterns of a foreign insurance company owned by U.S. shareholder for purpose of determining the amount of investment income earned by the insurance company that is not treated as Subpart F income under section 954(i).

Respondents: Business or other for profit.

Estimated Total Burden Hours: 300 hours.

OMB Number: 1545–1819.

Type of Review: Extension.

Title: REG–116641–01 (Final) Information Reporting and Backup Withholding for Payment Card Transactions.

Description: The document contains final regulations relating to the information reporting requirements, information reporting penalties, and backup withholding requirements for payment card transactions. This document also contains final regulations relating to the IRS TIN Matching Program.

Respondents: Business or other for-profit.

Estimated Total Burden Hours: 11,750,000 hours.

Clearance Officer: Glenn P. Kirkland (202) 622–3428, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Alexander T. Hunt (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Michael A. Robinson,

Treasury PRA Clearance Officer.

[FR Doc. E5–7341 Filed 12–13–05; 8:45 am]

BILLING CODE 4810–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

December 8, 2005.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before January 13, 2006 to be assured of consideration.

Financial Crimes Enforcement Network (FinCEN)

OMB Number: 1506–0019.

Type of Review: Revision.

Title: Suspicious Activity Report by Securities and Futures Industries and 31 CFR 103 17(d) and 103.19(d).

Form: FinCEN form 101.

Description: Treasury is requiring certain securities broker-dealers, future commission merchants, and introducing brokers in commodities to file suspicious activity reports.

Respondents: Business or other for-profit.

Estimated Total Reporting Burden: 16,800 hours.

Clearance Officer: Russell Stephenson (202) 354–6012, Department of the Treasury, Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183.

OMB Reviewer: Alexander T. Hunt (202) 395–7316, Office of Management and Budget, Room 10235, New

Executive Office Building, Washington, DC 20503.

Michael A. Robinson,

Treasury PRA Clearance Officer.

[FR Doc. E5–7342 Filed 12–13–05; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[AC–06: OTS Nos. 00803, H–3845 and H–4256]

Enfield Federal Savings and Loan Association, Enfield Mutual Holding Company, and NEBS Bancshares, Inc., Enfield, CT; Approval of Conversion Application

Notice is hereby given that on November 10, 2005, the Assistant Managing Director, Examinations and Supervision—Operations, Office of Thrift Supervision (''OTS''), or her designee, acting pursuant to delegated authority, approved the application of Enfield Federal Savings and Loan Association and Enfield Mutual Holding Company, Enfield, Connecticut, to convert to the stock form of organization. Copies of the application are available for inspection by appointment (phone number: (202) 906–5922 or e-mail: *Public.Info@OTS.Treas.gov*) at the Public Reading Room, OTS, 1700 G Street, NW., Washington, DC 20552, and OTS Northeast Regional Office, Harborside Financial Center Plaza Five, Suite 1600, Jersey City, New Jersey 07311.

Dated: December 8, 2005.

By the Office of Thrift Supervision.

Nadine Y. Washington,

Corporate Secretary.

[FR Doc. 05–24008 Filed 12–13–05; 8:45 am]

BILLING CODE 6720–01–M

Federal Register

Wednesday,
December 14, 2005

Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Astragalus lentiginosus* var. *coachellae* (Coachella Valley Milk-Vetch); Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AT74

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Astragalus lentiginosus* var. *coachellae* (Coachella Valley Milk-Vetch)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), herein address the designation of critical habitat for *Astragalus lentiginosus* var. *coachellae* (Coachella Valley milk-vetch) under the Endangered Species Act of 1973, as amended (Act). In total, we are designating zero acres of critical habitat for *Astragalus lentiginosus* var. *coachellae.* We identified 17,746 ac (7,182 ha) of local, County, State, Federal, and private lands containing features essential to the conservation of *A.l.* var. *coachellae* in Riverside County. However, all habitat with essential features is located within areas to be conserved and managed by the draft Coachella Valley MSHCP/NNCP or within areas conserved within the Coachella Valley Preserve System under the Coachella Valley fringe-toed HCP, and therefore is excluded or exempted from critical habitat under section 4(b)(2) or 3(5)(A) of the Act.

DATES: This rule becomes effective on January 13, 2006.

ADDRESSES: Comments and materials received, as well as supporting documentation used in the preparation of this final rule, will be available for public inspection, by appointment, during normal business hours at the Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, California 92011. You may obtain copies of the final rule and economic analysis from this address or by calling (760) 431–9440, or from our Internet site at *http://carlsbad.fws.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

SUPPLEMENTARY INFORMATION:

Designation of Critical Habitat Provides Little Additional Protection to Species

In 30 years of implementing the Act, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. The Service's present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

Role of Critical Habitat in Actual Practice of Administering and Implementing the Act

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, ''Because the Act can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7.'' Currently, only 470 species, or 37.5 percent of the 1,253 listed species in the U.S. under the jurisdiction of the Service, have designated critical habitat.

We address the habitat needs of all 1,253 listed species through conservation mechanisms such as listing, section 7 consultations, the Section 4 recovery planning process, the Section 9 protective prohibitions of unauthorized take, Section 6 funding to the States, and the Section 10 incidental take permit process. The Service believes that it is these measures that may make the difference between extinction and survival for many species.

We note, however, that the August 6, 2004, Ninth Circuit judicial opinion, *Gifford Pinchot Task Force* v. *United States Fish and Wildlife Service,* found our definition of adverse modification was invalid. In response to the decision, the Director has provided guidance to the Service based on the statutory language. In this rule, our analysis of the consequences and relative costs and benefits of the critical habitat designation is based on application of the statute consistent with the 9th Circuit's ruling and the Director's guidance.

Procedural and Resource Difficulties in Designating Critical Habitat

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent (NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, the Service's own proposals to list critically imperiled species, and final listing determinations on existing proposals are all significantly delayed.

The accelerated schedules of court-ordered designations coupled with the need to avoid the risks associated with noncompliance with judicially imposed deadlines, have left the Service with limited ability to provide for adequate public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little additional protection to listed species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects and the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy Act (NEPA). None of these costs result in any benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

Background

Astragalus lentiginosus var. *coachellae* is found on loose wind-blown sands in dunes and flats, and in

sandy alluvial washes in the northern Coachella Valley area spanning roughly from the sandy alluvial washes just east of Cabezon to the dunes off Washington Avenue, north and west of Indio in Riverside County, California. At the time *A. l.* var. *coachellae* was listed under the Act in 1998, we were aware that 90 percent of this taxon's occurrences were located within 3 mi (5 km) of Interstate 10 from north of Indio to Cabezon (Barrows 1987; CNDDB 1996). A majority of these occurrences were discovered in and around Snow Creek, Whitewater River downstream from the percolation ponds, Mission and Morongo Creeks, the Willow Hole Reserve, the Big Dune south of Interstate Highway 10 (I–10), and the Coachella Valley Preserve (Coachella Valley Association of Governments unpublished data 2004). The largest populations of up to several thousand plants were found prior to listing in the Big Dune area south of I–10, including several thousand plants that were discovered again in 2005 (USFWS unpublished data 2005). Other areas containing large populations that were known prior to listing that contain from several hundred to a thousand plants include the Willow Hole reserve area, Snow Creek area, and Coachella Valley Preserve (Coachella Valley Association of Governments unpublished data 2004).

There also exists a disjunct *Astragalus lentiginosus* var. *coachellae* population that was known at the time of listing. This population is located approximately 50 miles (80 km) east of the Coachella Valley in the Chuckwalla Valley near the City of Desert Center. This population has only been found in a limited extent on and near a sandy roadside berm along a 5-mile (8-km) stretch of Highway 177, northeast of the City of Desert Center. The Palen Dunes, located approximately 3 miles (5 km) south of Highway 177, contain sandy soils that appear suitable for *A. l.* var. *coachellae.* However, it is uncertain whether the plant occurs in this area since surveys are limited to only one unsuccessful survey attempt in 1998 (Bureau of Land Management, unpublished data 2001a).

Please refer to the final listing rule published in the **Federal Register** on October 6, 1998 (63 FR 53596), for a detailed discussion on the taxonomic history and description of this taxon. It is our intent in this document to reiterate and discuss only those topics directly relevant to the development and designation of critical habitat or relevant information obtained since the final listing.

The primary threat to *Astragalus lentiginosus* var. *coachellae* and its habitat is the extensive and growing urban development in the Coachella Valley (63 FR 53596), including residential, commercial, and agricultural development. Urbanization has both direct and indirect adverse effects on *A. l.* var. *coachellae.* Urbanization directly destroys suitable and occupied habitat onsite, and indirectly degrades suitable and occupied habitat by blocking the fluvial (water) and eolian (wind) transport of sand from sand source areas to downwind areas of suitable habitat. Other threats to *Astragalus lentiginosus* var. *coachellae* and its habitat include the obstruction of sand transport and competition by dense populations of invasive exotic plants, such as Saharan mustard *(Brassica tournefortii)* and Mediterranean grass *(Schismus barbatus)*, and direct mortality by off-highway vehicle (OHV) use (63 FR 53596).

Previous Federal Actions

The following section summarizes the Federal actions that occurred since the rule listing this species as endangered was published in the **Federal Register** on October 6, 1998. Please refer to the final listing rule (63 FR 53596) for a discussion of Federal actions that occurred prior to the species Federal listing.

At the time of listing we determined that designation of critical habitat was ''not prudent'' (63 FR 53596). On November 15, 2001, the Center for Biological Diversity and the California Native Plant Society filed a lawsuit against Secretary of the Interior and the Service challenging our ''not prudent'' determinations for eight plant species listed as endangered or threatened, including *Astragalus lentiginosus* var. *coachellae (Center for Biological Diversity, et al.* v. *Norton,* No. 01 CV 2101, S.D. Cal.). A second lawsuit asserting the same challenge was filed on November 21, 2001, by the Building Industry Legal Defense Foundation (*Building Industry Legal Defense Foundation* v. *Norton,* No. 01 CV 2145, S.D. Cal.). The parties in both cases agreed to remand the critical habitat determinations for the eight plant species at issue to the Service for reconsideration. On July 1, 2002, the Court directed us to reconsider our not prudent determination and submit to the Federal Register for publication a proposed critical habitat designation, if prudent, for *Astragalus lentiginosus* var. *coachellae* on or before November 30, 2004, and to submit to the Federal Register for publication of a final critical habitat designation on or before November 30, 2005. The proposed rule to designate critical habitat for *Astragalus lentiginosus* var. *coachellae* was signed on November 30, 2004, and published in the **Federal Register** on December 14, 2004 (69 FR 74468).

Summary of Comments and Recommendations

During the initial 60-day public comment period for the proposed designation of critical habitat (69 FR 74468), we contacted all appropriate State, local and Federal agencies, elected officials, scientific organizations, and other interested parties, via mail and/or fax, and invited them to submit comments and/or information concerning the proposed rule. We also published newspaper notices on December 17, 2004, in the *Desert Sun,* Palm Springs, CA; *Press-Enterprise,* Riverside, CA; *San Diego Union-Tribune,* San Diego, CA; *Orange County Register,* Santa Ana, CA; and in the *Los Angeles Times,* Los Angeles, CA, inviting public comment. The initial comment period ended February 14, 2005. We did not receive any requests for a public hearing prior to the published deadline.

A second comment period was open from September 27, 2005, to October 27, 2005 (70 FR 56434), announcing the availability of the September 2005 draft economic analysis (DEA) of critical habitat designation for *Astragalus lentiginosus* var. *coachellae* as prepared by Northwest Economic Associates and reopening the comment period for the proposed rule. All comments and new information have been incorporated into this final rule as appropriate.

During the first comment period, we received four comments, including a joint letter from two non-profit organizations, a letter from a county agency, a water agency, and a local mining business. All four comment letters disagreed with the size and area proposed critical habitat: three of the letters requested the reduction of critical habitat and one letter requested the expansion of critical habitat to more areas.

During the second comment period, we received one comment letter on the draft economic analysis from an environmental organization. The commenter, who also commented during the first comment period, disagreed with excluding areas from critical habitat and requested that we include sand source areas in critical habitat. The commenter also claimed that the economic analysis grossly overestimated the costs associated with

conserving *Astragalus lentiginosus* var. *coachellae.*

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited independent opinions from four knowledgeable individuals who have expertise with the species, with the geographic region where the species occurs, and/or with the principles of conservation biology. The purpose of such review is to ensure that the designation is based on scientifically sound data, assumptions, and analyses, including input of appropriate experts and specialists.

Of the four individuals contacted, two responded. The two peer reviewers that responded generally supported the proposal and provided us with additional information, clarifications, and suggestions to improve the final critical habitat designation. One reviewer recommended expanding the critical habitat designation to include lands within the draft Coachella Valley Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan (MSHCP/NCCP) that were proposed for exclusion. This recommendation was based on the fact that the draft Coachella Valley MSHCP/NCCP has yet to be approved and that effective conservation efforts for *Astragalus lentiginosus* var. *coachellae* are, therefore, still unproven. The other peer reviewer did not comment on whether critical habitat should be expanded or reduced, but recommended the Service provide more explanation for our determinations for including or excluding certain areas from designated critical habitat. Both peer reviewers discussed the importance of including important sand source areas as critical habitat because they are important for providing and transporting sediment containing new sands to downstream and downwind sandy areas containing PCEs, even though these areas do not contain PCEs that support populations of this taxon. Both reviewers suggested ways to improve the clarity of both the rule and our decision-making process.

We reviewed all comments, including comments received from the public and peer reviewers during the comment periods, for substantive, relevant issues and new data regarding critical habitat and *Astragalus lentiginosus* var. *coachellae.* Peer reviewer comments are summarized and addressed separately in the following section. Public comments are grouped into three general issue categories relating to critical habitat and the draft economic analysis and addressed in the Public Comments section below.

Peer Review Comments

(1) *Comment:* A peer reviewer requested we clarify how critical habitat may provide legal protection to a federally listed plant on non-Federal lands. Specifically, they sought more information on several matters, including: (1) Whether non-Federal landowners were contacted about the proposed critical habitat designation and inquired about their perspective of the proposal; (2) whether non-Federal landowners are currently under any agreement with State, Federal, or local governments for the conservation of this taxon; (3) an assessment of how the proposed designation may open the Service to litigation for designating critical habitat on non-Federal lands and increase vandalism to plants on non-Federal lands.

Our Response: First, although some habitat containing features essential to the conservation of *Astragalus lentiginosus* var. *coachellae* were determined to occur on non-Federal lands, these lands were excluded from critical habitat designation because of their inclusion in the preferred alternative reserve design in the draft Coachella Valley MSHCP/NCCP (CVMC 2004).

Second, we did not contact all non-Federal landowners whose property contained habitat with features essential to the conservation of this taxon. However, we did inform the public about the proposed critical habitat designation through several local newspapers and with a letter to elected officials and several local, State, Tribal, and Federal agencies working in the Coachella Valley. We also are currently working with non-Federal landowners whose property contains habitats with features essential to the conservation of this taxon on the draft Coachella Valley MSHCP/NCCP to conserve habitat for this taxon.

Third, it is not within the scope of a critical habitat designation to determine whether a designation of critical habitat on non-Federal lands will make the Service more vulnerable to litigation. As required under section 4(b)(1)(A) of the Act, we use the best scientific data available to determine areas that contain habitat with features essential to the conservation of the species. Ownership of lands being proposed as critical habitat is relevant to the Secretary's consideration under 4(b)(2) of the Act of relevant factors such as the economic impacts to landowners of designating such lands as critical habitat. We also share concerns that designating critical habitat may lead to an increase in vandalism of *Astragalus lentiginosus* var. *coachellae,* as stated in our rule to list the species on October 6, 1998 (63 FR 53596). However, we anticipate that vandalism to this taxon may not increase since we are working with non-Federal landowners on the draft Coachella Valley MSHCP/NCCP and excluding lands that contain habitat with features essential to the conservation of the species from critical habitat. Furthermore, the draft Coachella Valley MSHCP/NCCP is also proposing to protect reserve areas containing *A. l.* var. *coachellae* with fencing and other forms of enforcement. These types of actions under a comprehensive management plan offer more protections for federally listed plants, such as *A. l.* var. *coachellae,* on non-Federal lands than a critical habitat designation.

(2) *Comment:* A peer reviewer emphasized the importance of protecting various types of habitat, including: (1) Currently unoccupied habitat; (2) currently unoccupied habitat that was historically occupied; (3) potential habitat downwind and downstream of current populations; and (4) source sand areas that provide future habitat in downwind and down-drainage areas. Another reviewer stated that it was unclear in the proposed rule whether these areas were included as critical habitat.

Our Response: First, the Act defines critical habitat as ''specific areas within the geographical area occupied by the species, at the time it is listed * * * on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection.'' We have identified all areas within the geographic range of the species that are known to be occupied, contain features essential to the conservation of *Astragalus lentiginosus* var. *coachellae,* and that may require special management considerations or protection. It is not our current policy to include all areas that could potentially provide suitable habitat or are not known to be occupied, even if they were historically occupied. Second, we agree with the reviewer that sand source areas are important for the conservation of *A. l.* var. *coachellae.* However, we have determined that the presence of active sand dunes (primary constituent element (PCE) 1) is an essential feature, and we have designated them as a PCE (see Primary Constituent Elements for a detailed discussion). Therefore, Federal actions that affect the sand transport system will indirectly affect critical habitat. Because there is already a regulatory

mechanism within this designation, it is not necessary to designate the sand source areas themselves. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases.

(3) *Comment:* A peer reviewer stated that one of the benefits of designating critical habitat is that it helps in identifying extant populations of *Astragalus lentiginosus* var. *coachellae* when initiating Section 7 consultations.

Our Response: We agree with the reviewer that there is an educational benefit of designating critical habitat because it identifies areas that contain features essential to the conservation of the species that may require special management protection or considerations, and this may provide information to Federal agencies required to consult with us on their actions.

(4) *Comment:* The same peer reviewer stated that another benefit of designating critical habitat is identifying unoccupied areas that may be important areas for supporting *Astragalus lentiginosus* var. *coachellae* populations in the future.

Our Response: We agree with the reviewer that unoccupied areas may be important for the recovery of the taxon by supporting future *Astragalus lentiginosus* var. *coachellae* populations. However, it is not the intent of the Act to designate critical habitat throughout a taxon's entire range, including areas that potentially could be occupied. We have identified areas known to be occupied at the time of listing and known to be currently occupied that contain habitat with features essential to the conservation of this taxon.

(5) *Comment:* A peer reviewer stated that it is beneficial to exclude areas from critical habitat if the area is already protected through the Federal or local government ownership as well as through private reserves.

Our Response: We agree with the reviewer. A critical habitat designation will not afford as much protection for an area containing habitat with features essential to the conservation of *Astragalus lentiginosus* var. *coachellae* as would be afforded under Federal, State, Tribal, or local ownership provided the property is managed for the conservation of this taxon. Also, under the definition of critical habitat, we can only include lands in critical habitat if the essential features may require special management considerations or protection. Thus, we have excluded all areas containing features essential to the conservation of this taxon due to their inclusion within conservation areas that are or will be conserved and managed by Federal and local governments (see section titled *Application of Section 3(5)(A) and Exclusions Under Section 4(b)(2) of the Act for a more detailed discussion).*

(6) *Comment:* A peer reviewer stated that designating only small tracts of land as critical habitat may not be beneficial because of the movement of suitable habitat through time due to wind and flooding, thus resulting in these areas becoming unsuitable.

Our Response: First, as discussed above in Comment #5, we have excluded in this final rule all areas that were proposed as critical habitat. Second, the reason only small tracts of lands were originally proposed as critical habitat was because larger adjacent areas with habitat containing features essential to conservation of this taxon were either excluded from the designation because they are proposed for protection under the draft Coachella Valley MSHCP/NCCP. We believe that these conservation practices will garner more conservation benefits than a critical habitat designation (see section titled *Application of Section 3(5)(A) and Exclusions Under Section 4(b)(2) of the Act* for a more detailed discussion).

(7) *Comment:* A peer reviewer stated that there is value in the process for determining critical habitat because it has allowed for an assessment of areas with habitat that contain features essential to the conservation of the taxon, even though not all these areas are being proposed because they are being addressed in other management plans.

Our Response: We agree with the reviewer and have discussed this later in the rule (see Relationship of Critical Habitat to the Pending Coachella Valley Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan and Natural Community Conservation Plan (MSHCP/NCCP) for a detailed discussion).

(8) *Comment:* A peer reviewer stated that there are many occurrences of *Astragalus lentiginosus* var. *coachellae* on sites that are ''cut off'' from sand sources by intervening land uses. The peer reviewer suggests that the rule would be more clear if it described how long these sites might be expected to support viable populations and whether these occurrences can be meaningful to long-term conservation for the plant, and whether management efforts could help protect these populations.

Our Response: We agree with the reviewer that there are occurrences of *Astragalus lentiginosus* var. *coachellae* that are now isolated from the sand transport system and ''cut off'' from the sand sources that maintain suitable habitat for this plant. The long-term viability of these occurrences is reduced because there is little to no potential that the natural ecological processes that maintain the habitat for *A. l.* var. *coachellae* will return. The length of time that these isolated occurrences will remain into the future depends upon a variety of site-specific factors such as the degree of isolation from the sand transport system, size and scale of the development that is blocking the downstream movement of sediment, and the rate of sand loss around the plant population. Management efforts may substitute for the natural ecological processes by mechanically transferring sand to areas ''cut off'' from sand sources. These management practices are discussed below (see section titled Special Management Considerations or Protection).

(9) *Comment:* A peer reviewer questioned why there were no Agua Caliente Reservation lands included within critical habitat if there are significant populations on these lands.

Our Response: We recognize that important populations exist on Agua Caliente Reservation lands in the Big Dune area. However, we determined that these areas did not contain features essential to the conservation of this taxon because the ecological processes that maintain suitable habitat in this area from the Whitewater River sand transport system have been compromised by development in Cathedral City. New eolian sands are prevented by development from replenishing the Big Dune area. We have determined that without these ecological processes the long-term prospect of *Astragalus lentiginosus* var. *coachellae* populations in this area is reduced.

(10) *Comment:* A peer reviewer stated that we should include a discussion on the best and worst case scenarios for *Astragalus lentiginosus* var. *coachellae* protections once the draft Coachella Valley MSHCP/NCCP is finalized.

Our Response: The impacts and conservation measures provided for *Astragalus lentiginosus* var. *coachellae* under the draft Coachella Valley MSHCP/NCCP will be analyzed as part of a section 7 consultation for the issuance of a section 10(a)(1)(B) permit to the Coachella Valley Association of Governments (CVAG) and local jurisdictions. The Service has not completed the section 7 consultation for this section 10 permit at this time. However, we are confident that CVAG will reach a successful conclusion to its MSHCP/NCCP development process

and successfully conserve habitat for *Astragalus lentiginosus* var. *coachellae* to meet the requirements outlined in section 10(a)(1)(B) of the Act. The draft MSHCP/NCCP proposes to conserve 19,321 ac (7,819 ha) of modeled *A. l.* var. *coachellae* habitat in their Conservation Areas that includes large core habitat areas and other important conservation areas, such as sand sources and sand transport corridors. Other goals include: (1) Protecting other important conservation areas to allow for population fluctuation and promote genetic diversity; (2) protecting necessary ecological processes, including the sand transport systems, that will be beneficial in maintaining the PCEs in the areas containing features essential for the conservation of *A. l.* var. *coachellae;* (3) maintaining biological corridors and linkages among all conserved populations to the maximum extent feasible; and (4) ensuring conservation of habitat quality through biological monitoring and adaptive management actions. Therefore, we have excluded under section 4(b)(2) of the Act all lands containing features essential for the conservation of *A. l.* var. *coachellae* within the Coachella Valley MSHCP/NCCP plan area (see section titled Pending Coachella Valley Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan MSHCP/NCCP for a more detailed discussion).

(11) *Comment:* A peer reviewer stated that we should include a discussion on what options the Service has for conservation of *Astragalus lentiginosus* var. *coachellae* if the draft Coachella Valley MSHCP/NCCP is never finalized.

Our Response: In the absence of an approved Coachella Valley MSHCP/NCCP, *Astragalus lentiginosus* var. *coachellae* would continue to receive means for protection and be provided a program for its conservation under the Act. Under section 4 of the Act, the Service would develop and implement a recovery plan for *A. l.* var. *coachellae,* although there are currently no plans by the Service to fund or finish preparing a recovery plan. However, implementation of a recovery plan by landowners, Federal agencies, and other parties is voluntary. Section 7(a)(1) of the Act calls for Federal agencies (including the Department of the Interior), in consultation with and assistance from the Secretary of the Interior, to utilize their authorities in furtherance of the purposes of the Act. Section 7(a)(2) of the Act requires Federal agencies to ensure that any Federal action would not likely jeopardize the continued existence of the species or result in the destruction or adverse modification of critical habitat. Section 9 of the Act includes prohibitions on the removal and reduction to possession; maliciously damaging or destroying, or removing, cutting, digging up, or damaging or destroying in knowing violation of any state law; or in violation of a state criminal trespass law of *A. l.* var. *coachellae* on Federal lands.

The Bureau of Land Management (BLM) continues to manage *Astragalus lentiginosus* var. *coachellae* under the California Desert Conservation Act and other authorities, including section 7 of the Act. We have made significant progress in completing the Coachella Valley MSHCP/NCCP and we believe that the plan would provide a greater level of conservation to *A. l.* var. *coachellae* than would sections 4, 7, and 9 of the Act by themselves. The plan provides for the conservation of core habitat areas and other conserved habitats that would benefit the species, protects necessary ecological processes and biological corridors and linkages, implements monitoring and management programs, and restricts activities that result in adverse impacts to this plant.

(12) *Comment:* A peer reviewer stated that we should include a discussion on the Service's authority (if any) to monitor compliance of the Coachella Valley MSHCP/NCCP and ensure that conservation measures for *Astragalus lentiginosus* var. *coachellae* are implemented as proposed in the draft plan.

Our Response: Section 10(a)(2)(B) of the Act specifies that an incidental take permit ''shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.'' The draft Coachella Valley MSHCP/NNCP includes monitoring and reporting requirements that will be incorporated into any permit issued under the plan.

(13) *Comment:* The same peer reviewer also stated that the Service should describe any proposed monitoring or adaptive management in the draft plan that might ensure adequate remedial work that will be done if needed.

Our Response: The draft Coachella Valley MSHCP/NCCP follows an adaptive management approach that involves development of objectives, conceptual models of system dynamics, a monitoring program, and changes to management based on monitoring results. The facets are interrelated and their integration will test assumptions systematically in order to adapt and learn.

(14) *Comment:* A peer reviewer stated that the Service's analysis of the benefits of excluding lands covered under the draft Coachella Valley MSHCP/NCCP did not present a cogent argument for why the benefits of excluding critical habitat within the draft Coachella Valley MSHCP/NCCP outweigh the benefits of inclusion.

Our Response: We believe that our argument for excluding non-Federal lands within the draft Coachella Valley MSHCP/NCCP emphasizes the point that benefits of a comprehensive management plan that covers a federally listed plant on non-Federal lands will garner more conservation benefits than designating critical habitat (see section titled Relationship of Critical Habitat to the Pending Coachella Valley Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan and Natural Community Conservation Plan (MSHCP/NCCP) for a more detailed discussion).

Comments From the State

Section 4(i) of the Act states, ''the Secretary shall submit to the State agency a written justification for her failure to adopt regulation consistent with the agency's comments or petition.'' No comments were received from the State regarding the proposal to designate critical habitat for the *Astragalus lentiginosus* var. *coachellae.*

Comments Related to the Process of Designating Critical Habitat

(15) *Comment:* One commenter stated that the Service failed to cite any scientific evidence supporting our decision to exclude certain areas with habitat containing features essential to the conservation of the taxon from the critical habitat designation.

Our Response: Section 4(b)(2) of the Act allows us to consider the economic, national security, and any other relevant impact of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species. As outlined in the proposed rule, we determined the benefits of exclusion outweigh the benefits of including lands covered by the draft Coachella Valley MSHCP/NCCP. We have also clarified our determination that exclusion of

these areas will not result in extinction of the species (see section titled Relationship of Critical Habitat to the Pending Coachella Valley Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan and Natural Community Conservation Plan (MSHCP/NCCP) for a more detailed discussion).

(16) *Comment:* A commenter contended that Habitat Conservation Plans (HCPs: In this case the draft Coachella Valley MSHCP/NCCP) have very different goals for species conservation than critical habitat designations. HCPs allow for take of covered species, reducing species numbers that are already in crisis of extinction even further and further reducing listed species opportunity for recovery. Whereas, a critical habitat designation and protection are meant to promote recovery of the species (section 3(3) and 3(5) of the Act; F.3d 434 and the August 6, 2004, Ninth Circuit judicial opinion, *Gifford Pinchot Task Force* v. *United State Fish and Wildlife Service*). Furthermore, under the Act, ''essential habitat'' and ''unoccupied areas'' that are critical to the species survival and recovery have no legal definition and therefore no legal standing under the law. As a result, the commenter contended that by not designating critical habitat as required, the Service is an abdication of responsibility to follow the law.

Our Response: The Service has operated under the Secretary's discretion to exclude areas from critical habitat if the benefits of such exclusion outweigh the benefits of its inclusion. Section 4(b)(2) of The Act states ''the Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.''

The Service's exclusion of areas containing features essential to the conservation of *Astragalus lentiginosus* var. *coachellae* from critical habitat is based on the inclusion of these areas within conservation areas of a nearly approved HCP. The benefits to *A. l.* var. *coachellae* that are garnered from a HCP outweigh the benefits of including these areas as designated critical habitat and applying another regulatory hardship on HCP participants for lands that are already or will conservation benefits for *A. l.* var. *coachellae.*

(17) *Comment:* A commenter stated that there is a benefit of having designated critical habitat in excluded areas should the draft Coachella Valley MSHCP/NCCP and Coachella Valley Fringe-Toed Lizard HCP falter in their conservation mandate.

Our Response: If these HCPs were to fail in their conservation mandate, it would be possible for the Service to re-propose these areas for critical habitat designation. However, the Service has determined that the benefits of designating critical habitat in these areas do not outweigh the benefits of excluding these areas from designation while these lands are covered under either the Coachella Valley MSHCP or the Coachella Valley Fringe-Toed Lizard HCP, and therefore have excluded these areas from designation.

(18) *Comment:* One commenter expressed their concern that any designation of critical habitat within the draft Coachella Valley MSHCP/NCCP Plan Area may jeopardize the participation by various cities in the Plan.

Our Response: It is our determination that maintaining partnerships in the planning process for the Coachella Valley MSHCP/NCCP will provide a greater conservation benefit to *Astragalus lentiginosus* var. *coachellae* than designating critical habitat on lands under these partners' auspices and potentially losing their participation in the Plan.

(19) *Comment:* A commenter stated that the proposed critical habitat included only one of twenty-six *Astragalus lentiginosus* var. *coachellae* locations recorded in the California Natural Diversity Database (CNDDB). They also stated that it is unclear if the remaining locations are within lands excluded from the designation, and commented that all lands with habitat essential to the conservation of the taxon should be included as critical habitat. They also stated excluding critical habitat would hurt the recovery potential of the taxon.

Our Response: Ten of twenty-eight CNDDB records (there are 28 records rather than 26 as stated in the comment) were captured within areas that we have determined contain features essential to the conservation of this taxon. In determining these areas, it is important not only to look at quantity of locations that were captured, but also the quality of the locations that were captured. Several of the CNDDB records are in habitats that are severely degraded due to significant disturbance from nearby development. Additionally, in determining areas containing essential features, we compiled a larger dataset of *Astragalus lentiginosus* var. *coachellae* locations than just the CNDDB records. It is evident from our data that we have captured a majority of the high quality locations within areas possessing features essential to the conservation of this taxon. High-quality locations include those sites with PCEs and are within areas still functioning as part of one of the three major sand transport systems in the Coachella Valley. We believe we captured locations that have the best prognosis for long-term survival and are the areas essential to the conservation of the taxon. Our proposed rule for critical habitat designation of *A. l.* var. *coachellae* clearly mapped areas that were being proposed as critical habitat as well as areas that were proposed for exclusion. We do not believe that it should have been confusing to determine as to whether the CNDDB records were located either within proposed areas, excluded areas, or areas not containing features essential to the conservation of *A. l.* var. *coachellae.*

We also do not believe that all areas containing features essential to the conservation of *Astragalus lentiginosus* var. *coachellae* should be designated critical habitat if they are within areas that are already receiving or will very likely receive management benefits to this taxon (see section titled *Application of Section 3(5)(A) and Exclusions Under Section 4(b)(2) of the Act* for a more detailed discussion). On the same note, we do not believe that excluding critical habitat based on existing or pending habitat conservation plans would set back the recovery potential of *A. l.* var. *coachellae* since these plans provide more conservation benefits than would be provided by designating these areas as critical habitat. As a result, we believe that the long-term partnerships that are formed by agreeing to habitat conservation plans or other conservation plans that provide conservation benefits to *A. l.* var. *coachellae* work more effectively toward promoting the recovery of this taxon than would a critical habitat designation.

(20) *Comment:* One commenter stated that the critical habitat designation suffers from a lack of habitat connectivity.

Our Response: We recognize that habitat connectivity is an important aspect of a critical habitat designation because this allows for gene flow

between populations and recolonization of areas with endangered or extirpated populations. We used the best available scientific data to develop the criteria used to delineate critical habitat boundaries associated with both recent occurrences and occurrences known at the time of listing (see *Criteria Used To Identify Critical Habitat*). We recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery.

Comments Related to Site-Specific Areas and Unoccupied Areas Identified for Possible Inclusion

(21) *Comment:* One commenter requested that unoccupied areas identified in the proposed rule as being important to maintain fluvial and eolian processes be included as part of the final critical habitat designation.

Our Response: See response to Comment #2 above.

(22) *Comment:* A commenter stated that not all Coachella Valley Water District (CVWD) lands were excluded from the critical habitat designation, possibly due to the Service's use of outdated parcel data. Similarly, another commenter stated that we should remove all Granite Construction Company property from critical habitat designation and suggested that its inclusion may be due to errors in parcel data.

Our Response: We excluded all CVWD lands from critical habitat because of their participation and anticipated signatory status in the draft Coachella Valley MSHCP/NCCP planning process (see Discussion in Relation of Critical Habitat to the Pending Coachella Valley Multiple Species Habitat Conservation Plan/ Natural Communities Conservation Plan (MSHCP/NCCP)). The inclusion of CVWD property within the critical habitat designation was an artifact of our mapping process during the proposed rule for describing legal boundaries for areas with habitat containing features essential for the conservation of this taxon. The mapping process for the proposed rule overlaid a 100m by 100m grid on areas containing essential features to create an outer boundary that was used to describe the legal Universal Transverse Mercator (UTM) coordinates. In some areas, this process captured excluded Water District lands containing essential features for the conservation of this taxon. We changed our mapping procedure for the final designation and abandoned use of the grid system. Instead, the legal UTM coordinates for the boundary of the critical habitat followed precisely with the boundary of the areas containing essential features. As a result, all CVWD lands containing features essential for the conservation of this taxon were excluded from critical habitat designation pursuant to section 4(b)(2) of the Act.

Granite Construction Company lands were also included within the legal maps for the same reasons. After the change in our mapping process for the final designation, Granite Construction Company lands are no longer in critical habitat because they do not contain habitat with features essential to the conservation of this taxon.

(23) *Comment:* Two commenters requested that BLM lands north of the percolation ponds be removed from critical habitat because it is not suitable habitat. One of these commenters also requested that all remaining BLM lands within the draft Coachella Valley MSHCP/NCCP Plan be excluded from critical habitat because the BLM's California Desert Conservation Area Plan Amendment (CDCAPA) for the Coachella Valley already requires BLM to manage their lands consistent with the Coachella Valley MSHCP/NCCP.

Our Response: We agree with the commenter and all BLM lands that were proposed as critical habitat are excluded from designation in this final rule based on BLM's commitment under their CDCAPA to manage their lands consistent with the draft Coachella Valley MSHCP once it is completed (see section titled Relationship of Critical Habitat to the Pending Coachella Valley Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan and Natural Community Conservation Plan (MSHCP/NCCP) for a more detailed discussion).

(24) *Comment:* One commenter stated that the *Astragalus lentiginosus* var. *coachellae* population located north of Desert Center also be included as critical habitat since it represents an important peripheral population. The commenter also discusses other peripheral populations that were not included.

Our Response: Although the *Astragalus lentiginosus* var. *coachellae* population in Desert Center appears unusual because it is so disjunct from the main center of the taxon's range, we do not have any information indicating that this population has special demographic, ecological, or genetic significance. It is not the intent of the Act to include every population throughout a species' range within critical habitat. The commenters did not provide information indicating the significance of the Desert Center population or what other peripheral populations should have been included within critical habitat.

(25) *Comment:* A commenter requested clarification on the area of proposed critical habitat in Unit 1 outside the bounds of the Whitewater Floodplain Conservation Area (southeast of the Conservation Area).

Our Response: This area has been determined to not contain features essential to the conservation of *Astragalus lentiginosus* var. *coachellae* and has been removed from critical habitat.

Comments Related to the Draft Economic Analysis

(26) *Comment:* A commenter stated that the draft economic analysis (DEA) should have included an analysis of benefits, such as maintaining natural flood control processes along waterways, amenity values, open space, flood/drought mitigation, and detoxification and decomposition of wastes.

Our Response: In the context of a critical habitat designation, the primary purpose of the rulemaking (*i.e.,* the direct benefit) is to designate areas in need of special management that contain the features that are essential to the conservation of listed species.

The designation of critical habitat may result in two distinct categories of benefits to society: (1) Use; and (2) non-use benefits. Use benefits are simply the social benefits that accrue from the physical use of a resource. Visiting critical habitat to see endangered species in their natural habitat would be a primary example. Non-use benefits, in contrast, represent welfare gains from ''just knowing'' that a particular listed species' natural habitat is being specially managed for the survival and recovery of that species. Both use and non-use benefits may occur unaccompanied by any market transactions.

A primary reason for conducting this analysis is to provide information regarding the economic impacts associated with a proposed critical habitat designation. Section 4(b)(2) of the Act requires the Secretary to designate critical habitat based on the best scientific data available after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. Economic impacts can be both positive and negative and by definition,

are observable through market transactions.

Where data are available, this analysis attempts to recognize and measure the net economic impact of the proposed designation. For example, if the fencing of a species' habitat to restrict motor vehicles results in an increase in the number of individuals visiting the site for wildlife viewing, then the analysis would recognize the potential for a positive economic impact and attempt to quantify the effect (*e.g.*, impacts that would be associated with an increase in tourism spending by wildlife viewers). In this particular instance, however, the economic analysis did not identify any credible estimates or measures of positive economic impacts that could offset some of the negative economic impacts analyzed earlier in this analysis.

Under Executive Order 12866, OMB directs Federal agencies to provide an assessment of both the social costs and benefits of proposed regulatory actions. OMB's Circular A–4 distinguishes two types of economic benefits: direct benefits and ancillary benefits. Ancillary benefits are defined as favorable impacts of a rulemaking that are typically unrelated, or secondary, to the statutory purpose of the rulemaking. In the context of critical habitat, the primary purpose of the rulemaking (*i.e.*, the direct benefit) is the potential to enhance conservation of the species. The published economics literature has documented that social welfare benefits can result from the conservation and recovery of endangered and threatened species. In its guidance for implementing Executive Order 12866, OMB acknowledges that it may not be feasible to monetize, or even quantify, the benefits of environmental regulations due to either an absence of defensible, relevant studies or a lack of resources on the implementing agency's part to conduct new research. Rather than rely on economic measures, the Service believes that the direct benefits of the proposed rule are best expressed in biological terms that can be weighed against the expected cost impacts of the rulemaking.

We have accordingly considered, in evaluating the benefits of excluding versus including specific area, the biological benefits that may occur to a species from designation (see below, Exclusions Under section 4(b)(2) of the Act), but these biological benefits are not addressed in the economic analysis.

(27) *Comment:* The same commenter objected to the attribution of conservation costs that benefit multiple sympatric species solely to *Astragalus lentiginosus* var. *coachellae* in the DEA.

Our Response: The DEA discusses other relevant regulations and protection efforts for other listed species that include *Astragalus lentiginosus* var. *coachellae* and its habitat. In general, the analysis errs conservatively in order to make certain the economic effects have not been missed. It treats as ''coextensive'' other Federal and State requirements that may result in overlapping protection measures (*e.g.*, California Environmental Quality Act) for the plant. The economic analysis distributes the cost of conserving *A. l.* var. *coachellae* habitat equally among the number of other listed species likely to co-exist with *A. l.* var. *coachellae* as indicated by the historical consultations. None of the past *A. l.* var. *coachellae* consultations focused solely on *A. l.* var. *coachellae* but rather on other listed and sensitive species co-occurring in the area. Within a biological opinion or HCP that covers several species, we are unable to accurately segregate out the cost for an individual species from the rest of the species covered in the biological opinion or HCP.

(28) *Comment:* The same commenter stated that the DEA does not make a distinction between the costs of listing the species under the Act versus designating critical habitat.

Our Response: The economic analysis is intended to assist the Secretary in determining whether the benefits of excluding particular areas from the designation outweigh the biological benefits of including those areas in the designation. Also, this information allows us to comply with direction from the U.S. 10th Circuit Court of Appeals that ''co-extensive'' effects should be included in the economic analysis to inform decision-makers regarding which areas to designate as critical habitat (*New Mexico Cattle Growers Association* v. *U.S. Fish and Wildlife Service* (248 F.3d 1277)).

This analysis identifies those potential activities believed to be most likely to threaten *Astragalus lentiginosus* var. *coachellae* and its habitat and, where possible, quantifies the economic impact to avoid, mitigate, or compensate for such threats within the boundaries of the critical habitat designation. Where critical habitat is being proposed after a species is listed, some future impacts may be unavoidable, regardless of the final designation and exclusions under section 4(b)(2). However, due to the difficulty in making a credible distinction between listing and critical habitat effects within critical habitat boundaries, this analysis considers all future conservation-related impacts to be co-extensive with the designation.

(29) *Comment:* A commenter contended that pre-designation impacts are attributed to the listing of the species and not critical habitat, and therefore should not be included in the DEA.

Our Response: The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the designation of critical habitat for *Astragalus lentiginosus* var. *coachellae.* The Act defines critical habitat to mean those specific areas that are essential to the conservation of the species. The Act also defines conservation to mean the use of all methods and procedures necessary to bring any endangered species or threatened species to the point at which the measures of the Act are no longer necessary. Thus we interpret the Act to mean that the economic analysis should include all of the economic impacts associated with the conservation of the species, which may include some of the effects associated with listing because the species was listed prior to the proposed designation of critical habitat. We note that the Act generally requires critical habitat to be designated at the time of listing, and, that had we conducted an economic analysis at that time, the impacts associated with listing would not be readily distinguishable from those associated with critical habitat designation.

(30) *Comment:* A commenter questioned the framework for quantifying conservation-related costs in the DEA of critical habitat for *Astragalus lentiginosus* var. *coachellae* for flood control projects, local transportation projects, California Department of Transportation (Caltrans) mitigation, and all other projects within the boundaries of the draft Coachella Valley MSHCP/NCCP as these projects and the costs associated with them are covered under the draft Coachella Valley MSHCP/NCCP.

Our Response: As described in Section 8.6.2 of the DEA, the post-designation Coachella Valley MSHCP/NCCP costs captured by the DEA include management, monitoring, and administration of the Coachella Valley MSHCP/NCCP reserve system. These costs are calculated and allocated based on the rate of projected development within the units. Other non-development related activities also contribute funds toward the management, monitoring and management of the Coachella Valley MSHCP/NCCP. As described in Section 6.1.2.2 of the DEA, CVAG, the joint

powers authority functioning as lead agency for the preparation of the draft Coachella Valley MSHCP/NCCP, is expected to contribute approximately $1 million toward management, monitoring, and administration of the Coachella Valley MSHCP/NCCP for transportation projects. The costs related to these transportation projects are not captured in the estimated Coachella Valley MSHCP/NCCP costs. Furthermore, as described in Sections 6.1.2.3 and 8.1.1.2 of the DEA, the costs captured in the DEA for Caltrans mitigation and flood control are related to land acquisitions, and land acquisition costs were not captured in the estimated Coachella Valley MSHCP/NCCP costs. The Coachella Valley MSHCP/NCCP costs estimated in the DEA include management, monitoring, and administration of the Coachella Valley MSHCP/NCCP reserve system.

(31) *Comment:* The same commenter questioned the use of cost information from the draft Coachella Valley MSHCP/NCCP in the DEA since the Coachella Valley MSHCP/NCCP is not yet finalized and will not be prior to final designation of critical habitat for *Astragalus lentiginosus* var. *coachellae*.

Our Response: As described in Section 1.3 of the DEA, estimates of post-designation effects are based on activities that are ''reasonably foreseeable,'' including, but not limited to, activities that are currently authorized, permitted, or funded, or for which proposed plans are currently available to the public. The draft Coachella Valley MSHCP/NCCP falls under this latter category. While in draft form, planning and development of the Coachella Valley MSHCP/NCCP began 12 years ago in 1994, and it is anticipated that the Coachella Valley MSHCP/NCCP will become permitted by year-end 2005. Furthermore, as described in response to Issue 1, considering the Coachella Valley MSHCP/NCCP costs captured by the DEA are separate from the estimated non-development-related costs, there are no double counting issues.

(32) *Comment:* A commenter questioned the consistency in the allocation of habitat conservation plan-related costs to *Astragalus lentiginosus* var. *coachellae* in the DEA. In particular, the commenter questioned why conservation costs to develop the Agua Caliente Band of Cahuilla Indians HCP were not allocated to costs of critical habitat for *Astragalus lentiginosus* var. *coachellae*.

Our Response: As described in Section 3.4 of the DEA, a draft HCP proposing coverage for 24 species, including *Astragalus lentiginosus* var. *coachellae*, has been developed for the Agua Caliente Indian Reservation. In the proposed rule, we did not identify habitat on Agua Caliente Tribal lands as containing features essential for the conservation of the *Astragalus lentiginosus* var. *coachellae*, thus, no pre or post-designation costs are estimated on Tribal lands as associated with the critical habitat designation.

(33) *Comment:* A commenter questioned the relevancy of some of the development-related *Astragalus lentiginosus* var. *coachellae* conservation costs described in Table 13. Specifically, the commenter questioned the inclusion of costs that do not directly or indirectly benefit *A. l.* var. *coachellae*.

Our Response: As described in Section 5.1 of the DEA, the section 7 consultation history involving *Astragalus lentiginosus* var. *coachellae* and development projects was reviewed. The consultation history for *A. l.* var. *coachellae* provides the types of conservation activities incurred by developers for conserving *A. l.* var. *coachellae* and its habitat. The costs associated with these consultations are not included in the DEA as these projects occurred in areas not identified in the proposed CHD. However, the information on the conservation activities is provided for background information on conservation efforts for the species and its habitat. Furthermore, while the commenters do not cite specific examples of costs included in the analysis that do not directly or indirectly benefit *A. l.* var. *coachellae*, this analysis does not include conservation costs for activities that do not benefit *A. l.* var. *coachellae.*

(34) *Comment:* A commenter questioned the DEA's derivation of the ''not allocated'' pre-designation costs of conserving *Astragalus lentiginosus* var. *coachellae* incurred by development in essential habitat in Table 15 of the DEA.

Our Response: The commenter is correct; Section 5.1.4 and Table 15 in the DEA are incorrect. Based on the consultation history for *Astragalus lentiginosus* var. *coachellae*, there have been five informal consultations and one formal consultation where the project proponent was required to implement *A. l.* var. *coachellae* conservation efforts. However, because these projects occurred in areas not identified in the proposed critical habitat designation, costs associated with these consultations are not included in this analysis. While the text and table in Section 5.1.4 of the DEA describe and estimate pre-designation costs for these projects, the remaining tables and text appropriately do not include these impacts. The final economic analysis will update Section 5.1.4 and Table 15 to exclude these costs; however, the final results of the report are not changed by this comment.

(35) *Comment:* A commenter asserted that the methodology used to quantify development impacts in the DEA is questionable as it assumes that habitat will be destroyed and it does not examine the ability of habitat to be acquired.

Our Response: Section 2.2.2.1 of the DEA describes the model applied to estimate impacts to development. The draft Coachella Valley MSHCP/NCCP has proposed implementation of a one-time mitigation fee for future development within the boundaries of the Coachella Valley MSHCP/NCCP. These funds will be used by the County to finance the future acquisition of lands for the Coachella Valley MSHCP/NCCP reserve and are captured by the DEA (Section 5.2.1). The DEA assumes that development is allowed in habitat areas if appropriate mitigation fees paid. That is, this open city modeling approach assumes that land is not lost to development, but instead that development occurs with mitigation, for example, preserving habitat outside the footprint of the development project. It is uncertain which specific areas containing essential features may be developed during the forecast period and when those areas may be developed. By assuming that all future development is allowed in habitat areas with appropriate mitigation fees, the DEA captures the cost to development projects of protecting the plant and its habitat.

(36) *Comment:* A commenter requested clarification on whether the Whitewater River/Thousand Palms Flood Control project is covered under the draft Coachella Valley MSHCP/NCCP, if it is on hold due to lack of funding, or if it is moving forward.

Our Response: As described in Section 8.2.1 of the DEA, ''Currently, the flood control project has been delayed due to a lack of funding for the project. Therefore, at this time it is not possible to determine what, if any, additional measures may be required due to the proposed project redesign. However, the flood control project is a ''Covered Activity'' in the draft Coachella Valley MSHCP.''

(37) *Comment:* A commenter questioned the ''not allocated'' pre-designation costs in Table 27 of the DEA of conserving *Astragalus lentiginosus* var. *coachellae* incurred by the BLM in areas containing features essential to the conservation of *A. l.* var. *coachellae*.

Our Response: The commenter identified a mistake in Table 27 of the DEA. These costs occurred in areas not identified in the proposed critical habitat designation and should not be included in this Table. The remaining tables and text in the DEA appropriately do not include these impacts. The final economic analysis will update Table 27 to exclude these costs; however, the final results of the report are not changed by this comment.

(38) *Comment:* A commenter stated the cost model used in the DEA to estimate the administrative cost of section 7 consultation is highly inflated.

Our Response: As described in Section 2.2 of the DEA, the cost model is based on a survey of Federal agencies and Service Field Offices across the country and the costs are believed to be representative of the typical range of costs of the section 7 consultation process. Throughout the development of the DEA, stakeholders were asked whether the range of estimated consultation costs was reasonable. In the case that stakeholders anticipated higher or lower costs, this improved information would be applied in the DEA. No stakeholders indicated, however, that the range of costs applied in the DEA was inappropriate.

(39) *Comment:* A commenter stated that the cost estimates of species conservation as provided in the DEA conflict with the cost estimated in the draft Coachella Valley MSHCP/NCCP. Therefore, either the DEA or the draft Coachella Valley MSHCP/NCCP contains errors in its impact estimates.

Our Response: Section E.S.5 of the draft Coachella Valley MSHCP/NCCP summarizes the costs of implementing the plan, including non-acquisition program administration costs, Monitoring Program, Management Program, and Adaptive Management Costs, and land acquisition and land improvement costs. The draft Coachella Valley MSHCP/NCCP estimates these costs will total almost $1.5 billion during the first 75 years of implementing the Coachella Valley MSHCP/NCCP. This impact estimate, however, is not directly comparable to that in the DEA as the policy actions being analyzed are different. The draft Coachella Valley MSHCP/NCCP estimates the cost of acquiring and managing its reserve area and conservation actions for the multiple species covered under the plan. Further, the geographic scope of the draft Coachella Valley MSHCP/NCCP and the areas designated as critical habitat for *Astragalus lentiginosus* var. *coachellae* are different.

(40) *Comment:* A commenter questioned the use of ''low income farmers'' as an example of a group that may be adversely affected by species conservation in Section 1.1 of the DEA. The commenter stated that no Federal nexus exists for farming activity and therefore farming is exempt from any regulation by the Endangered Species Act.

Our Response: As described in Appendix A of the DEA, approximately 39 ac (16 ha) of private lands in Units 1 and 2 are classified as agriculture land and were included in proposed critical habitat. While the number of agriculture acres was negligible in the proposed rule, and actually not designated as critical habitat in the final rule, the use of farmers as an example of a group of individuals that could be impacted in Section 1.1 of the DEA is simply for illustrative purposes and is considered appropriate. In addition, while a Federal nexus may not exist for farming activities, the DEA quantifies coextensive effects. As defined in Section 1.2, the DEA estimates impacts associated with overlapping protective measures of other Federal, State, and local laws that aid habitat conservation in the areas proposed for designation.

(41) *Comment:* A commenter requested that a more equitable input-output model be used to evaluate the regional economic effects in the DEA.

Our Response: As described in Section 1.1.2.2 of the DEA, it was assumed that development is not restricted by critical habitat designation, but that developers will instead mitigate their activities through mitigation fee payments to address *Astragalus lentiginosus* var. *coachellae* conservation concerns. Therefore, regional economic impacts are not expected as a result of *A. l.* var. *coachellae* conservation efforts.

(42) *Comment:* A commenter mentioned that critical habitat for plants has no jurisdiction on private lands that lack a federal nexus and that the DEA does not address this issue.

Our Response: As described in Section 2.2.2 of the DEA, the critical habitat designation for *Astragalus lentiginosus* var. *coachellae* or any other threatened or endangered species has the potential to impose costs on private individuals or groups of individuals if there is a connection or nexus between private activities and Federal actions. For example, if a Federal permit is required before developers can begin construction or if there is Federal funding for a private activity, then it is possible that the provisions of the Act, including critical habitat designation, may potentially restrict private actions if the action results in a section 7 consultation. This analysis appropriately identifies and analyzes economic impacts on activities that may occur on private lands within the proposed critical habitat areas. Furthermore, the DEA is not limited to only those activities with a Federal nexus. As described in Section 1.1, the DEA quantifies costs associated with measures taken to protect the species and its habitat, not just section 7-related costs.

(43) *Comment:* A commenter stated Section 4.3.2 of the DEA must be modified to clarify that benefits are limited to areas where *Astragalus lentiginosus* var. *coachellae* and fringe-toed lizard are sympatric, not through the whole range of *A. l.* var. *coachellae*.

Our Response: This comment clarifies statements in the DEA on page 46. This comment does not change the results of the report.

Summary of Changes From the Proposed Rule

In developing the final designation of critical habitat for *Astragalus lentiginosus* var. *coachellae*, we reviewed peer and public comments received on the proposed designation of critical habitat published on December 14, 2004 (69 FR 74468) and draft economic analysis published on September 27, 2005 (70 FR 56434); conducted further evaluation of lands proposed as critical habitat; updated our mapping parcel data; and were more precise with our mapping.

We modified our mapping process in the final rule from the proposed rule to remove 675 ac (272 ha) of Service's Refuge lands and private lands that were inadvertently proposed as critical habitat. These lands were either already excluded from critical habitat under section 4(b)(2) of the Act or did not contain features essential for the conservation of *Astragalus lentiginosus* var. *coachellae*. In the proposed rule, we used a process that overlaid a grid on areas containing features essential for the conservation of *A. l.* var. *coachellae* in order to produce legal Universal Transverse Mercator (UTM) coordinates that represented the critical habitat boundaries. This gridding process extended the legal boundaries beyond the boundaries of the areas containing essential features and consequently included private lands that did not contain essential features or included private lands and Service Refuge lands that contained essential features, but were intended to be excluded under section 4(b)(2) of the Act. For the final designation, we have abandoned the use of the gridding process and have based

the legal coordinates precisely on the boundaries of the areas containing essential features. Based on this mapping modification, we removed all proposed private and Service Refuge lands (675 ac (272 ha)) from critical habitat.

In addition to the non-Federal lands that were excluded pursuant to section 4(b)(2) of the Act based on their coverage under the draft Coachella Valley MSHCP/NCCP, we have also excluded BLM lands that were proposed as critical habitat. BLM is an official cooperator with the Coachella Valley MSHCP/NCCP and has committed to manage their lands consistent with the MSHCP/NCCP under their California Desert Conservation Area Plan Amendment for the Coachella Valley that was signed in 2002 (see section titled Pending Coachella Valley Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan (MSHCP/NCCP for a more detailed discussion).

We have also determined that BLM and Service Refuge (Coachella Valley National Wildlife Refuge) lands within the Coachella Valley Preserve System do not meet the definition of critical habitat under section 3(5)(A) of the Act since these lands may not require special management considerations due to their inclusion and management within the Coachella Valley Preserve System under the Coachella Valley Fringe-Toed Lizard HCP. Both the BLM and the Service entered into an MOU with the Coachella Valley Fringe-Toed Lizard HCP in 1986 that defined their roles and responsibilities for managing their lands within the Coachella Valley Preserve System. Conservation measures outlined in the Coachella Valley Fringe-Toed Lizard HCP also benefit *Astragalus lentiginosus* var. *coachellae* since it has similar habitat requirements as the Coachella Valley fringe-toed lizard for sandy soils. Based on this HCP and MOU, we have not included 3,527 ac (1,427 ha) of Service Refuge lands from Unit 3 and 128 ac (52 ha) of BLM lands from all three units (see section titled Relationship of Critical Habitat to Federal Lands within the Coachella Valley Fringe-Toed Lizard HCP—Application of Section 3(5)(A) of the Act for a more detailed discussion). Table 1 reflects the changes made in this final rule and outlines the total area containing habitat with features essential to the conservation of *A. l.* var. *coachellae*, areas excluded from final critical habitat under the pending Coachella Valley MSHCP/NCCP or not included based on the approved Coachella Valley Fringe-Toed Lizard HCP, and total area designated as final critical habitat.

TABLE 1.—TOTAL AREA CONTAINING HABITAT WITH ESSENTIAL FEATURES, AREAS EXCLUDED FROM FINAL CRITICAL HABITAT UNDER THE PENDING COACHELLA VALLEY MSHCP/NCCP, AND AREAS NOT INCLUDED AS CRITICAL HABITAT WITHIN THE COACHELLA VALLEY PRESERVE SYSTEM UNDER THE COACHELLA VALLEY FRINGE-TOED LIZARD HCP, AND TOTAL AREA DESIGNATED AS FINAL CRITICAL HABITAT FOR ASTRAGALUS LENTIGINOSUS VAR. COACHELLAE (AC/HA)

Critical habitat unit	Total area containing habitat with essential features	Area excluded under pending Coachella Valley MSHCP/NCCP	Area not included under Coachella Valley Fringe-Toed Lizard HCP	Total area designated as final critical habitat
1. Whitewater River System	8,210 ac (3,323 ha)	8,188 ac (3,314 ha)	22 ac (9 ha)	0 ac. (0 ha).
2. Mission Creek/Morongo Wash System	4,699 ac (1,901 ha)	4,607 ac (1,864 ha)	92 ac (37 ha)	0 ac. (0 ha).
3. Thousand Palms System	4,837 ac (1,958 ha)	1,296 ac (525 ha)	3,541 ac (1,433 ha)	0 ac. (0 ha).
Total	17,746 ac (7,182 ha)	14,091 ac (5,703 ha)	3,655 ac (1,480 ha)	0 ac. (0 ha).

In the proposed rule we requested comment on the potential inclusion of unoccupied sand source areas downwind and downstream of suitable habitat. We received feedback from three commenters, all of whom supported including these areas in the critical habitat designation as areas containing habitat with features essential to the conservation of the taxon. We acknowledge the importance of sand to this species in the Primary Constituent Elements section and have determined that inclusion of the sand sources areas in the final critical habitat designation is not essential to the conservation of the species as these areas are both unoccupied and unsuitable for *Astragalus lentiginosus* var. *coachellae*. Finally, the draft Coachella Valley MSHCP/NCCP is proposing to protect sand source areas in a way that will benefit *A. l.* var. *coachellae*.

Our Primary Constituent Elements have been revised to reflect only features essential for the conservation of *Astragalus lentiginosus* var. *coachellae* on lands that are occupied by this taxon and on which we are designating critical habitat. The Primary Constituent Elements in the proposed rule included features that occurred only on lands that are not expected to ever be occupied by *A. l.* var. *coachellae* (sand source areas), and which we do not consider to be essential to the conservation of this species.

We have included a discussion in the Section 7 Consultation section that explains the relationship between critical habitat and BLM activities that are covered under their California Desert Conservation Area Plan.

We changed the land ownership data in GIS for the final rule. We determined that the ownership data provided by the CVAG is superior to the State ownership data that was used in the proposed rule because it is a region-specific dataset that is currently being used in land management planning for the Coachella Valley region. This changed the land ownership classification for areas in the proposed rule that were thought to be State Lands Commission lands. These lands were reclassified in the final rule as either private or CVWD lands under the CVAG's dataset. Because of our section 4(b)(2) exclusion determinations

for this designation, lands under these ownerships were excluded from critical habitat designation.

Critical Habitat

Critical habitat is defined in section 3 of the Act as—(i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. Conservation, as defined under section 3 of the Act means to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on Federal actions that are likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow government or public access to private lands. Section 7 is a purely protective measure and does not require implementation of restoration, recovery, or enhancement measures.

To be included in a critical habitat designation, the habitat within the area occupied by the species must first have features that are essential to the conservation of the species. Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species (i.e., areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Habitat occupied at the time of listing may be included in critical habitat only if the essential features thereon may require special management or protection. Thus, we do not include areas where existing management is sufficient to conserve the species. (As discussed below, such areas may also be excluded from critical habitat pursuant to section 4(b)(2).) Accordingly, when the best available scientific data do not demonstrate that the conservation needs of the species require additional areas, we will not designate critical habitat in areas outside the geographical area occupied by the species at the time of listing. An area currently occupied by the species but was not known to be occupied at the time of listing will likely, but not always, be essential to the conservation of the species and, therefore, typically included in the critical habitat designation.

The Service's Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Service represent the best scientific data available. They require Service biologists to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information is generally the listing package for the species. Additional information sources include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge. All information is used in accordance with the provisions of Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Methods

As required by section 4(b)(1)(A) of the Act, we use the best scientific data available in determining areas that are essential to the conservation of *Astragalus lentiginosus* var. *coachellae*. This includes information from our own documents, including the final rule listing the taxon as endangered (63 FR 53596), recent biological surveys, reports, aerial photos, and other documentation. We also used the habitat model developed by the Coachella Valley Mountain Conservancy (CVMC) for the proposed Coachella Valley MSHCP/NCCP (CVMC 2004), as a starting point for identification of areas with habitat that contain features essential to the conservation of this taxon and compared it to data from other plant surveys.

We have also reviewed available information that pertains to the habitat requirements of this species. We used published historical surveys for *Astragalus lentiginosus* var. *coachellae* and ecological descriptions of the Sonoran Desert (Abrams 1944, Munz and Keck 1959, Shreve and Wiggins 1964, Turner and Brown 1982, Holland 1986) to describe the range of environmental conditions in which the plant existed prior to current landscape changes that have resulted in the loss of the species' habitats. We used data in

reports submitted during section 7 consultations and by biologists holding section 10(a)(1)(A) recovery permits to evaluate the habitat model developed for the plant (Sanders and Thomas Olsen Associates 1996, Service unpublished Geographic Information System (GIS) data). We also used agency and academic reports to describe the sand transport systems (Lancaster et al 1993, Griffiths *et al.* 2002) and used reports about related varieties of *Astragalus lentiginosus* to describe its ecology and phenology (Beatley 1974, Forseth *et al.* 1984, and Pavlik 1985). Finally, we used information and materials submitted during the public comment period for the proposed critical habitat rule.

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to designate as critical habitat that were within the geographic area occupied by the species at the time of listing, we are required to base critical habitat determinations on the best scientific data available and to consider those physical and biological features (primary constituent elements (PCEs)) that are essential to the conservation of the species, and that may require special management considerations or protection. These include, but are not limited to: Space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The primary constituent elements essential to the conservation of *Astragalus lentiginosus* var. *coachellae* are derived from the physical and biological features that are essential to the conservation of this taxon as described below.

Space for Individual and Population Growth Within the Eolian (Wind-Blown) Sand Transport System

Astragalus lentiginosus var. *coachellae* has a limited distribution. The majority of populations are found in the Coachella Valley area, mostly in and around Snow Creek, Whitewater River, Mission and Morongo Creeks, Willow Hole, Big Dune, and Coachella Valley Preserve areas (Bureau of Land Management, unpublished data 2001b). There are also several historic and recent records southeast of the Coachella Valley in the Chuckwalla Valley, along approximately a 5-mile portion of Highway 177 northeast of Desert Center (Bureau of Land Management, unpublished data 2001a).

Astragalus lentiginosus var. *coachellae* populations in the Coachella Valley are strongly affiliated with active, stabilized, and shielded sandy substrates (Holland 1986, Sanders and Thomas Olsen Associates 1996). This taxon is primarily found on loose eolian (wind transported) and rarely on alluvial (water transported) sands that are located on dunes or flats, and along disturbed margins of washes (Barneby 1964). The highest densities of *A. l.* var. *coachellae* have been found in locations containing large deposits of eolian sand, including Snow Creek (Sanders and Thomas Olsen Associates 1996), Big Dune, and Willow Hole areas (Bureau of Land Management, unpublished data 2001b).

The sandy substrates that provide suitable habitat for *Astragalus lentiginosus* var. *coachellae* are extremely dynamic in terms of spatial mobility and tendency to change back and forth from active to stabilized (Lancaster 1995). This has significant consequences for *A. l.* var. *coachellae* because their population densities vary with different types of sandy substrates. For instance, the greatest densities of plants have been recorded on dune and hummock habitats, such as Big Dune, Snow Creek and Willow Hole, whereas smaller densities of plants have been recorded on stabilized sand fields (Bureau of Land Management, unpublished GIS data 2001b). Conserving a wide variety of sandy substrate types is important for the conservation of *A. l.* var. *coachellae* because of the dynamics of the eolian sand transport processes.

Active dunes are generally characterized as barren expanses of moving sand where perennial shrub species are sparse. These dunes may intergrade with stabilized or partially stabilized dunes, which have similar sand accumulations and formations, but are stabilized by evergreen or deciduous shrubs, scattered low annuals, and perennial grasses.

Active sand fields are similar to active dunes, but are characterized as smaller sand accumulations that are not of sufficient depth to form dune formations. These may be characterized as hummocks forming behind individual shrubs or clumps of vegetation.

Stabilized sand fields are similar to active sand fields, but contain sand accumulations that are stabilized by vegetation or are armored. Armoring is the process where the wind picks up and moves small sand grains, and leaves behind larger sand grains forming an ''armor'' that prevents wind from moving additional smaller particles trapped below (Sharp and Saunders 1978). The stabilized sand fields in the latter case are temporary, becoming active when the armor is disturbed over large areas, or new blow sand is deposited from upwind fluvial depositional areas.

Astragalus lentiginosus var. *coachellae* is also found in shielded sand dunes and fields. These areas have similar sand formations as compared to active and stabilized sand dunes and fields, except that sand source and transport systems that would normally replenish these areas have been interrupted or shielded by human development.

Astragalus lentiginosus var. *coachellae* also occurs in localized patches of eolian sand or in active washes that are, in some cases, fairly distant from large dunes or sand field areas. Some of these localized patches of eolian sands are characterized as ephemeral sand accumulations lacking dune formation. This type of habitat generally occurs at the western end of the Coachella Valley where wind velocities are highest (Sharp and Saunders 1978).

Astragalus lentiginosus var. *coachellae* fruiting bodies are inflated, an apparent adaptation for being dispersed by wind. Protecting wind transport corridors between *A. l.* var. *coachellae* populations from obstruction is important for allowing inflated fruit pods to disperse to other areas and promote gene flow among populations. Protecting these corridors is also important for allowing pollinators to reach different populations and presumably assist in also maintaining gene flow. Finally, some of the fine sands blowing across the corridor are deposited and occasionally accumulate and serve as ephemeral habitat.

Primary Constituent Elements for Astragalus lentiginosus var. coachellae

Based on our current knowledge of the life history, biology, and ecology of the species and the requirements of the habitat to sustain the essential life history functions of the species, we have determined that *Astragalus lentiginosus* var. *coachellae*'s primary constituent elements are:

1. Active sand dunes, characterized as large accumulations of moving sand with sparse perennial shrub cover that are contained within one of the three major sand transport systems (Whitewater River, Mission Creek and

Morongo Wash, and Thousand Palms sand transport systems), that provide soil conditions for the growth of *Astragalus lentiginosus* var. *coachellae.*

2. Stabilized or partially stabilized sand dunes containing evergreen or deciduous shrubs, scattered low annuals, or perennial grasses that are contained within one of the three major sand transport systems (Whitewater River, Mission Creek and Morongo Wash, and Thousand Palms sand transport systems) and providing soil conditions for individual population growth of *Astragalus* lentiginosus var. *coachellae.*

3. Active or stabilized sand fields containing smaller sand accumulations than dunes and are often characterized as hummocks forming on leeward sides of shrubs that are contained within one of the three major sand transport systems (Whitewater River, Mission Creek and Morongo Wash, and Thousand Palms sand transport systems) and providing soil conditions for individual growth of *Astragalus lentiginosus* var. *coachellae*. Stabilized fields are similar to active fields but contain sands stabilized by vegetation or that are armored.

4. Shielded sand fields or dunes that are contained within one of the three major sand transport systems (Whitewater River, Mission Creek and Morongo Wash, and Thousand Palms sand transport systems) and providing soil conditions for individual growth of *Astragalus lentiginosus* var. *coachellae.* These habitat features are similar to active or stabilized sand fields or dunes, except the sand source is no longer able to replenish these areas with new sand due to anthropogenic factors.

5. Active washes containing fluvial sand deposits that are contained within one of the three major sand transport systems (Whitewater River, Mission Creek and Morongo Wash, and Thousand Palms sand transport systems) and providing soil conditions for individual growth of *Astragalus lentiginosus* var. *coachellae.*

6. Ephemeral non-sandy areas within the sand transport system where mass movements of sand by eolian processes can occur and that are contained within one of the three major sand transport systems (Whitewater River, Mission Creek and Morongo Wash, and Thousand Palms sand transport systems) and providing soil conditions for individual growth of *Astragalus lentiginosus* var. *coachellae.*

Unoccupied Areas Identified for Possible Inclusion

The Act has different standards for designation of critical habitat in occupied and unoccupied habitat. For areas occupied by the species, these are '' (i) the specific areas on which are found those physical and biological features essential to the conservation of the species and that may require special management considerations or protection. For areas not occupied, a determination is required that the entire area is essential for the conservation of the species before it can be included in critical habitat. Congress has also cautioned the Service to be ''exceedingly circumspect'' in designating unoccupied areas as critical habitat.

Our proposed rule included a section containing Unoccupied Areas Identified for Possible Inclusion, for which we requested comment regarding whether all, only a portion, or none of these areas should be included in the designation. *Astragalus lentiginosus* var. *coachellae's* PCEs are dependent on sand being continually replenished from sand source areas upwind and upstream of where it occupies. Those areas identified for possible inclusion included sand source areas (mountain drainages) for each Unit that function to provide fluvial sediment containing sands to fluvial depositional areas where wind transports the sands to areas that support the taxon's PCEs. Areas identified for specific review included mountain drainages in the San Bernardino and San Jacinto mountains for Unit 1, mountain drainages in the eastern San Bernardino and Little San Bernardino mountains for Unit 2, and mountain drainages in the Indio Hills west of Thousand Palms Canyon for Unit 3. For a more detailed discussion on the function of these sand source areas see *Areas Containing the Fluvial and Eolian Processes That Generate Suitable Habitat* in the proposed designation of critical habitat for *A. l.* var. *coachellae* (69 FR 74468). We also requested comment on whether the draft Coachella Valley MSHCP/NCCP would provide for sufficient sand transport to maintain *A. l.* var. *coachellae,* and whether there are threats to sand source areas that would be addressed by designating them as critical habitat.

Although peer review and public comment were generally favorable towards including the unoccupied sand source areas in the final critical habitat designation, we are only designating areas actually occupied at the time of listing in 1998. We have determined that the presence of active sand dunes (PCE 1) is an essential feature, and we have designated them as a PCE. We believe that the PCEs adequately describe the essential function of the seed source areas in occupied areas. Further, we believe the draft Coachella Valley MSHCP/NCCP will adequately address the issue of protecting the function of these sand source areas so that they continue to replenish sands to protected sandy habitat areas in the Coachella Valley.

Criteria Used To Identify Critical Habitat

We are designating critical habitat on lands that we have determined were occupied at the time of listing, are currently known to be occupied, contain the primary constituent elements essential for the conservation of *Astragalus lentiginosus* var. *coachellae,* and may be in need of special management considerations or protection

We reevaluated the proposed designations based on public comment, peer review of the proposed rule, the economic analysis of the proposed rule, the public comments on that analysis, and other available information, to ensure that the designation accurately reflects habitat with the PCEs that is essential to the conservation of *Astragalus lentiginosus* var. *coachellae.* All areas identified in the model are within the historical and current ranges of *A. l.* var. *coachellae* and contain the PCEs described above. Rather than designate every area containing PCEs, we designated only those areas which available evidence suggests those areas support the numbers and distribution of *A. l.* var. *coachellae* conservation. Areas for which the evidence available at this time was less certain were not included in this designation, although we believe these areas to be important to the species and may include them in future recovery plans. We designated critical habitat for *A. l.* var. *coachellae* in areas that are necessary to advance at least one of the following conservation criteria:

(1) The conservation of areas representative of the geographic distribution of the species since species that are protected across their ranges have lower chances of extinction (Soule and Simberloff 1986; Pavlik 1996; Noss *et al.* 1999);

(2) The conservation of areas representative of the ecological distribution of the species. *Astragalus lentiginosus* var. *coachellae* is associated with various sandy soil types and vegetation communities. Maintaining the full range of varying habitat types and characteristics for a species is necessary because it would include the full extent of the physical and biological conditions necessary for the species (Noss *et al.* 2002).

(3) The conservation of areas necessary to allow movement of pollen and seeds between areas representative of the geographic and ecological distribution of *Astragalus lentiginosus* var. *coachellae.*

(4) The conservation of areas that still function within one of three major sand transport systems within the geographic range of this taxon in the northern Coachella Valley. These three systems named for the purposes of this rule are the Whitewater River, Mission Creek/Morongo Wash, and Thousand Palms sand transport systems. The sand transport systems are very important for sustaining the various types of sandy habitats required by *Astragalus lentiginosus* var. *coachellae* in the Coachella Valley. The eolian sands in the valleys originate in the drainage basins in the surrounding mountains. Major precipitation and flooding episodes erode sediment from the hillslopes and carry it downstream through the fluvial systems. Fine-grained sediments are deposited in either bajadas (alluvial fans) or depositional areas that form the supply of sand for the eolian sand transport system.

In cases where more occupied areas were present than were needed for the conservation of the geographic or ecological distribution of the species, we gave priority to areas which were would be receiving protection under the draft Coachella Valley MSHCP/NCCP.

Astragalus lentiginosus var. *coachellae* is one of the species proposed for coverage by the proposed Coachella Valley MSHCP/NCCP. A spatially explicit habitat model for the plant in the Coachella Valley spanning from Cabezon to Thousand Palms was created to assist in the design of preserves and to evaluate the potential benefits of the MSHCP/NCCP on *A. l.* var. *coachellae* (Coachella Valley Mountain Conservancy (CVMC) 2004). We used this habitat model to assist us in identifying specific areas to designate as critical habitat for the *A. l.* var. *coachellae.* The model was developed with occurrence data for *A. l.* var. *coachellae* (Bureau of Land Management, unpublished data 2001b). Environmental variables associated with the occurrence locations were identified and maps containing those variables were combined with GIS land use and habitat information to create the model. Eight types of habitats were used in the model: (1) Margins of active dunes, (2) active shielded desert dunes, (3) stabilized desert dunes, (4) stabilized sand fields, (5) stabilized shielded sand fields, (6) ephemeral sand fields, (7) active sand fields, and (8) mesquite hummocks.

Because the model has not been refined with any field data since it was developed (CVMC 2004), we reviewed the validity of the environmental variables used to create the model with occurrence data and information about the plant's ecology. We found records for *Astragalus lentiginosus* var. *coachellae* in all of the natural communities used to create the model. The areas we determined contain essential features for the conservation of this taxon include a mosaic of these habitat types, as well as intervening areas of ephemeral habitat to allow for the transport of wind-dispersed seed pods and eolian sands between locations containing large areas of habitat.

Habitat with essential features for the conservation of *Astragalus lentiginosus* var. *coachellae* was mapped using GIS and refined using topographical and aerial map coverages. We excluded areas containing features essential for the conservation of this taxon that were covered under legally operative or nearly completed habitat conservation plans (HCPs) pursuant to section 4(b)(2) of the Act. Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed animal species incidental to otherwise lawful activities. An incidental take permit application must be supported by an HCP that identifies conservation measures that the permittee agrees to implement for the species to minimize and mitigate the impacts of the requested incidental take. We encourage HCP applicants to also incorporate measures to provide for the conservation of listed plant species. We often exclude non-Federal public lands and private lands that are covered by an existing operative HCP and executed implementation agreement (IA) under section 10(a)(1)(B) of the Act from designated critical habitat because the benefits of exclusion outweigh the benefits of inclusion as discussed in section 4(b)(2) of the Act.

In the final rule, we described the legal Universal Transverse Mercator (UTM) coordinates, North American Datum 27, of the critical habitat boundaries by recording coordinates along actual boundaries of the areas containing features essential to the conservation of *Astragalus lentiginosus* var. *coachellae.* This is in contrast to the proposed critical habitat rule where we overlaid a 100-meter by 100-meter grid on areas containing essential features to determine the critical habitat boundaries that were described as the legal UTM coordinates. The 100-meter gridding process in the proposed rule was used to provide a more easily describable boundary for habitat boundaries that are often non-linear. However, we abandoned using this process because it created confusion by inadvertently capturing areas outside of areas containing features essential to the conservation of this taxon or areas that were originally excluded pursuant to section 4(b)(2) of the Act as described above.

When determining critical habitat boundaries, we made every effort to avoid including within the boundaries of the map contained within this final rule developed areas such as buildings, paved areas, and other structures that lack primary constituent elements for *Astragalus lentiginosus* var. *coachellae.* The scale of the maps prepared under the parameters for publication within the *Code of Federal Regulations* may not reflect the exclusion of such developed areas. Any such structures and the land under them inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in the proposed rule and are not designated as critical habitat. Therefore, Federal actions limited to these areas would not trigger section 7 consultation, unless they affect the species and/or primary constituent elements in adjacent critical habitat.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the primary constituent elements contained with the identified habitat may require special management considerations or protection. As we undertake the process of designating critical habitat for a species, we first evaluate lands defined by those physical and biological features essential to the conservation of this taxon for inclusion in the designation pursuant to section 3(5)(A) of the Act. Secondly, we evaluate lands defined by those features to assess whether they may require special management considerations or protection. Threats to *Astragalus lentiginosus* var. *coachellae's* PCEs include direct and indirect effects of residential and commercial development and exotic plant species.

Areas containing features essential to the conservation of *Astragalus lentiginosus* var. *coachellae* may require special management due to threats posed by urban development that are not designed to avoid direct destruction of *A. l.* var. *coachellae's* PCEs and that obstruct eolian sand transport to areas that contain the PCEs. On private lands, urban and golf course developments destroy plants and occupied habitat directly. Large housing and golf course

developments may also affect the localized wind and flooding regimes by reducing wind movement by the structures and landscaping and by changing the flooding and drainage patterns. Occupied habitats downstream and downwind of these developments, dependent upon the continuous replenishment of loose unconsolidated sands for their long-term existence, may be degraded by the alteration, blockage, and reduction in their supply of sand. In addition, some areas may require special management due to other types of development that are also not designed to avoid direct impacts to *Astragalus lentiginosus* var. *coachellae's* PCEs and that obstruct eolian sand transport to areas that contain the PCEs. On public lands, the construction and operation of sand and gravel mining, dams, and percolation ponds in western Coachella Valley can directly impact plants and occupied habitat and decrease the amount of fluvial transported sediments to deposition areas downstream occupied habitats. For example, the percolation ponds constructed on BLM areas resulted in the direct loss of plants and occupied habitat and may have altered the transport of sand to downstream occupied habitats. *Astragalus lentiginosus* var. *coachellae* is threatened by the lack of minimization measures in project designs for operation and maintenance of these facilities that reduce both direct impacts to *A. l.* var. *coachellae* and its habitat and indirect impacts to sand transportation downstream and downwind from these facilities to occupied habitats. Finally, some areas may require special management due to other threats posed by invasive exotic plants to *Astragalus lentiginosus* var. *coachellae's* PCEs. On both private and public lands in the Coachella Valley region, the major invasive exotic plant species include Saharan mustard (*Brassica tournefortii*), Mediterranean grass (*Schismus barbatus*), and Russian thistle (*Salsola tragus*). The invasion of these exotic species is likely having indirect effects on *Astragalus lentiginosus* var. *coachellae's* PCEs by reducing wind velocity near ground level and stabilizing loose sediments that are a major component of the PCEs. The reduction in sand movement reduces the quality of the PCEs (loose-sandy habitat) that support *A. l.* var. *coachellae* populations and obstructs eolian sand transport to downwind areas containing PCEs. Further, the reduction in sand movement may reduce the amount of scarification that is often necessary to germinate *A. l.* var. *coachellae's* seeds.

Final Critical Habitat Designation

We determined that approximately 17,746 ac (7,182 ha) of habitat that was known to be occupied at the time of listing and is known to be currently occupied and contains features essential to the conservation of *Astragalus lentiginosus* var. *coachellae* exist in Riverside County, California (Table 1). All 17,746 ac (7,182 ha) are within areas that are conserved or will soon be conserved under HCPs, including 3,655 ac (1,479 ha) that is already conserved within the Coachella Valley Preserve System under the approved Coachella Valley Fringe-Toed Lizard HCP and 14,091 ac (5,703 ha) that will very likely be conserved under the Coachella Valley MSHCP/NCCP. On the basis of our evaluation of the conservation measures afforded to *A. l.* var. *coachellae* under the Coachella Valley Fringe-Toed Lizard HCP, we have concluded that the Federal lands within the Coachella Valley Preserve System that contain features essential to conservation of this taxon do not meet the definition of critical habitat under section 3(5)(A) of the Act because they may not require special management considerations. In addition, on the basis of our evaluation of the conservation measures that will very likely be afforded to *A. l.* var. *coachellae* under the draft Coachella Valley MSHCP/NCCP, we have concluded that the benefit of excluding the lands covered by this MSHCP/NCCP outweighs the benefit of including them as critical habitat (see section titled *Application of Section 3(5)(A) and Exclusions Under Section 4(b)(2) of the Act* for a more detailed discussion), and therefore are excluding these lands from critical habitat designation pursuant to section 4(b)(2) of the Act. As a result, we are not designating any areas containing features essential to the conservation of *A. l.* var. *coachellae* as critical habitat *in this final rule.*

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. Such alterations include, but are not limited to: ''Alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.'' We are currently reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports may include reasonable and prudent alternatives or reasonable and prudent measures to assist the agency in eliminating conflicts that may be caused by the proposed action. We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). Until such time as a proposed designation is finalized, any reasonable and prudent alternatives or reasonable and prudent measures included in a conference report are advisory.

If a species is listed or critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the action agency ensures that their actions do not destroy or adversely modify critical habitat.

When we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. ''Reasonable and prudent alternatives'' are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the

Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or are likely to adversely modify or destroy proposed critical habitat.

Federal activities that may affect the *Astragalus lentiginosus* var. *coachellae* or its critical habitat will require section 7 consultation. Activities on private or State lands requiring a permit from a Federal agency, such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act, a section 10(a)(1)(B) permit from the Service, or some other Federal action, including funding (*e.g.,* Federal Highway Administration or Federal Emergency Management Agency funding), will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal and private lands that are not federally funded, authorized, or permitted do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat may also jeopardize the continued existence of the *Astragalus lentiginosus* var. *coachellae*. Federal activities that, when carried out, may adversely affect critical habitat for the *A. l.* var. *coachellae* include, but are not limited to:

(1) Activities that inhibit downstream sediment transport and the replenishment of sands to areas of occupied habitat, and thus degrading the PCEs, such as active sand dunes or fields, in areas containing features essential for the conservation of *Astragalus lentiginosus* var. *coachellae*. An example of such activity includes sand and gravel mining within stream channels;

(2) Activities that block downwind transport of eolian sands to areas of suitable habitat, and thus degrading the PCEs, such as active sand dunes or fields, in areas containing features essential for the conservation of *Astragalus lentiginosus* var. *coachellae*. Examples of such activities include any type of development or the planting of tamarisk rows that obstruct near surface winds carrying eolian sands;

(3) Activities that foster invasion of exotic weeds in areas containing features essential to the conservation of *Astragalus lentiginosus* var. *coachellae* (*e.g.,* roads, landscaping, soil disturbance) that may outcompete *A. l.* var. *coachellae* for valuable resources and may stabilize sands in upwind areas and prevent them from being transported to areas containing features essential for the conservation of *A. l.* var. *coachellae*.

Both designated critical habitat Units are known to be occupied by *Astragalus lentiginosus* var. *coachellae*. Federal agencies already consult with us on activities in areas currently occupied by the taxon or if the taxon may be affected by the action to ensure that their actions do not jeopardize the continued existence of the *A. l.* var. *coachellae*.

On December 24, 2002, we issued a *Biological Opinion* on the BLM's California Desert Conservation Area Plan Amendment (CDCAPA) for the Coachella Valley . At issue was the proposed amendment to the 1980 BLM California Desert Conservation Area Plan (CDCA Plan).

Congress designated the CDCA with Section 601 of the Federal Land Policy and Management Act (FLPMA) of 1976. To provide for management of recreational use, as well as to resolve other resource and public land use conflicts, FLPMA also directed the Secretary of the Interior to ''prepare and implement a comprehensive, long-range plan for management, use, development, and protection of the public lands within the CDCA.'' The CDCA Plan was signed in January 1980, and this document now serves as the primary document that describes the basic management principles that the BLM uses for managing their portion of the CDCA. The CDCA Plan has undergone numerous minor amendments over the past 25 years, including major amendments to divide it into five eco-regions/planning areas. The Coachella Valley is one of five bioregional planning areas under the CDCA Plan. Amendments to this plan for each bioregion address unique biological resource issues that are applicable to a given area, and prescribe management actions that address local land use needs. To more effectively and consistently manage their portion of the public lands within the CDCA, the BLM developed a land zoning system that provided specific land management prescriptions. Under this zoning strategy, different areas are assigned to one of four multiple-use classes (MUC). The MUC assignment is based on the considered sensitivity of resources and kinds of uses occurring in each geographic area.

Under their CDCAPA for the Coachella Valley, the BLM proposes seven interim measures to protect federally listed species, including *Astragalus lentiginosus* var. *coachellae*. These interim measures were developed to conserve species during development of the Coachella Valley MSHCP/NCCP. These interim measures that are relevant to *A. l.* var. *coachellae* include: (1) The BLM will only consider land exchanges or disposals involving threatened or endangered species habitat if they benefit the species; and (2) the BLM will not allow any new activities that may adversely affect *A. l.* var. *coachellae* on BLM lands within the conservation areas of the draft Coachella Valley MSHCP/NCCP. In addition, the BLM will manage for maintenance of hydrologic regime and sand sources for all known populations and habitat of *A. l.* var. *coachellae* on BLM lands.

Overall, the CDCAPA for the Coachella Valley bioregion provided general guidance that can either benefit or adversely affect the conservation of federally listed species, including *Astragalus lentiginosus* var. *coachellae*, depending on location and project type relative to their Multiple-Use Class activity guidelines. However, future activities and projects will still need to receive site-specific environmental review and section 7 consultation.

Application of Section 3(5)(A) and Exclusions Under Section 4(b)(2) of the Act

Section 3(5)(A) of the Act defines critical habitat as the specific areas within the geographic area occupied by the species on which are found those physical and biological features (i) essential to the conservation of the species and (ii) which may require special management considerations or protection. Therefore, areas within the geographic area occupied by the species that do not contain the features essential

for the conservation of the species are not, by definition, critical habitat. Similarly, areas within the geographic area occupied by the species that do not require special management also are not, by definition, critical habitat. To determine whether an area requires special management, we first determine if the essential features located there generally require special management to address applicable threats. If those features do not require special management, or if they do in general but not for the particular area in question because of the existence of an adequate management plan or for some other reason, then the area does not require special management.

We consider a current plan to provide adequate management or protection if it meets three criteria: (1) The plan is complete and provides a conservation benefit to the species (*i.e.*, the plan must maintain or provide for an increase in the species' population, or the enhancement or restoration of its habitat within the area covered by the plan); (2) the plan provides assurances that the conservation management strategies and actions will be implemented (*i.e.*, those responsible for implementing the plan are capable of accomplishing the objectives, and have an implementation schedule or adequate funding for implementing the management plan); and (3) the plan provides assurances that the conservation strategies and measures will be effective (*i.e.*, it identifies biological goals, has provisions for reporting progress, and is of a duration sufficient to implement the plan and achieve the plan's goals and objectives).

Further, section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species.

In our critical habitat designations, we use both provisions outlined in sections 3(5)(A) and 4(b)(2) of the Act to evaluate those specific areas that we proposed for designation as critical habitat. Lands we have found that do not meet the definition of critical habitat under section 3(5)(A), and lands excluded pursuant to section 4(b)(2) include those covered by the following types of plans if they provide assurances that the conservation measures they outline will be implemented and effective: (1) Legally operative HCPs that cover the species, (2) draft HCPs that cover the species and have undergone public review and comment (i.e., pending HCPs), (3) Tribal conservation plans that cover the species, (4) State conservation plans that cover the species, and (5) National Wildlife Refuge System Comprehensive Conservation Plans. Table 1 contains a summary of areas containing features essential to the conservation of *Astragalus lentiginosus* var. *coachellae* that do not meet the definition of critical habitat as well as areas containing essential features that are being excluded from critical habitat in this rule.

Relationship of Critical Habitat to Federal Lands Within the Coachella Valley Fringe-Toed Lizard HCP—Application of Section 3(5)(A) of the Act

We are not including areas containing features essential to the conservation of *Astragalus lentiginosus* var. *coachellae* in portions of all three units that are contained within Federal lands (BLM and Service Refuge lands) within the boundaries of the Coachella Valley Preserve System in the Coachella Valley fringe-toed lizard HCP under section 3(5)(A) of the Act. On April 21, 1986, the Service approved and issued a Section 10(a)(1)(B) incidental take permit under the Act for the Coachella Valley fringe-toed lizard under the Coachella Valley Fringe-Toed Lizard HCP and IA. The HCP called for the establishment of three separate preserves for the conservation of the Coachella Valley fringe-toed lizard: (1) The Coachella Valley Preserve; (2) the Willow Hole-Edom Hill Preserve; and (3) the Indian Avenue Preserve within the Whitewater River floodplain, which are collectively known as the Coachella Valley Preserve System. Acquisition and maintenance of the Coachella Valley Preserve System was the basis for the issuance of the Service's section 10(a) permit to allow the incidental take of the Coachella Valley fringe-toed lizard on private lands. The Coachella Valley Preserve System is managed cooperatively by the major landowners within each Preserve, including the BLM, the Service, the CDFG, and The Nature Conservancy. These major landowners signed an IA in 1986 that defined their roles and responsibilities in the management of the Coachella Valley Preserve System, which was later amended in 1991 to include the CDPR as a major landowner. Another amendment on August 3, 1999 transferred management responsibilities by the TNC to the Center for Natural Lands Management (CNLM). The Coachella Valley Preserve System was designed to capture habitats closely associated with the Coachella Valley fringe-toed lizard, including primarily loose, unstabilized, windblown sand. These habitats encompass several of the PCEs important for the conservation of *Astragalus lentiginosus* var. *coachellae*, including active sand dunes, stabilized or partially stabilized sand dunes, active or stabilized sand fields, and shielded sand fields that are contained within the Thousand Palms sand transport system.

Even though *Astragalus lentiginosus* var. *coachellae* is not a covered species under the Coachella Valley Fringe-Toed Lizard HCP, it receives conservation benefits from the management of the Coachella Valley Preserve System due to the protections afforded to the habitats associated with the Coachella Valley fringe-toed lizard that are also associated with *Astragalus lentiginosus* var. *coachellae*. In May 1995, the BLM prepared the Coachella Valley Preserve System Management Plan and Decision Record (CVPS Management Plan) that provided guidance for managing the Coachella Valley Preserve System. The proposed CVPS Management Plan was available for public review in October 1994. The CVPS Management Plan discussed management actions that were designed to conserve other sand-dependent sensitive species, including *Astragalus lentiginosus* var. *coachellae* (which was a Federal candidate species at the time). These management actions included, acquisition of suitable habitat for the Coachella Valley fringe-toed lizard, law enforcement, install and maintain boundary fencing and signs, research effective methods for removing exotic invasive weeds, such as Russian thistle (*Salsola tragus*) and mustard (*Brassica tournefortii*), and research techniques for enhancing sand deposition into the preserves.

In order for the Secretary to determine that an area is adequately managed and does not require special management, the Secretary must evaluate existing management and find that it provides (1) a conservation benefit to the species; (2) reasonable assurances for implementation; and (3) reasonable assurances that conservation efforts will be effective. The Secretary has reviewed the management plan and actions for the Coachella Valley Preserve System and has determined that the Preserve System is adequately managed for *Astragalus lentiginosus* var. *coachellae*, and therefore does not need special management. Therefore, all areas within BLM and Service Refuge lands

containing features essential for the conservation of *A. l.* var. *coachellae* within the boundaries of the Coachella Valley Preserve System are not included in this final critical habitat designation pursuant to section 3(5)(A) of the Act. Finally, rather than not including the other non-Federal landowners within the Coachella Valley Preserve System in critical habitat, these lands are excluded from critical habitat pursuant to section 4(b)(2) of the Act because of their intent to be signatories to the draft Coachella Valley MSHCP/NCCP.

Relationship of Critical Habitat to Pending Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act requires us to consider other relevant impacts, in addition to economic impacts, when designating critical habitat. Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed wildlife species incidental to otherwise lawful activities. Development of an HCP is a prerequisite for the issuance of an incidental take permit pursuant to section 10(a)(1)(B) of the Act. An incidental take permit application must be supported by an HCP that identifies conservation measures that the Permittee agrees to implement for the species to minimize and mitigate the impacts of the permitted incidental take. Although take of plant species is not prohibited under the Act, and therefore cannot be authorized under an incidental take permit, plant species are included on the permit in recognition of the conservation benefits provided to them under the HCP and for the purposes of the No Surprises assurances.

HCPs vary in size and may provide for incidental take coverage and conservation management for one or many federally listed species. Additionally, more than one applicant may participate in the development and implementation of an HCP. Large regional HCPs expand upon the basic requirements set forth in section 10(a)(1)(B) of the Act because they reflect a voluntary, cooperative approach to large-scale habitat and species conservation planning. Many of the large regional HCPs in southern California have been, or are being, developed to provide for the conservation of numerous federally listed species and unlisted sensitive species and the habitat that provides for their biological needs. These HCPs are designed to proactively implement conservation actions to address future projects that are anticipated to occur within the planning area of the HCP. However, given the broad scope of these regional HCPs, not all projects envisioned to potentially occur may actually take place.

In developing critical habitat designations, the Service has analyzed habitat conservation planning efforts to determine if the benefits of excluding them from critical habitat outweigh the benefits of including them in designated critical habitat. In reviewing HCPs, the Service has assessed the potential impacts of critical habitat designation on lands covered by HCPs on future partnerships, the status of HCP efforts and progress made in developing and implementing such plans, and their relationship to the conservation of species. In certain circumstances, the Service has determined that an HCP not yet completed may be considered for exclusion from critical habitat designation pursuant to section 4(b)(2) of the Act.

Pending Coachella Valley Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan (MSHCP/NCCP)

We re-affirmed our December 14, 2004, proposed rule exclusion of non-Federal lands containing features essential for the conservation of *Astragalus lentiginosus* var. *coachellae* within the draft Coachella Valley MSHCP/NCCP's plan area under section 4(b)(2) of the Act (69 FR 74468). In addition, we have determined that BLM lands within the draft Coachella Valley MSHCP/NCCP that are outside of the Coachella Valley Preserve System warrant exclusion from the critical habitat designation due to their official participation in the draft Coachella Valley MSHCP/NCCP planning process and commitment under their CDCAPA to manage their lands consistent with the Coachella Valley MSHCP/NNCP once it is completed.

The draft Coachella Valley MSHCP/NCCP has been in development from the mid-1990s to present. Since 1997, the planning process has proceeded under the auspices of a Memorandum of Understanding governing the preparation of the MSHCP/NCCP entered into by the following entities: CVAG; the cities of Cathedral City, Coachella, Desert Hot Springs, Indian Wells, Indio, La Quinta, Palm Desert, Palm Springs, and Rancho Mirage; County of Riverside; the Service; California Department of Fish and Game (CDFG); BLM; U.S. Forest Service; and the National Park Service. Later, the Caltrans, CVWD, Imperial Irrigation District, Riverside County Flood Control and Water Conservation District, Riverside County Regional Parks and Open Space District, Riverside County Waste Management District, California Department of Parks and Recreation (CDPR), and Coachella Valley Mountains Conservancy also joined in preparation of the Plan. The parties later amended the Planning Agreement to also address the requirements of the NCCP Act and prepare a NCCP pursuant to California Fish and Game Code Section 2810. As stated in their CDCAPA for the Coachella Valley, BLM has committed 95% of their public land base within the conservation areas of the MSHCP/NCCP to be managed consistent with the MSHCP/NCCP. The MSHCP/NCCP area proposes to encompass approximately 1,131,000 ac (457,700 ha) in Riverside County. The MSHCP/NCCP is proposing to provide 747,000 ac (302,300 ha) of conservation areas that will provide conservation benefits for 52 federally listed and sensitive species, including *A. l.* var. *coachellae*, over the life of the permit (75 years). The Permittees' funding program proposes funding from a variety of potential sources, including, but not limited to: (1) Local development mitigation fees; (2) fees on the importation of waste into landfills and transfer stations in Riverside County; (3) transportation project mitigation; (4) regional infrastructure project mitigation; and (5) Eagle Mountain Landfill Environmental Mitigation Trust Fund. CVAG has demonstrated a sustained commitment to develop the MSHCP/NCCP to comply with section 10(a)(1)(B) of the Act, the California Endangered Species Act, and the State's NCCP program. On November 5, 2004, the Service published a Notice of Availability of a Final Environmental Impact Statement/Environmental Impact Report (EIS/EIR) for the MSHCP/NCCP.

All areas containing features essential for the conservation of *Astragalus lentiginosus* var. *coachellae* are contained within the proposed preferred alternative reserve design of the draft Coachella Valley MSHCP/NCCP. CVAG estimates there are 36,398 ac (14,730 ha) of modeled habitat for *A. l.* var. *coachellae* habitat within the draft Coachella Valley MSHCP/NCCP plan area. The draft MSHCP/NCCP proposes to conserve 19,321 ac (7,819 ha) of modeled *A. l.* var. *coachellae* habitat in their Conservation Areas that includes large core habitat areas and other important conservation areas, such as sand sources and sand transport corridors. Core habitat areas include: Snow Creek/Windy Point Conservation Area; Whitewater Floodplain Conservation Area; Willow Hole

Conservation Area; and Thousand Palms Conservation Area. Other goals include: (1) Protecting other important conservation areas to allow for population fluctuation and promote genetic diversity; (2) protecting necessary ecological processes, including the sand transport systems, that will be beneficial in maintaining the PCEs in the areas containing features essential for the conservation of *A. l.* var. *coachellae*; (3) maintaining biological corridors and linkages among all conserved populations to the maximum extent feasible; and (4) ensuring conservation of habitat quality through biological monitoring and adaptive management actions.

CVAG carefully considered all available and occupied habitats for *Astragalus lentiginosus* var. *coachellae* in developing their conservation strategy for this species. CVAG concluded that the habitats within the proposed Conservation Areas would provide long-term protection for self-sustaining populations of this taxon because of the following factors: (1) Conserved habitat areas are large enough to increase the likelihood for maintaining self-sustaining populations of *A. l.* var. *coachellae* and incorporate key habitat elements for the species; (2) potential adverse effects within Conservation Areas would not eliminate or significantly impact any core populations; (3) potential development would not adversely impact the necessary ecological processes (such as sand source and transport system) needed to maintain currently viable habitat, and (4) lands in the MSHCP/NCCP reserve system would be managed and monitored (CVMC 2004). The Service evaluated the Conservation Areas for *A. l.* var. *coachellae*, and based on our analysis and the best scientific data available, recognized that the Conservation Areas also contained the physical and biological features essential to the conservation of the species.

In light of the Service's confidence that CVAG will reach a successful conclusion to its MSHCP/NCCP development process and successfully conserve habitat for *Astragalus lentiginosus* var. *coachellae*, we have identified and excluded under section 4(b)(2) of the Act all lands (14,091 ac (5,703 ha)) containing features essential for the conservation of *A. l.* var. *coachellae* within the Coachella Valley MSHCP/NCCP plan area, including non-Federal lands covered by the MSHCP/NCCP and Federal lands managed consistent with the MSHCP/NCCP. We believe that CVAG has made significant progress in the development of its MSHCP/NCCP to meet the requirements outlined in section 10(a)(1)(B) of the Act.

(1) Benefits of Inclusion

Overall, we believe that there is minimal benefit from designating critical habitat for *Astragalus lentiginosus* var. *coachellae* within the draft Coachella Valley MSHCP/NCCP because, as explained above, these lands are being proposed to be managed for the conservation of this taxon.

A benefit of including an area within a critical habitat designation is the protection provided by section 7(a)(2) of the Act that directs Federal agencies to ensure that their actions do not result in the destruction or adverse modification of critical habitat. The designation of critical habitat may provide a different level of protection under section 7(a)(2) of the Act for *Astragalus lentiginosus* var. *coachellae* that is separate from the obligation of a Federal agency to ensure that their actions are not likely to jeopardize the continued existence of the endangered species. Under the *Gifford Pinchot* decision, critical habitat designations may provide greater benefits to the recovery of a species than was previously believed, but it is not possible to quantify this benefit at present. However, the protection provided is still a limitation on the harm that occurs as opposed to a requirement to provide a conservation benefit. We are in the final stages of completing a section 7 consultation on the issuance of the section 10(a)(1)(B) permit for the Coachella Valley MSHCP/NCCP for which *A. l.* var. *coachellae* is a covered species. The section 10(a)(1)(B) permit includes plants in recognition of the conservation value of the HCP and to provide ''No Surprises'' to Permittees, even though the take prohibition does not apply to plants.

If designated, primary constituent elements in this area would be protected from destruction or adverse modification by Federal actions using a conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. This requirement would be in addition to the requirement that proposed Federal actions avoid likely jeopardy to the species' continued existence. However, since all areas containing features essential for the conservation of the *Astragalus lentiginosus* var. *coachellae* are occupied, consultation for activities which may adversely affect the species would be required, even without the critical habitat designation.

Another potential benefit of designation would be to signal the importance of these lands to the conservation of *Astragalus lentiginosus* var. *coachellae* to Federal agencies and to the public. In *Sierra Club* v. *Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001), the Fifth Circuit Court of Appeals stated that the identification of habitat containing the features essential to the conservation of the species can provide informational benefits to the public, State and local governments, scientific organizations, and Federal agencies. The court also noted that heightened public awareness of the plight of listed species and their habitats may facilitate conservation efforts. The inclusion of an area as critical habitat may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation values for certain species. However, we believe that this educational benefit has largely been achieved for *A. l.* var. *coachellae*. The public outreach and environmental impact reviews required under the National Environmental Policy Act for the draft Coachella Valley MSHCP/NCCP provided significant opportunities for public education regarding the conservation of the areas occupied by *A. l.* var. *coachellae*. There would be little additional informational benefit gained from including these lands as critical habitat because of the level of information that has been, and continues to be, made available to the public as part of the regional planning effort. Additionally, we believe the value of the Conservation Areas to provide protection and enhancement of habitat for *Astragalus lentiginosus* var. *coachellae* within the draft Coachella Valley MSHCP/NCCP is well established among State and local governments, and Federal agencies even without the designation of critical habitat.

The inclusion of the identified 14,091 ac (5,703 ha) of land as critical habitat would provide some additional Federal regulatory benefits for the species consistent with the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. A benefit of inclusion would be the requirement of a Federal agency to ensure that their actions on these non-Federal lands do not likely result in jeopardizing the continued existence of the species or result in the destruction or adverse modification of critical habitat. This additional analysis to determine destruction or adverse modification of critical habitat is likely to be small because the lands are not under Federal ownership and any Federal agency proposing a Federal action on the 11,877 ac (4,807 ha) of non-Federal lands would likely consider

the conservation value of these lands as identified in the draft Coachella Valley MSHCP/NCCP and take the necessary steps to avoid jeopardy or the destruction or adverse modification of critical habitat.

As discussed below, however, we believe that designating any lands within the Coachella Valley MSHCP/NCCP as critical habitat would provide little additional educational and Federal regulatory benefits for the species. Because the excluded areas are occupied by the species, there must be consultation with the Service over any action which may result in adverse effects to these populations on Federal lands or on lands with a Federal nexus. The additional educational benefits that might arise from critical habitat designation have been largely accomplished through the public review and comment of the environmental impact documents which accompanied the development of the Coachella Valley MSHCP/NCCP.

For 30 years prior to the Ninth Circuit Court's decision in *Gifford Pinchot*, the Fish and Wildlife Service equated the jeopardy standard with the standard for destruction or adverse modification of critical habitat. However, in *Gifford Pinchot* the court noted the government, by simply considering the action's survival consequences, was reading the concept of recovery out of the regulation. The court, relying on the CFR definition of adverse modification, required the Service to determine whether recovery was adversely affected. The *Gifford Pinchot* decision arguably made it easier to reach an ''adverse modification'' finding by reducing the harm, affecting recovery, rather than the survival of the species. However, there is an important distinction: Section 7(a)(2) limits adverse effects to the species and its designated critical habitat through either a jeopardy or destruction or adverse modification analyses. It does not require positive improvements or enhancement of the species status. Thus, any management plan which considers enhancement or recovery as the management standard will almost always provide more benefit than the critical habitat designation. This is particularly true for management plans that include plants on non-Federal lands because plants do not receive protection stemming from the take prohibitions under the Act on non-Federal lands.

(2) Benefits of Exclusion

As mentioned above, the draft Coachella Valley MSHCP/NCCP proposes to provide for the conservation of the PCEs for *Astragalus lentiginosus* var. *coachellae* by: (1) Protecting important ecological processes that maintain the PCEs for *A. l.* var. *coachellae*; (2) maintaining biological corridors and linkages among all conserved populations to the maximum extent feasible; and (3) ensure conservation of habitat quality through biological monitoring and adaptive management actions, such as controlling exotic invasive weeds that may degrade the PCEs. The draft Coachella Valley MSHCP/NCCP therefore proposes to provide for the protection of PCEs, and address special management needs. Designation of critical habitat would therefore not provide as great a benefit to the species as the positive management measures in the plan.

The benefit of excluding lands within nearly completed HCPs from critical habitat designation includes relieving landowners, communities, and counties of any additional regulatory burden that might be imposed by a critical habitat designation consistent with the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. Many HCPs, particularly large regional HCPs take many years to develop and, upon completion, become regional conservation plans that are consistent with the recovery objectives for listed species that are covered within the plan area. Additionally, many of these HCPs provide conservation benefits to unlisted, sensitive species and federally listed plants that do not receive protections on non-Federal lands not subject to a Federal nexus. Imposing an additional regulatory review after an HCP is nearly completed solely as a result of the designation of critical habitat may undermine conservation efforts and partnerships in many areas. In fact, it could result in the loss of species' benefits if participants abandon the voluntary HCP process because the critical habitat designation may result in additional regulatory requirements than faced by other parties who have not voluntarily participated in species conservation. Designation of critical habitat within the boundaries of nearly approved HCPs could be viewed as a disincentive to those entities currently developing HCPs or contemplating them in the future. Another benefit from excluding these lands is to maintain the partnerships developed among several partners in the Coachella Valley including CVAG; the cities of Cathedral City, Coachella, Desert Hot Springs, Indian Wells, Indio, La Quinta, Palm Desert, Palm Springs, and Rancho Mirage; County of Riverside; CVWD, Imperial Irrigation District, Riverside County Flood Control and Water Conservation District, Riverside County Regional Parks and Open Space District, Riverside County Waste Management District, CDPR; Coachella Valley Mountains Conservancy; CDFG; Caltrans; BLM; U.S. Forest Service; the National Park Service; and us to complete and implement the Coachella Valley MSHCP/NCCP. Instead of using limited funds to comply with administrative consultation and designation requirements which cannot provide protection beyond what is currently in place, the partners could instead use their limited funds for the conservation of this species.

A related benefit of excluding lands within HCPs from critical habitat designation is the unhindered, continued ability to seek new partnerships with future HCP participants including States, Counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. If lands within nearly completed HCP plan areas are designated as critical habitat, it would likely have a negative effect on our ability to establish new partnerships to develop HCPs, particularly large, regional HCPs that involve numerous participants and address landscape-level conservation of species and habitats. By excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future. This is especially important for federally listed plants that do not receive take prohibitions under the Act on non-Federal lands. By including measures to conserve plants and habitat in an HCP, non-Federal participants are voluntarily agreeing to conserve plants that would not otherwise receive protections with a critical habitat designation. Further, imposing additional regulatory burdens on HCP participants with regard to a listed plant could discourage them from including plants as covered species and providing conservation benefits for them.

Furthermore, an HCP or NCCP/HCP application must itself be consulted upon. While this consultation will not look specifically at the issue of adverse modification to critical habitat, unless critical habitat has already been designated within the proposed plan area, it will determine if the HCP jeopardizes the species in the plan area. In addition, Federal actions not covered by the HCP in area that may affect occupied by listed species would still require consultation under section 7 of

the Act. HCP and NCCP/HCPs typically provide for greater conservation benefits to a covered species than section 7 consultations because HCPs and NCCP/HCPs assure the long-term protection and management of a covered species and its habitat, and funding for such management through the standards found in the 5 Point Policy for HCPs (64 FR 35242) and the HCP ''No Surprises'' regulation (63 FR 8859). Such assurances are typically not provided by section 7 consultations that, in contrast to HCPs, often do not commit the project proponent to long-term special management considerations or protections. Thus, a consultation typically does not accord the lands it covers the extensive benefits a HCP or NCCP/HCP provides. The development and implementation of HCPs or NCCP/HCPs provide other important conservation benefits, including the development of biological information to guide the conservation efforts and assist in species conservation, and the creation of innovative solutions to conserve species while allowing for development.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We have reviewed and evaluated the exclusion of 14,091 ac (5,703 ha) of lands within the nearly completed Coachella Valley MSHCP/NCCP plan area from critical habitat designation for *Astragalus lentiginosus* var. *coachellae*; and based on this evaluation, we find that the benefits of exclusion, which include potentially avoiding increased regulatory costs that could result from including those lands in this designation of critical habitat, ensuring the willingness of existing partners to continue active conservation measures, maintaining the ability of attracting new partners, and directing limited funding to conservation actions with partners, of the lands containing features essential to the conservation of *A. l.* var. *coachellae* within the draft Coachella Valley MSHCP/NCCP outweigh the benefits of inclusion, which include limited educational and regulatory benefits that are largely otherwise provided for under the draft MSHCP/NCCP, of these lands as critical habitat. The benefits of inclusion of these 14,091 ac (5,703 ha) of lands as critical habitat are lessened because of the significant level of conservation that is proposed to be provided for *A. l.* var. *coachellae* under the draft Coachella Valley MSHCP/NCCP, including the conservation of PCEs, protection of important ecological processes that maintain PCEs, maintenance of biological corridors and linkages among all conserved populations to the maximum extent feasible, and conservation of habitat quality through biological monitoring and adaptive management actions that may improve PCEs.

In contrast, the benefits of excluding 11,877 ac (4,807 ha) of non-Federal lands covered by their likely signatory status to the draft Coachella Valley MSHCP/NCCP and 2,214 ac (896 ha) of BLM lands based on their commitment under their CDCAPA for the Coachella Valley to manage their lands consistent with the draft Coachella Valley MSHCP/NCCP and official participation in the draft Coachella Valley MSHCP/NCCP planning process from critical habitat designation are increased because of the high level of cooperation by the participants in the Coachella Valley MSHCP/NCCP to conserve this taxon. This partnership exceeds any conservation value provided by a critical habitat designation, particularly for federally listed plants, which do not receive protection stemming from take prohibitions on non-Federal lands under the Act.

(4) Exclusion Will Not Result in Extinction of the Species

In the proposed designation of critical habitat for *Astragalus lentiginosus* var. *coachellae* published on December 14, 2004 (69 FR 74468), we excluded all non-Federal lands containing essential features for the conservation of *A. l.* var. *coachellae* from the proposed designation under Section 4(b)(2) of the Act because of their relationship to the draft Coachella Valley MSHCP/NCCP. In this final designation, we continue to believe that the exclusion of non-Federal lands as well as BLM lands (14,091 ac (5,703 ha)) in all three Units will not result in extinction of *A. l.* var. *coachellae* since all areas containing essential features for the conservation of *A. l.* var. *coachellae* are being proposed for conservation and management that will benefit this taxon pursuant to the draft Coachella Valley MSHCP/NCCP. The draft Coachella Valley MSHCP/NCCP includes specific conservation objectives, avoidance and minimization measures, and management for the draft Coachella Valley MSHCP/NCCP that exceed any conservation value provided as a result of a critical habitat designation.

The jeopardy standard of section 7 and routine implementation of habitat conservation through the section 7 process also provide assurances that the species will not go extinct. The exclusion leaves this protection unchanged from what would exist if the excluded areas were designated as critical habitat.

Critical habitat is being designated for *Astragalus lentiginosus* var. *coachellae* in other areas that will be accorded the protection from adverse modification by Federal actions using the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot.* These factors acting in concert with the other protections provided under the Act, lead us to find that exclusion of these 14,091 ac (5,703 ha) within the draft Coachella Valley MSHCP/NCCP will not result in extinction of *A. l.* var. *coachellae.*

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific information available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species concerned.

Following the publication of the proposed critical habitat designation, we conducted an economic analysis to estimate potential economic effects of the proposed *Astragalus lentiginosus* var. *coachellae* critical habitat designation (Northwest Economics Associates 2005). The draft analysis was made available for public review on September 27, 2005 (70 FR 56434). We accepted comments on the draft analysis until October 27, 2005.

The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the designation of critical habitat for the *Astragalus lentiginosus* var. *coachellae.* This information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. This economic analysis considers the economic efficiency effects that may result from the designation, including habitat protections that may be co-extensive with the listing of the species. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. This information can be used by the Secretary to assess whether the effects of the designation might unduly burden a particular group or economic sector.

This analysis focuses on the direct and indirect costs of the rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in the analysis as they are considered to be part of the regulatory and policy baseline.

There is no economic impact within the final designation because the Service has not designated any lands as critical habitat for *Astragalus lentiginosus* var. *coachellae.*

A copy of the final economic analysis and supporting documents are included in our administrative file and may be obtained by contacting the Carlsbad office (see **ADDRESSES** section).

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but it will not have an annual effect on the economy of $100 million or more or affect the economy in a material way. Due to the tight timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule. As explained above in the section titled Economic Analysis, we prepared an economic analysis of this action. We used this analysis to meet the requirement of section 4(b)(2) of the Act to determine the economic consequences of designating the specific areas as critical habitat. We also used it to help determine whether to exclude any area from critical habitat, as provided for under section 4(b)(2), if we determine that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless we determine, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. In our proposed rule, we withheld our determination of whether this designation would result in a significant effect as defined under SBREFA until we completed our draft economic analysis of the proposed designation so that we would have the factual basis for our determination.

According to the Small Business Administration (SBA), small entities include small organizations, such as independent nonprofit organizations, and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if this designation of critical habitat for *Astragalus lentiginosus* var. *coachellae* will affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (*e.g.,* residential, industrial, and commercial development). We considered each industry or category individually to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by the designation of critical habitat. Designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies; non-Federal activities are not affected by the designation.

Typically, when proposed critical habitat designations are made final, Federal agencies must consult with us if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process. Our analysis determined that costs involving conservation measures for *Astragalus lentiginosus* var. *coachellae* would be incurred for activities involving residential, commercial, and industrial development (land subdivision companies); transportation (Caltrans, CVAG, or Riverside County Transportation Commission); Federal land (BLM, U.S. Forest Service, and the Service); other public (CDFG and CDPR) or conservation (TNC and CNLM) land management; water supply (Mission Springs Water District and CVWD); flood control (CVWD and Riverside County Flood Control and Water Conservation District agencies); implementation of the draft Coachella Valley MSHCP/NCCP; and wind energy projects (private businesses and individuals). However, since no critical habitat is being designated, no consultations would be necessary.

In our economic analysis of the proposed designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of this species and designation of its critical habitat. Because zero acres of critical habitat are being designated, there would be no additional costs to small businesses, and, thus, this rule would not result in a ''significant effect'' for small businesses in Riverside County, California. As such, we are certifying that this rule will not result in a significant economic impact on a substantial number of small entities.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 et seq.)

Under SBREFA, this rule is not a major rule. Our detailed assessment of the economic effects of this designation is described in the economic analysis. Based on the effects identified in the economic analysis as well as the fact that this rule is a zero designation of critical habitat, we believe that this rule will not have an annual effect on the economy of $100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This final rule to designate critical habitat for *Astragalus lentiginosus* var. *coachellae* is not a significant regulatory action under Executive Order 12866, and it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

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

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, Tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities who receive Federal funding, assistance, permits or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(b) We do not believe that this rule will significantly or uniquely affect small governments because we are designating zero acres of critical habitat. Consequently, we do not believe that critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

Takings

In accordance with Executive Order 12630 (''Government Actions and Interference with Constitutionally Protected Private Property Rights''), we have analyzed the potential takings implications of designating critical habitat for *Astragalus lentiginosus* var. *coachellae*. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. Because we are designating zero acres of critical habitat for *Astragalus lentiginosus* var. *coachellae,* this rule does not pose significant takings implications.

Federalism

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with DOI and Department of Commerce policy, we requested information from, and coordinated development of, this critical habitat designation with appropriate State resource agencies in California. The designation of zero acres of critical habitat in areas currently occupied by *Astragalus lentiginosus* var. *coachellae* would have no impact on State and local governments and their activities. The process of identifying habitat with features essential to the conservation of the species may have some benefit to these governments in that these areas essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have designated zero acres of critical habitat in accordance with the provisions of the Act. This final rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of *Astragalus lentiginosus* var. *coachellae.*

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

It is our position that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the

Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We have determined that no tribal lands occupied at the time of listing contain the features essential for the conservation and no tribal lands that are unoccupied are essential for the conservation of the *Astragalus lentiginosus* var. *coachellae.*

References Cited

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

Author(s)

The primary authors of this package are the Carlsbad Fish and Wildlife Office staff.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. In § 17.12(h), in the List of Endangered and Threatened Plants, revise the entry for *''Astragalus lentiginosus* var. *coachellae''* under ''FLOWERING PLANTS'' to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*	*	
Astragalus lentiginosus var. *coachellae.*	Coachella Valley milk-vetch.	U.S.A. (CA)	Fabaceae	E	647	17.96(a) (No areas designated)	NA
*	*	*	*	*	*	*	

■ 3. In § 17.96, amend paragraph (a) by adding an entry for *Astragalus lentiginosus* var. *coachellae* in alphabetical order under Family Fabaceae to read as follows:

§ 17.96 Critical habitat—plants.

(a) Flowering plants.

* * * * *

Family Fabaceae: *Astragalus lentiginosus* var. *coachellae* (Coachella Valley Milk-Vetch)

Pursuant to section 4(b)(2) of the Act, we have excluded all areas determined to meet the definition of critical habitat under section 3(5)(A) of the Act for *Astragalus lentiginosus* var. *coachellae.* Therefore, no specific areas are designated as critical habitat for this species.

* * * * *

Dated: November 30, 2005.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 05–23694 Filed 12–13–05; 8:45 am]

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Federal Register

Wednesday,
December 14, 2005

Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Sonoma County Distinct Population Segment of the California Tiger Salamander; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AU23

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Sonoma County Distinct Population Segment of the California Tiger Salamander

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final decision in rulemaking process.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate and exclude approximately 17,418 acres (ac) (7,049 hectares (ha)) of critical habitat for the Sonoma County distinct population segment of the California tiger salamander (*Ambystoma californiense*) pursuant to the Endangered Species Act of 1973, as amended (Act). We are excluding all critical habitat based on interim conservation strategies and measures being implemented by those local governing agencies with land use authority over the area and also as a result of economic exclusions authorized under section 4(b)(2) of the Act. Therefore, no critical habitat is being designated for the Sonoma County distinct population segment of the California tiger salamander in Sonoma County, California.

DATES: This final decision becomes effective on January 13, 2006.

ADDRESSES: Comments and materials received, as well as supporting documentation used in the preparation of this rulemaking, will be available for public inspection, by appointment, during normal business hours, at the Sacramento Fish and Wildlife Office (SFWO), 2800 Cottage Way, W–2605, Sacramento, CA 95825. The final rule and economic analysis will be available via the Internet at *http://www.fws.gov/sacramento/*.

FOR FURTHER INFORMATION CONTACT: Field Supervisor, Sacramento Fish and Wildlife Office, at the above address, (telephone (916) 414–6600; facsimile (916) 414–6712).

SUPPLEMENTARY INFORMATION:

Designation of Critical Habitat Provides Little Additional Protection to Species

In 30 years of implementing the Act, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. The Service's present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

Role of Critical Habitat in Actual Practice of Administering and Implementing the Act

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, ''Because the Act can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7.'' Currently, only 466 species or 36.7 percent of the 1,269 listed species in the United States under the jurisdiction of the Service have designated critical habitat.

We address the habitat needs of all 1,269 listed species through conservation mechanisms such as listing, section 7 consultations, the Section 4 recovery planning process, the Section 9 protective prohibitions of unauthorized take, Section 6 funding to the States, and the Section 10 incidental take permit process. The Service believes that it is these measures that may make the difference for the conservation of many species.

We note, however, that two courts found our definition of adverse modification to be invalid (March 15, 2001, decision of the United States Court Appeals for the Fifth Circuit, *Sierra Club* v. *U.S. Fish and Wildlife Service et al.*, F.3d 434 and the August 6, 2004, Ninth Circuit judicial opinion, *Gifford Pinchot Task Force* v. *United States Fish and Wildlife Service*). On December 9, 2004, the Director issued guidance to be used in making section 7 adverse modification determinations.

Procedural and Resource Difficulties in Designating Critical Habitat

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent (NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, the Service's own proposals to list critically imperiled species and final listing determinations on existing proposals are all significantly delayed.

The accelerated schedules of court ordered designations have left the Service with almost no ability to provide for adequate public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals due to the risks associated with noncompliance with judicially-imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little additional protection to listed species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects and the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy Act (NEPA). None of these costs result in any benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat in this rule. For more information on the Sonoma County distinct population segment of the California tiger salamander, refer to the final listing rule and proposed critical habitat rule

published in the **Federal Register** on March 19, 2003 (68 FR 13498), and August 2, 2005 (70 FR 44301), respectively.

As previously mentioned in the proposed critical habitat rule published in the **Federal Register** on August 2, 2005 (70 FR 44301), we have been cooperatively working with Federal, State, County, and local officials as well as representatives from local business and environmental groups over the last 18 months to develop a conservation strategy for the California tiger salamander in Sonoma County. The development of the Santa Rosa Plain Conservation Strategy (Conservation Strategy) along with implementation measures has been moving forward and the County of Sonoma along with the cities of Santa Rosa, Rohnert Park, Cotati and Windsor have all passed resolutions supporting the development and agree to work toward implementation of the Conservation Strategy for the protection of the Sonoma County distinct population segment of the California tiger salamander as well as several other Federally listed plant species occurring on the Santa Rosa Plain.

On June 29, 2005, the Service and the California Department of Fish and Game (CDFG) issued interim guidelines which contain project specific conservation measures for projects affecting the California tiger salamander on the Santa Rosa Plain. These interim guidelines are in place and the measures identified in them are currently being implemented by those individuals impacting habitat features considered essential for the conservation of the Sonoma County distinct population segment of the California tiger salamander. These conservation measures have been reviewed by the team developing the Conservation Strategy as well as peer reviewed by biologists knowledgeable of amphibian conservation or ecological conservation in general and are consistent with long-term conservation of the California tiger salamander and other listed plants on the Santa Rosa Plain. As the Conservation Strategy is finalized, the Service and the CDFG intend to continue to implement and or revise these interim guidelines to best conserve the California tiger salamander and other Federally-listed plant species on the Santa Rosa Plain.

Previous Federal Actions

On October 13, 2004, a complaint was filed in the U.S. District Court for the Northern District of California (*Center for Biological Diversity and Environmental Defense Council* v. *U.S. Fish and Wildlife Service et al.* (Case No. C–04 4324 FMS)). On February 3, 2005, the District Court required the Service to submit for publication in the **Federal Register**, a final determination on the proposed critical habitat designation on or before December 1, 2005. On August 2, 2005, we noticed in the **Federal Register** a proposed critical habitat designation (70 FR 44301). On August 19, 2005, a court order was filed on the above complaint, which upheld the section 4(d) rule exempting grazing from Section 9 prohibitions, but vacated the downlisting of the Santa Barbara and Sonoma populations and reinstated their endangered distinct population segment status. On October 25, 2005, we noticed in the **Federal Register** the availability of a draft economic analysis on the proposed designation (70 FR 61591). In a November 17, 2005 **Federal Register** notice (70 FR 69717), we requested comments on a refinement of those areas considered to contain the essential features necessary for the conservation of the Sonoma County distinct population segment of the California tiger salamander, and identified the adjusted economic impacts. This final decision associated with the rulemaking process is in accordance with the settlement agreement and court order. For more information on previous Federal actions concerning the California tiger salamander, refer to the proposed rule to designate critical habitat in Sonoma County published in the **Federal Register** on August 2, 2005 (70 FR 44301), as well as the listing notice published in the **Federal Register** on March 19, 2003 (68 FR 13498).

Summary of Comments and Recommendations

We requested written comments from the public on the proposed designation of critical habitat for California tiger salamander in the proposed rule published on August 2, 2005 (70 FR 44301). We also contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed rule. In addition, we held two public hearings on September 8, 2005, in Santa Rosa, California.

We had three open comment periods, totaling 91 days, between August 2, 2005 and November 28, 2005. During those periods, we received comments directly addressing the proposed critical habitat designation: three from peer reviewers, six from local government, and 55 from organizations or individuals. We reviewed all comments received from the peer reviewers and the public for substantive issues and new information regarding critical habitat for the Sonoma County distinct population segment of the California tiger salamander. Comments received were grouped into general issues specifically relating to the proposed critical habitat rulemaking for the Sonoma County distinct population segment of the California tiger salamander, are addressed in the following summary, and incorporated into the final rule as appropriate.

Comments From the State

Section 4(i) of the Act states, ''the Secretary shall submit to the State agency a written justification for her failure to adopt regulation consistent with the agency's comments or petition.'' We did not receive any comments from State agencies regarding the proposal to designate critical habitat for the Sonoma County distinct population segment of the California tiger salamander.

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from six knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We received a response from three of the peer reviewers. These reviewers provided specific information regarding species location and habitat as well as information on the areas that could be excluded based on soil information, locations of wetlands, potential breeding habitat, elevation information, and habitat fragmentation. This information was used to assist us in determining the final critical habitat boundaries. Any changes as a result of peer review information are reflected and incorporated in this final rulemaking as appropriate. Specific peer review comments are addressed in the following summary below.

Peer Review Comments

Comment: The critical habitat area should be reduced to approximately 18,000–20,000+ acres of extant occupied habitat and comprised of a 1.3 mile (mi) (2 kilometer (km)) buffer around known breeding locations.

Our Response: As outlined in our notice published in the **Federal Register** on November 17, 2005 (70 FR 69717), we refined the proposed designation to just those areas surrounding known breeding locations, and by applying parameters for dispersal and upland habitat similar to those we used in critical habitat designation for the Santa

Barbara and Central populations of the California tiger salamander. We began mapping habitat by buffering breeding locations by a distance of 0.70 mi (1.1 km) to capture dispersal and upland habitat use by the species. Some research has found that 99 percent of interpond dispersal would be captured using this 0.7 mi (1.1 km) radius around a breeding pond (Trenham *et al.* 2001; Trenham and Shaffer 2005). Salamanders have been documented dispersing even farther than 0.7 mi (1.1 km) (Sweet 1998) however, and the Conservation Strategy chose a radius of 1.3 mi (2.1 km) to ensure that incidental take coverage would be inclusive of all areas likely to be occupied by salamanders and to establish a broad area in which conservation for salamander would be implemented. Ultimately however, as discussed below, we excluded all areas designation as critical habitat (see Application of Exclusions Under Section 4(b)(2) of the Act).

Comment: Existing urban centers within the historic range of California tiger salamander should be removed from the designation. Retaining these urban centers will bias the economic evaluation of critical habitat.

Our Response: In our final designation, we mapped only those areas which contained the essential features necessary to conserve the Sonoma County distinct population segment of the California tiger salamander. We removed all developed and nonessential areas to the best of our ability, however due to mapping precision we were unable to remove all such development. The scale of the maps prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed areas. Any such structures and the land under them left inside the critical habitat boundaries shown on the maps of this final rule have been excluded by text in the rule and are not designated as critical habitat. These developed and nonessential habitat areas although within the boundary of the final designation would not contain the primary constituent elements and as such would not be considered critical habitat. We excluded all the final critical habitat based on implementation of local government management strategies and economic cost (see Exclusions Under Section 4(b)(2) of the Act section).

Comment: There is anecdotal evidence of one adult California tiger salamander near Rainsville Road in the 1990s from an amateur herpetologist and the critical habitat boundary should extend south to Rainsville Road, north of Petaluma.

Our Response: As part of our deliberation over which areas to designate, we used currently known California tiger salamander breeding locations within Sonoma County. We believe that basing our designation on breeding locations would ensure the conservation of the species by providing areas which contain the essential features of aquatic, upland, and dispersal habitats. We lacked adequate documentation of essential features, particularly breeding habitat, that might be associated with this observation to include it in a critical habitat designation. We recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery. Areas that support populations, but are outside the critical habitat designation, will continue to be subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard as determined on the basis of the best available information at the time of the action.

Other Comments

Issue 1: Habitat and Species Specific Information

Comment: A few comments stated they were in favor of including the Petaluma area as critical habitat because they have observed salamanders in this area and suitable habitat exists.

Our Response: We have been unable to confirm the claims of these comments. Breeding or individual observations of the species in the Petaluma area have yet to be verified by recognized experts. Since the emergency listing in July, 2002, we have received numerous claims from the public that they have seen salamanders at various locations within the potential range of the species. Upon further investigation by recognized experts in those instances, the arboreal salamander (*Aneides lugubris*) is frequently mistaken for the California tiger salamander and no confirmed breeding areas for the California tiger salamander have been confirmed outside those identified during this rulemaking process.

Issue 2: Unit Designations

Comment: Several comments included specific recommendations on how the critical habitat unit(s) should be designed including specific areas which should be included and excluded from the final designation.

Our Response: We used the best scientific information available in determining the extent of the critical habitat boundaries and revised our proposed rule based on comments received and peer review. We mapped only those areas which contained the essential features necessary to conserve the Sonoma County distinct population segment of the California tiger salamander. When determining critical habitat boundaries, we made every effort to avoid including within the boundaries of the map contained within this final rule developed areas such as buildings, paved areas, and other structures that lack the primary constituent elements for the California tiger salamander. The scale of the maps prepared under the parameters for publication within the *Code of Federal Regulations* may not reflect the exclusion of such developed areas. Any such structures and the land under them inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in the rule and are not designated as critical habitat. These developed and nonessential habitat areas would not contain the primary constituent elements and as such would not be considered critical habitat. We excluded all the area which would otherwise have been designated as final critical habitat based on implementation of local government management strategies and economic cost (see Exclusions Under Section 4(b)(2) of the Act section).

Comment: One commenter stated that critical habitat unit is too limited and that California tiger salamanders have been observed south to Muir Woods, Marin County.

Our Response: We used the best scientific data available for the designation of critical habitat and alternative considered for the Sonoma County distinct population segment of the California tiger salamander, as per section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12. We used the California Natural Diversity Database (CNDDB), survey records, and other information to determine the historical and potential range of the species at the time of listing in March 2003. There are no confirmed records of the Sonoma County distinct population segment of the California tiger salamander found in Marin County.

Comment: Several commenters stated that the extension of California tiger salamander critical habitat into the Petaluma area is not justified based on the current known locations of the

species and distribution of California tiger salamander habitats. Several commenters also stated that the Petaluma area is nearly completely developed and lacks the primary constituent elements, the designation would cause significant economic impacts; and that the lands within the Petaluma city limit should be excluded from critical habitat.

Our Response: We used the best scientific information available in determining the extent of the critical habitat boundaries and revised our proposed rule based on comments received and peer review. The area which otherwise would have received a designation as critical habitat is based on known breeding locations for the species. As a result, the area south of Pepper Road in Cotati was not considered essential to the conservation of the species. In addition, as a result of analyzing the benefits of designating critical habitat versus benefits of not designating critical habitat we excluded all the final critical habitat based on implementation of local government management conservation strategies and economic costs (see Exclusions Under Section 4(b)(2) of the Act section). Although the area considered essential in the final determination does not include the Petaluma area, this does not mean that the area does not contain appropriate habitat for the California tiger salamander or that the area may be needed for recovery of the species. We continue to encourage all local governmental municipalities to work closely with State and Federal resource agencies to conserve and protect endangered and sensitive species and their habitats.

Comment: One commenter recommends excluding the areas north of Santa Rosa Creek; within the 100 year flood plain; east of Highway 101 from Rohnert Park Expressway north; and south of Pepper Road to Lichau Creek.

Our Response: We have revised the areas considered as critical habitat based on scientific information, peer review, and comments received. As a result, we have removed many areas from the proposed rule that did not contain the essential features. Also our final determination has excluded all the remaining area which otherwise would have been designated as critical habitat based on implementation of local government management strategies and economic cost (see Exclusions Under Section 4(b)(2) of the Act section).

Issue 3: Social and Economic Costs/ Regulatory Burden

Comment: Several commenters requested excluding the lands in the City of Santa Rosa's urban grown boundary as critical habitat because of their concerns of high economic impacts.

Our Response: Section 4 of the Endangered Species Act of 1973, as amended, and our implementing regulations, state that critical habitat shall be designated for species listed under the Act. We have excluded all areas which otherwise would have been designated as critical habitat, including areas within the City of Santa Rosa urban growth boundary (UGB), after taking into consideration the economic impact and conservation measures being implemented by local governmental agencies (see Exclusions Under Section 4(b)(2) of the Act section).

Comment: One commenter expressed concern about the burden on agricultural practices such as plowing fields, planting new vines, and the removal of existing vines.

Our Response: Designation of critical habitat in areas occupied by the species does not necessarily result in a regulatory burden above that already in place due to the presence of the listed species. The Service works with private landowners to identify activities and modifications to activities that will not result in take, to develop measures to minimize the potential for take, and to provide authorizations for take through Sections 7 and 10 of the Act. One intention of critical habitat is to inform people of areas that contain the features that are essential for the conservation of the species. We encourage landowners to work in partnership with us to develop plans that allow their land management and development practices to proceed in a manner consistent with the conservation of listed species. The California tiger salamander is already a Federally-listed species, and as such, projects that may result in take of the species are already required to consult with the Service under Section 7 or Section 10 of the Act. However, we excluded all areas which otherwise would have been designated as critical habitat based on implementation of local government management strategies and economic cost (see Exclusions Under Section 4(b)(2) of the Act section).

Issue 4: Notification and Comment Period Comments

Comment: One commenter stated that the comment period was too short and the information about the Conservation Strategy was not available until just recently.

Our Response: The proposed critical habitat designation was published in the **Federal Register** on August 2, 2005 (70 FR 44301), and we accepted comments from all interested parties for a 60-day comment period, until October 3, 2005. On October 25, 2005, we reopened the comment period for 21 days until November 14, 2005, and made available the draft economic analysis (70 FR 61591). On November 17, 2005, we reopened the comment period for 12 days until November 28, 2005 (70 FR 69717), and requested comments on a refinement of those areas considered to contain the essential features necessary for the conservation of the Sonoma County distinct population segment of the California tiger salamander. The Conservation Strategy was released for public comment on August 17, 2005. The document was posted on the websites of the City of Santa Rosa and the Sacramento Fish and Wildlife Office of the U.S. Fish and Wildlife Service. The Service issued a press release and local media reported the event. A public meeting to accept comments and provide information was held in Santa Rosa on September 12, 2005. The public comment period closed on the Conservation Strategy on September 17, 2005.

Issue 5: Designation Process

Comment: One commenter stated that the proposed rule's boilerplate position statement that critical habitat provides no additional benefit to listed species violates the Act's requirement that the Service base its determinations solely on the best available science.

Our Response: The Service's statements regarding the general protections provided by critical habitat does not change the method in which we make our final critical habitat determinations. We used the best scientific data available in determining the extent of the area which would be designated as critical habitat absent exclusions and in identifying areas which contain the features essential to the conservation of the species.

Comment: One commenter stated that the proposed rule implies that if the Service does not receive justification for inclusion of an area during the public comment period, then that area will be dropped from the final critical habitat designation. The commenter also stated that the Service needs to make its decision on the basis of the best available scientific information and where the information is not completely clear or incomplete, the benefit of the doubt should go toward actions which would benefit conservation of the species.

Our Response: It was not our intent to suggest that areas would be removed from the designation if information was

not received to justify their inclusion. We based the final critical habitat on the best scientific information available as well as incorporated appropriate peer review information. We believe that the final area identified as critical habitat prior to exclusion under section 4(b)(2) represents the best scientific information as to what areas contain the essential features necessary for conservation of the Sonoma County distinct population segment of the California tiger salamander considering the economic and other relevant impacts.

Comment: One commenter stated that the Service needs to narrow the scope of the proposed critical habitat and not include the entire geographical area that can be occupied by the threatened or endangered species.

Our Response: The final boundaries of that area which would be designated as critical habitat prior to exclusion under section 4(b)(2) for the Sonoma County distinct population segment of the California tiger salamander has been greatly reduced from the proposed designation. Based on the best scientific data available, we removed those areas from the proposed designation which did not contain the essential habitat features, were already developed, or were outside the current range of the species. The final area which would be designated as critical habitat absent exclusion under section 4(b)(2) is based on the aquatic, upland and dispersal habitat surrounding known breeding locations.

Issue 6: Cooperative Efforts

Comment: One commenter expressed their support of the cooperative/partnership approach being used by the Conservation Strategy members. They stated that designating critical habitat would provide disincentives to private landowners by requiring farmers and ranchers obtaining funds from the U.S. Department of Agriculture through the Farm Bill to complete the consultation process, which hinders the completion of conservation activities on these lands.

Our Response: We support all cooperative/partnership efforts to conserve federally listed threatened and endangered species. Federal agencies already consult with us on activities (i.e., permitting or funding of projects) in areas currently occupied by the species or if the species may be affected by the action to ensure that their actions do not jeopardize the continued existence of the species. Therefore, we believe that the designation of critical habitat would not likely result in significant additional regulatory burden above that already in place due to the presence of the listed species. However, we excluded all the area which would otherwise be designated as critical habitat based on implementation of local government management strategies and economic cost (see Application of Exclusions Under Section 4(b)(2) of the Act section).

Issue 8: Conservation Strategy

Comment: One commenter stated that identifying the Conservation Strategy as an alternative to designating critical habitat is not appropriate or lawful under the Endangered Species Act.

Our Response: We did not propose the Conservation Strategy to be an alternative to designating critical habitat. However, Section 4(b)(2) of the Act states that ''The Secretary may exclude any area from critical habitat if [s]he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [s]he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.'' We excluded all the area which would otherwise have been designated as critical habitat based on implementation of local government management strategies and economic cost (see Application of Exclusions Under Section 4(b)(2) of the Act section).

Comment: Several commenters expressed support of the Conservation Strategy, but had reservations because it was not finalized and that it needs improvement in order to conserve the Sonoma County distinct population segment of the California tiger salamander and four Federally-listed plants.

Our Response: In development of the Conservation Strategy, the Federal, State, County and local government agencies, as well as representatives from the building industry and environmental organizations, received similar comments regarding issues with the Conservation Strategy. The Conservation Strategy has been independently peer reviewed and comments received from peer reviewers have been incorporated into the current version of the plan. The Conservation Strategy focuses on establishing large, contiguous preserves and a coordinated region-wide restoration and management strategy, species research, endowment funding, administration of preserve management, and implementation that will contribute to the recovery of the California tiger salamander and four Federal and State listed plants in Sonoma County. The County of Sonoma, the City of Santa Rosa, the City of Cotati, the Town of Windsor, the City of Rohnert Park, the California Department of Fish and Game, and the Service have signed a planning agreement and the local jurisdictions adopted individual resolutions that agree to implement an interim conservation strategy while the Conservation Strategy is fully adopted and implemented. We have outlined those reasons why we believe the current Conservation Strategy would provide a benefit above that of designating critical habitat (see Exclusion Under Section 4(b)(2) of the Act section). However, the Conservation Strategy is still under development and subject to final approval. Should the current Conservation Strategy not be implemented or changed to such an extent as it no longer provides for the conservation of the Sonoma County distinct population segment of the California tiger salamander, we would revisit our current determination on designating critical habitat for the species and repropose critical habitat.

Comment: One commenter stated that the Service needs to protect the areas where the California tiger salamander reside rather than relocate them as is identified in the Conservation Strategy.

Our Response: The designation of critical habitat does not prescribe management actions but does define areas which contain the essential features described as primary constituent elements. We agree that protection of areas where California tiger salamanders are endemic should be the priority of the strategy, and this is demonstrated by the conservation areas identified in the Conservation Strategy. The Conservation Strategy identifies areas that support potential habitat but is not currently occupied by the California tiger salamander and recommends translocation of the species to be an option only under certain circumstances. These areas may be suitable for translocation of individuals to aid in the recovery of the species. Some projects authorized under Section 7 or 10 of the ESA may have unavoidable impacts to the species. These unavoidable impacts may be minimized by salvaging individuals and relocating them to suitable habitat on a case by case basis. Preliminary data has demonstrated that this management technique may be successful. The Conservation Strategy has been peer reviewed by recognized experts and the comments regarding translocation have been incorporated into the current version of the plan.

Issue 9: Economic Analysis

Comment: One commenter states that the Draft Economic Analysis (DEA) fails to evaluate benefits associated with conserving the California tiger salamander. Further, this commenter states that the DEA should review the benefits of conserving open space and riparian areas.

Our Response: In the context of a critical habitat designation, the primary purpose of the rulemaking (i.e., the direct benefit) is to designate areas in need of special management that contain the features essential to the conservation of listed species. While a listed species may be the primary beneficiary of designated critical habitat, the designation of critical habitat may also result in two distinct categories of benefits to society: (1) Use, and (2) non-use benefits. Use benefits are the social benefits that accrue from the physical use of a resource. Visiting critical habitat to see endangered species in their natural habitat would be a primary example. Non-use benefits, in contrast, represent welfare gains from just knowing that a particular listed species' natural habitat is being specially managed for the conservation of that species. Both use and non-use benefits may occur unaccompanied by any market transactions.

A primary reason for conducting this analysis is to provide information regarding the economic impacts associated with a proposed critical habitat designation. Section 4(b)(2) of the Act requires the Secretary to designate critical habitat based on the best scientific data available after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. Economic impacts can be both positive and negative and by definition, are observable through market transactions.

Where data are available, this analysis attempts to recognize and measure the net economic impact of the proposed designation. For example, the DEA investigates whether conserved open space at designated mitigation sites results in increased property values. The DEA did not find any evidence that housing price was influenced by proximity to the nearest conservation area. The authors hypothesize that this may be attributable to the large amount of open space in Sonoma County. While section 4(b)(2) of the Act gives the Secretary discretion to exclude certain areas from the final designation, she is authorized to do so only if an exclusion does not result in the extinction of the species. In terms of carrying out its responsibilities under section 4(b)(2) then, the Service need only to consider whether the economic impacts (both positive and negative) or any other impact are significant enough to merit exclusion of any particular area without causing the species to go extinct.

Comment: One commenter states that the DEA overestimates costs associated with conserving California tiger salamander, because it includes economic impacts attributable to listing under the Act. The commenter further states that the DEA confuses the economic costs by including costs of conservation efforts to protect the species (not its critical habitat) with conservation of the proposed critical habitat. For this reason, the commenter questions why the DEA includes pre-designation costs, as these costs are associated with listing of the species.

Our Response: This analysis identifies those economic activities believed to most likely threaten the California tiger salamander and its habitat and, where possible, quantifies the economic impact to avoid, mitigate, or compensate for such threats within the boundaries of the critical habitat. In instances where critical habitat is being proposed after a species is listed, some future impacts may be unavoidable, regardless of the final designation and exclusions under 4(b)(2). However, due to the difficulty in making a credible distinction between listing and critical habitat effects within critical habitat boundaries, this analysis considers all future conservation-related impacts to be coextensive with the designation.

Comment: Several commenters state that the DEA should incorporate the recent ruling in the Ninth Circuit Court of Appeals, *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service.*

Our Response: The DEA acknowledges that the Ninth Circuit judicial opinion, *Gifford Pinchot Task Force* v. *United States Fish and Wildlife Service,* invalidated the Service's regulation defining destruction or adverse modification of critical habitat. The Service is currently reviewing the decision to determine what affect it (and to a limited extent *Center for Biological Diversity* v. *Bureau of Land Management* (Case No. C–03–2509–SI, N.D. Cal.)) may have on the outcome of consultations pursuant to section 7 of the Act. As a result of this ruling, the DEA assumes that efforts to mitigate impacts to the habitat must occur within the boundaries of critical habitat. Consistent with this requirement, zonal mitigation sites assumed in the DEA are those identified in the Santa Rosa Plain Conservation Strategy.

Comment: Several commenters state that the DEA underestimates the impact of critical habitat on transportation projects in Sonoma County.

Our Response: Planned transportation projects are captured in the DEA using the California Department of Transportation's California Transportation Investment System (CTIS) tool that includes information for interstates, principal arterials, and rural minor arterials. The CTIS tool incorporates information about projects overseen by the State Transportation Improvement Program, the State Highway Operations and Protection Program, the Interregional Transportation Strategic Plan, the California Aviation System Plan, and various regional transportation planning organizations. Version 1.3.2 of this tool is used in the DEA as the updated Version 2.0 had not been released at the time the report was prepared. Accordingly, the DEA is prepared using the most current publicly available information on planned transportation projects. Public comments received were inadequate to update impact calculations.

Based on the public comments received, the Service's contractor for completing the economic analysis contacted the Sonoma County Transportation Authority (Authority) to request more detailed information on the nature, location and scope of additional planned projects. The Authority was unable to provide the needed information in time to revise the impact analysis within the court-directed timeframe. However, since no critical habitat is being designated, the impacts asserted by the commenter will not be incurred.

Comment: Several commenters state that mitigation prices used in the DEA are too low. The comments further cite a wide range of current market prices for mitigation in Sonoma County.

Our Response: The DEA calculates mitigation prices as the cost of land assembly in the various California tiger salamander mitigation zones plus the cost of required improvements to land to make the site suitable for California tiger salamander occupation. This approach is consistent with the welfare-theoretic underpinnings of the impact model, in particular its focus on efficiency effects. One social cost of using land for mitigation is the value of the foregone alternative uses of the land. These values are approximately equal to the purchase price of the land. Another social cost of mitigation is the value of the resources used to modify the land to make it suitable for California tiger salamander occupation.

Mitigation prices may rise above the supply price of mitigation, for example when the supply of mitigation is constrained by permitting delays or other factors. However, prices above supply cost are a transfer between agents and net out of an efficiency impact.

Comment: Two commenters state that the DEA should not use mitigation formulas described in the Conservation Strategy since it is not a legally binding document. Further, the commenters state that the DEA should not assume that critical habitat has no impacts outside of a 1.3-mile buffer around breeding habitat.

Our Response: The cities of Santa Rosa, Rohnert Park, and Cotati, the town of Windsor, Sonoma County, the local development community, environmental organizations, the Service, and other federal and state agencies have undertaken a process to support California tiger salamander conservation at a regional level. This effort has involved extensive scientific research and analysis of the biological and ecological issues relating to California tiger salamander and of its specific circumstances in the region. During the week of November 7, 2005, all of the local jurisdictions formally approved execution of a planning agreement that commits them to work with the Service and other parties to finalize and implement the Conservation Strategy. Indeed, one economic cost of critical habitat may be to disrupt and impose additional costs on this collaborative effort.

Comment: Two commenters state that the DEA underestimates or ignores potential impacts to agriculture. In particular, commenters are concerned that the DEA does not quantify impacts to the wine grape industry and does not quantify increases in production costs or decreases in agricultural land values resulting from critical habitat.

Our Response: The DEA quantifies the reduction in agricultural land values resulting from foregone or constrained land development opportunities. A review of available biological opinions did not reveal any evidence of limitations on crop production practices resulting from listing of the California tiger salamander.

The DEA acknowledges that critical habitat may increase the costs and reduce the economic optimality of vineyard development within critical habitat. However, given the relative abundance of substitute vineyard sites within Sonoma County relative to the forecasted increase in vineyard acreage, it is speculative at present to assign costs to this potential impact.

Summary of Changes From Proposed Rule

In the proposed critical habitat rule for the Sonoma County distinct population segment of the California tiger salamander, we identified the historical and potential range of the species in Sonoma County, utilizing all known breeding and adult locality data and GIS resources available to the Service. Based on comments received from the public and from peer review, and a refinement of our parameters for dispersal and upland habitat use by the species, we revised the final designation of critical habitat for the Sonoma County distinct population segment of the California tiger salamander, as follows:

(1) As outlined in our notice published in the **Federal Register** on November 17, 2005 (70 FR 69717), we refined the proposed designation by applying parameters for dispersal and upland habitat similar to those we used in critical habitat designation for the Santa Barbara and Central populations of the California tiger salamander. We began mapping habitat by buffering known salamander breeding locations by a distance of 0.70 mi (1.1 km) to capture dispersal and upland habitat use by the species. We adjusted the 0.70 mi (1.1 km) area around breeding sites depending on habitat availability, dispersal barriers, and development and removed areas which did not contain the essential features. See Methodology and Criteria Sections below for more information.

(2) We revised the proposed critical habitat unit based on comments and biological information and peer review received during the public comment periods.

(3) Collectively, we excluded or removed the entire designation. Some areas in the proposed rule were removed because they did not contain the primary constituent elements. Other areas were excluded based on conservation measures being implemented by the local government agencies, or because of disproportionately high economic costs, as authorized under section 4(b)(2) of the Act (see ''Application of Exclusions Under Section 4(b)(2) of the Act'' section below).

Critical Habitat

Critical habitat is defined in section 3 of the Act as—(i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures that are necessary to bring an endangered or a threatened species to the point at which listing under the Act is no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on Federal actions that are likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow government or public access to private lands.

To be included in a critical habitat designation, the habitat within the area occupied by the species must first have features that are essential to the conservation of the species. Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species (i.e., areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Habitat occupied at the time of listing may be included in critical habitat only if the essential features thereon may require special management or protection. Thus, we do not include areas where existing management is sufficient to conserve the species (as discussed below, such areas may also be excluded from critical habitat pursuant to section 4(b)(2)). Accordingly, when the best available scientific data do not demonstrate that the conservation needs of the species so require, we will not designate critical habitat in areas outside the geographical area occupied by the species at the time of listing. An area currently occupied by the species but was not known to be occupied at the time of listing will likely be essential to the conservation of the species and, therefore, included in the critical habitat designation.

The Service's Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and Section 515 of the Treasury and General Government Appropriations

Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Service represent the best scientific and commercial data available. They require Service biologists to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information is generally the listing package for the species. Additional information sources include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge. All information is used in accordance with the provisions of Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the conservation of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Methods

As required by section 4(b)(1)(A) of the Act, we use the best scientific data available in determining areas that contain the features that are essential to the conservation of the Sonoma County distinct population segment of the California tiger salamander. In determining the areas to designate critical habitat for the California tiger salamander, we used the best scientific data available. We have reviewed the overall approach to the conservation of the Sonoma County distinct population segment of the California tiger salamander undertaken by local, State, and Federal agencies operating within the species' range since its listing in 2003 (68 FR 13498).

We have also reviewed available information that pertains to the habitat requirements of this species. The material included data in reports submitted during section 7 consultations and by biologists holding section 10(a)(1)(A) recovery permits; research published in peer-reviewed articles and presented in academic theses and agency reports; and regional Geographic Information System (GIS) coverages.

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we are required to base critical habitat determinations on the best scientific data available and to consider those physical and biological features (primary constituent elements (PCEs)) that are essential to the conservation of the species, and that may require special management considerations and protection. These include, but are not limited to: Space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distribution of a species.

The specific primary constituent elements required for the California tiger salamander are derived from the biological needs of the California tiger salamander as described below and in the Background section of this designation and previous listing or critical habitat designation for the species.

The areas determined to contain the features essential for the conservation of the California tiger salamander are designed to provide sufficient aquatic habitat for breeding and upland habitat as refugia for adults to maintain and sustain populations of California tiger salamanders throughout their range, and provide those habitat components necessary for the species. Conserving California tiger salamanders over the long term requires a three-pronged approach: (1) Protecting the hydrology and water quality of breeding pools and ponds; (2) retaining or providing for connectivity between breeding locations for genetic exchange and recolonization; and (3) protecting sufficient upland habitat around each breeding location to allow for enough adult survival to maintain a breeding population over the long term. In our determination of the amount of critical habitat to designate, we focused on identifying those areas which contained the features which would provide the breeding and upland habitat to maintain and sustain existing populations of salamanders in documented breeding sites (vernal pool complexes) identified within Sonoma County. Due to the complex life history and dispersal capabilities of California tiger salamanders, and the dynamic nature of the environments in which they are found, the primary constituent elements described below should be found throughout the unit that is being identified as critical habitat. Critical habitat for the Sonoma County distinct population segment of the California tiger salamander will provide for breeding and nonbreeding habitat and for dispersal between these habitats, as well as allowing for an increase in the size of the Sonoma County distinct population segment of the California tiger salamander.

Space for Individual and Population Growth and Normal Behavior

California tiger salamanders require a combination of aquatic habitat and upland habitat in order to successfully maintain normal population growth and behavior. Aquatic habitat is essential for California tiger salamander breeding and for providing space, food, and cover necessary to sustain early life history stages of California tiger salamanders. Breeding habitat consists of fresh water bodies, including natural and man-made ponds, vernal pools, or other ephemeral or permanent wetland features which allow California tiger salamanders to complete their aquatic portion of their lifecycle. To be considered essential, aquatic habitats must have the potential

to hold water for a minimum of 12 weeks in the winter or spring in a year of average rainfall. This is the amount of time needed for juveniles to complete metamorphosis and become capable of surviving in upland habitats. During periods of drought or less-than average rainfall, these breeding sites may not hold water long enough for individuals to complete metamorphosis, but these sites would still be considered because they constitute breeding habitat in years of average rainfall. Without its essential aquatic habitat features, the California tiger salamander would not survive, because breeding could not occur.

Upland Habitat

Associated upland habitat containing underground refugia is essential for the survival of adult California tiger salamanders and juveniles that have recently undergone metamorphosis. Adult and juvenile California tiger salamanders are terrestrial, and they enter aquatic habitats only for short periods of time to breed. For the majority of their life cycle, California tiger salamanders depend for survival on upland habitats containing underground or covered refugia where they are protected from desiccation. Juveniles have been found in soil cracks and rodent burrows and adults almost exclusively in rodent burrows. These underground refugia provide protection from the hot, dry weather in the nonbreeding season (Shaffer and Trenham 2005). California tiger salamanders also find food in small mammal burrows and rely on the burrows for protection from predators. The upland areas also regulate the hydrological functioning and protect water quality of the aquatic habitat (Hanes and Stromberg 1998). As described in previous rules (69 FR 68572; 70 FR 49380), California tiger salamanders have been found up to 1.3 mi (2 km) from occupied occurrences (Sweet, 1998). The only known study we are aware of that specifically investigated movement of California tiger salamanders between breeding ponds projected that 0.70 mi (1.1 km) would encompass 99 percent of interpond dispersal (Trenham *et al.* 2001; Trenham and Shaffer 2005). As we did for the Santa Barbara and Central populations, we used the 0.70 mi (1.1 km) away from breeding location to identify those upland habitat features essential for the Sonoma County distinct population segment of the California tiger salamander.

Food

California tiger salamanders use both aquatic and terrestrial habitat during their lifecycle. As a result California tiger salamanders require areas which support a prey base of both aquatic (e.g., zooplankton, aquatic larvae, aquatic invertebrates, tadpoles, etc.) and terrestrial (e.g., terrestrial invertebrates, insects, frogs, worms, etc.) species. The aquatic and upland habitat features would support the necessary prey base in all aspects of the California tiger salamander lifecycle.

Reproduction

Lifetime reproductive success for California and other tiger salamanders is low. Trenham *et al.* (2000) found the average female bred 1.4 times and produced 8.5 young that survived to metamorphosis per reproductive effort. This resulted in roughly 11 metamorphic offspring over the lifetime of a female. In part, this low reproductive success is due to the extended time it takes for California tiger salamanders to reach sexual maturity: Most do not breed until 4 or 5 years of age. While individuals may survive for more than 10 years, many breed only once. Combined with low survivorship of metamorphosed individuals (in some populations, less than 5 percent of marked juveniles survive to become breeding adults (Trenham *et al.* 2000)), reproductive output in most years is not sufficient to maintain populations. This trend suggests that the species requires occasional ''boom'' breeding events to prevent extirpation (temporary or permanent loss of the species from a particular habitat) or extinction (Trenham *et al.* 2000). With such low recruitment, isolated populations are susceptible to unusual, randomly occurring natural events as well as from human-caused factors that reduce breeding success and individual survival. Factors that repeatedly lower breeding success in isolated pools can quickly extirpate a population. California tiger salamanders would require an interconnected network of ponds and upland areas so that they can disperse from one pond to nearby ponds in order to augment or recolonize locally extirpated ponds and uplands.

Dispersal Habitat

Protecting the ability of California tiger salamanders to move freely across the landscape in search of breeding ponds is essential in maintaining gene flow and for recolonization of sites that are temporarily extirpated and is essential in preserving the California tiger salamander's population structure. The life history and ecology of the California tiger salamander make it likely that this species has a metapopulation structure (Hanski and Gilpin 1991). A metapopulation is a set of local populations or breeding sites within an area, where typically migration from one local population or breeding site to other areas containing suitable habitat is possible, but not routine. Movement between areas containing suitable habitat (i.e. dispersal) is restricted due to inhospitable conditions around and between areas of suitable habitat. Because many of the areas of suitable habitat may be small and support small numbers of salamanders, local extinction of these small units may be common.

A metapopulation's persistence depends on the combined dynamics of these local extinctions and the subsequent recolonization of these areas through dispersal (Hanski and Gilpin 1991; Hanski 1994). The essential dispersal habitat feature generally consists of upland areas adjacent to essential aquatic habitat that are not isolated from breeding ponds by barriers that California tiger salamanders cannot cross. Essential dispersal habitat features provide connectivity among California tiger salamander breeding ponds. While California tiger salamanders can bypass many obstacles, and do not require a particular type of habitat for dispersal, the habitat connecting essential aquatic habitat features must be free of barriers (e.g. a physical or biological feature that prevents salamanders from dispersing beyond the feature). Examples of barriers are areas of steep topography devoid of soil or vegetation and State Highway 101. Agricultural lands such as row crops, orchards, vineyards, and pastures do not constitute barriers to the dispersal of California tiger salamanders. Therefore, a critical element for successful conservation is the maintenance of sets of interconnected sites that are within the ''rescue'' distance of other ponds (Trenham *et al.* 2001).

Primary Constituent Elements for the Sonoma County Distinct Population Segment of the County California Tiger Salamander

Based on our current knowledge of the life history, biology, and ecology of the species and the requirements of the habitat to sustain the essential life history functions of the species, we have determined that the Sonoma County distinct population segment of the California tiger salamander's primary constituent elements (PCEs) are:

(1) Standing bodies of fresh water, including natural and manmade ponds, vernal pools, and other ephemeral or

permanent water bodies that typically become inundated during winter rains and hold water for a sufficient length of time (i.e., 12 weeks) necessary for the species to complete the aquatic portion of its life cycle;

(2) Barrier-free uplands adjacent to breeding ponds (within 0.7 mi (1.1 km)) that contain small mammal burrows. Small mammals are essential in creating the underground habitat that adult California tiger salamanders depend upon for food, shelter, and protection from the elements and predation; and

(3) Accessible upland areas between breeding locations (PCE 1) and areas with small mammal burrows (PCE 2) that allow for dispersal among such sites.

Criteria Used To Identify Critical Habitat

In determining the areas we would consider as critical habitat, we first looked at those breeding locations identified as being occupied at the time of listing and which contain the habitat features (primary constituent elements, PCEs) essential for the conservation of the species. We then looked at those additional areas found to be occupied subsequent to listing which also contained those essential habitat features determined to provide for the conservation of the Sonoma County distinct population segment of the California tiger salamander.

In our determination of critical habitat for the Sonoma County distinct population segment of the California tiger salamander, we selected areas that possess the physical and biological features that are essential to the conservation of the species and that may require special management considerations or protection. After identifying the PCEs that are essential to the conservation of the California tiger salamander, we used the PCEs in combination with occurrence data; confirmed breeding information, geographic distribution; GIS data layers for habitat mapping; vegetation, topography, watersheds, and current land uses; scientific information on the biology and ecology of the California tiger salamander; and accepted conservation principles for threatened or endangered species.

In our proposed designation and in our refinement of that proposal, we identified areas that contain those features which are essential to the conservation of the California tiger salamander within the occupied range of the Sonoma County distinct population segment of the California tiger salamander, as was reported and mapped by biologists who had conducted California tiger salamander surveys throughout the range of the species. The range boundaries were developed based on the principles of conservation science, genetics of the species, topography, geology, soils, vernal pool type distribution, historic distribution, and survey information (CNDDB 2005). In the proposed designation, we purposefully included a broad area that after further review included some areas which were developed and or did not contain the essential features or lacked the documented occurrence information.

In order to map only those areas containing the essential features, we refined the proposed designation to just those areas surrounding known breeding locations in Sonoma County. In addition, we applied parameters for upland dispersal and habitat use similar to those used in the critical habitat designations for the Central and Santa Barbara populations of California tiger salamander. Our refined designation and associated economic impacts were published in the **Federal Register** on November 17, 2005 (70 FR 69717).

In the development of the final designation, we revised the critical habitat boundaries to better identify those areas containing the essential features for conservation of species. We focused on areas within the range where we had credible records of breeding (reports filed by biologists holding section 10(a)(1)(A) recovery permits) indicating California tiger salamander presence (CNDDB 2005). Our conservation strategy for the Sonoma population focuses on those breeding locations that provide sufficient aquatic and upland habitats to ensure high enough adult survival to maintain and sustain extant occurrences of California tiger salamander within the range of the Sonoma County distinct population segment.

We then identified the amount of upland habitat surrounding these breeding occurrences where adult California tiger salamanders live during the majority of their life cycle. To determine a general guideline for the amount of upland habitat necessary to support an occurrence of adult California tiger salamander, we reviewed the primary literature regarding California tiger salamander upland habitat use, including Trenham (2000), Trenham *et al.* (2000 and 2001), and Trenham and Shaffer (2005).

The best scientific peer-reviewed data indicate that California tiger salamander do not remain primarily in burrows close to aquatic habitats and breeding ponds, but instead move some distance out into the surrounding upland landscapes. As described in previous rules (69 FR 68572; 70 FR 49380), California tiger salamander have been found up to 1.3 mi (2 km) from occupied occurrences (Sweet 1998). The only known study we are aware of that specifically investigated movement of California tiger salamanders between breeding ponds projected that 0.70 mi (1.1 km) would encompass 99 percent of interpond dispersal (Trenham *et al.* 2001; Trenham and Shaffer 2005). As we did for the Santa Barbara and Central populations, we used a 0.70 mi (1.1 km) dispersal distance (radius) as a guide for the amount of upland habitat around known occupied extant occurrences to be mapped as critical habitat for the purposes of preserving the Sonoma County distinct population segment of the California tiger salamander within small mammal burrows (PCE 2). However, we recognize that (as with movements in search of suitable underground refugia) upland habitat features influence California tiger salamander movements within a particular landscape. As a result, we made adjustments to the upland areas to include additional areas containing the PCEs. In other cases, the critical habitat was reduced so as not to include non-habitat areas (those not exhibiting the PCEs) from the designation. Some agricultural and other lands were included if they were within the 0.7 mi (1.1 km) distance and the essential feature for upland refugia or connectivity between occurrences and were not considered a barrier to movement.

When determining critical habitat boundaries, we made every effort to avoid the designation of developed areas such as buildings, paved areas, and other structures that lack PCEs for the California tiger salamander. Any such structures inadvertently left inside critical habitat boundaries are not considered part of the critical habitat unit. This also applies to the land on which such structures sit directly. Therefore, Federal actions limited to these areas would not trigger section 7 consultations, unless activities within these areas affect the species and/or primary constituent elements in adjacent critical habitat.

A brief discussion of the area that would have been designated as critical habitat had it not been excluded is provided in the unit descriptions below. Additional detailed documentation concerning the essential nature of this area is contained in our supporting record for this rulemaking.

Special Management Considerations or Protections

When designating critical habitat, we assess whether the areas determined to be occupied at the time of listing and contain the PCEs may require special management considerations or protections. Threats which may warrant special management within the area being identified as critical habitat for the California tiger salamander include activities such as: Habitat destruction and fragmentation (e.g. urban and agricultural development); sedimentation, introduction of nonnative predators such as bullfrogs and fish and non-native salamanders; activities that could disturb aquatic breeding habitats and water quality, such as heavy equipment operation, ground disturbance, maintenance projects (e.g. pipelines, roads, powerlines), off-road travel or recreation; activities that would reduce small mammal populations to the point that there is insufficient underground refugia used by salamanders for foraging, protection from predators, and shelter from the elements; activities that create barriers impassable for salamanders or increase mortality in upland habitat between extant occurrences in breeding habitat; and, activities that disrupt vernal pool complexes' ability to support California tiger salamander breeding function. A detailed discussion of threats to the Sonoma County distinct population segment of the California tiger salamander and its habitat can be found in the final listing rule (68 FR 13498, March 19, 2003) and the proposed critical habitat designation (70 FR 44301, August 2, 2005).

Critical Habitat Designation

In the development of the critical habitat for the Sonoma County distinct population segment of the California tiger salamander, we determined which lands have features essential to the conservation of the species by defining the physical and biological features essential to the species' conservation and delineating the specific areas containing them. We then evaluated those lands determined to have essential features to ascertain if any specific areas are appropriate for exemption or exclusion from critical habitat pursuant to either sections 3(5)(A), 4(a)(3), or 4(b)(2) of the Act. On the basis of our evaluation, we have determined that the benefits of excluding lands under appropriate management for the Sonoma County distinct population segment of the California tiger salamander outweighs the benefits of their inclusion. We also evaluated the economic costs of the designation and identified those areas which had disproportionately high cost and evaluated whether those high cost areas also warranted exclusion. We have subsequently excluded the entire lands from the Sonoma County distinct population segment of the California tiger salamander critical habitat pursuant to section 4(b)(2) of the Act (refer to Exclusions under Section 4(b)(2) of the Act section below) based on both the ongoing management being implemented by local governing agencies and high economic costs.

The area which would be designated as critical habitat absent exclusions under section 4(b)(2), described below, constitute our best assessment of the areas: (1) Within the geographical area occupied by the species at the time of listing; (2) that contain the PCEs; and (3) that may require special management. Although all of the areas are within the geographical area known to be occupied by the species at the time of listing, we are not designating all of the areas known to be occupied by the Sonoma County distinct population segment of the California tiger salamander. We provide separate discussions on: (1) The reasons why these areas contain features essential for the conservation of the Sonoma County distinct population segment of the California tiger salamander and (2) special management considerations for these areas. All of the areas containing features determined to be essential for the conservation of the Sonoma County distinct population segment of the California tiger salamander were known to be occupied at the time of listing.

The tables below show the lands being excluded from critical habitat pursuant to section 4(b)(2) of the Act (Table 1), a summary of the areas containing the features that are essential to the Sonoma County distinct population segment of the California tiger salamander (Table 2) and the approximate area that would be designated as critical habitat absent exclusion under section 4(b)(2) for the Sonoma County distinct population segment of the California tiger salamander by land ownership (Table 3).

TABLE 1.—APPROXIMATE AREA ACRES (AC)/HECTARES (HA) EXCLUDED FROM CRITICAL HABITAT FOR THE SONOMA COUNTY DISTINCT POPULATION SEGMENT OF THE CALIFORNIA TIGER SALAMANDER PURSUANT TO SECTION 4(b)(2) OF THE ACT

Excluded area total	California	
	ac	ha
Unit 1	17,418	7,049

TABLE 2.—AREAS DETERMINED TO CONTAIN FEATURES ESSENTIAL TO CONSERVATION OF THE SONOMA COUNTY DISTINCT POPULATION SEGMENT FOR THE CALIFORNIA TIGER SALAMANDER AND THE AREA EXCLUDED FROM THE FINAL CRITICAL HABITAT DESIGNATION [AC (HA)]

Unit	Definitional area		Excluded area		Total	
	ac	ha	ac	ha	ac	ha
1a	1,313	531	1,313	531	0	0
1b	12,887	5,215	12,887	5,215	0	0
1c	2,442	988	2,442	988	0	0
1d	776	314	776	314	0	0
Total	17,418	7,049	17,418	7,049	0	0

TABLE 3.—CRITICAL HABITAT UNITS DESIGNATED BUT EXCLUDED FOR THE SONOMA COUNTY DISTINCT POPULATION SEGMENT FOR THE CALIFORNIA TIGER SALAMANDER

Unit	Federal		State		Local		Other		Total	
	ac	ha	ac	ha	ac	ha	ac	ha	ac	ha
1a	.....	.....	8	3	.....	.....	1,305	528	1,313	531
1b	.....	.....	260	105	.....	.....	12,627	5,110	12,887	5,215
1c	.....	.....	.....	.....	.....	.....	2,442	988	2,442	988
1d	.....	.....	.....	.....	.....	.....	776	314	776	314
Total	.....	.....	268	108	.....	.....	17,150	6,941	17,418	7,049

Figure 1 below represents the area which would otherwise be designated as critical habitat for the Sonoma County distinct population segment of the California tiger salamander absent exclusions under section 4(b)(2). We have excluded the entire final critical habitat for the species based on economic impacts and the conservation benefits of implementation of interim and long-term conservation measures for the California tiger salamander being adopted and implemented by local governing agencies. We present brief descriptions of the unit, and reasons why it meets the definition of critical habitat for the Sonoma County distinct population segment for the California tiger salamander, below.

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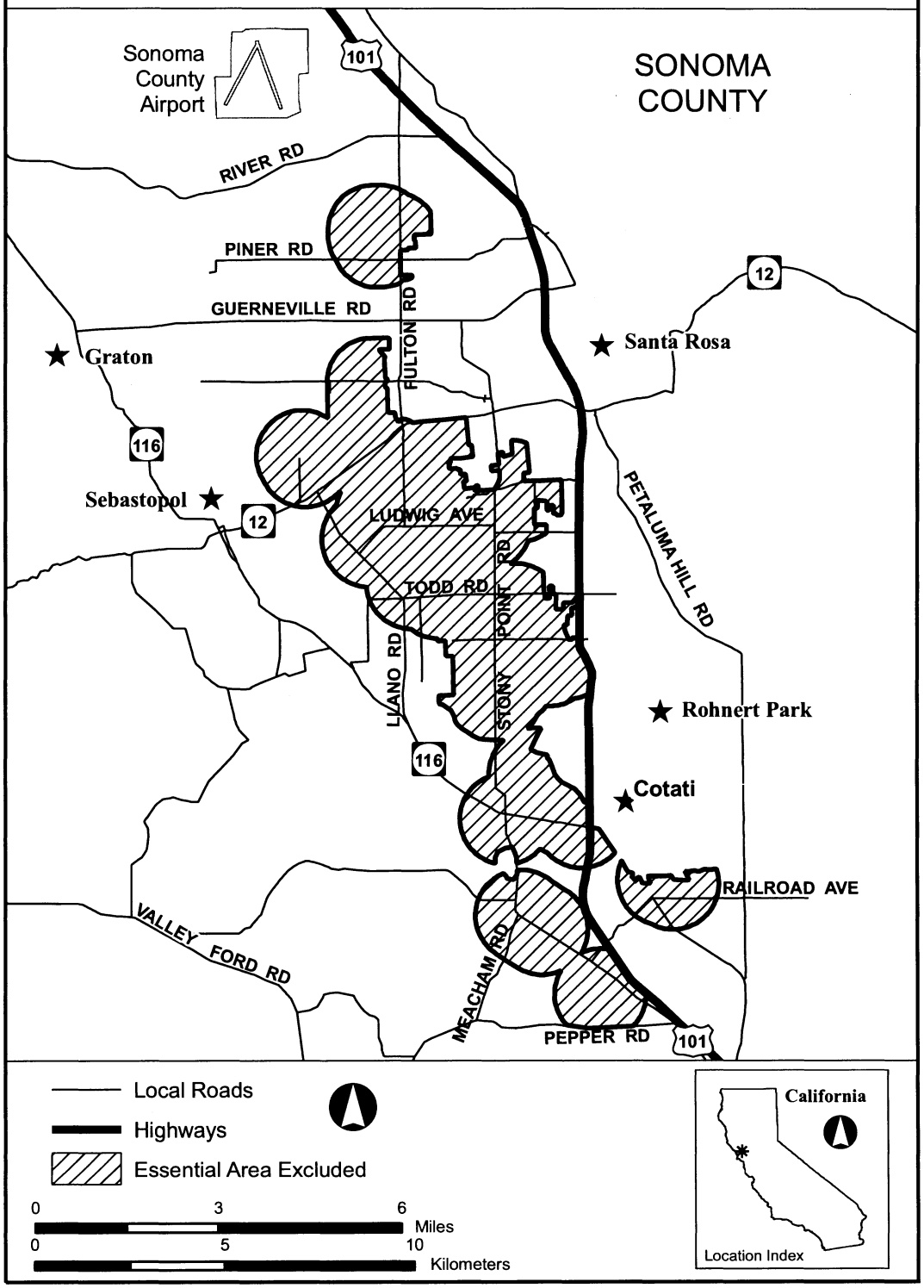
Figure 1: Areas Containing the Essential Features Excluded for the Sonoma County Distinct Population Segment of the California Tiger Salamander



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Santa Rosa Plain Unit

The Santa Rosa Plain unit consists of 17,418 ac (7,049 ha) in four subunits distributed in the Santa Rosa Plain south of Mark West Spring Creek and north of Pepper Road. The area is located mostly west of the developed portions of Santa Rosa, Rohnert Park and Cotati. Each one of the subunits represents a breeding center for the species. All four of these areas were considered occupied at the time of listing and contain the features considered essential for the conservation of the species. The special management required for this unit includes management of introduction of nonnative predators and other species to ponds; management of off-road vehicle use; management of construction, installation and maintenance of roads, pipelines, powerlines, and telecommunication lines; small mammal populations management; management of activities that create barriers impassable for salamanders; and management of activities that disrupt vernal pool complexes' ability to support California tiger salamanders.

Subunit 1a; (1,313 ac (531 ha))

This subunit is located in the northern portion of the designation near Fulton and Piner Roads. Land ownership within the subunit includes approximately 8 ac (3 ha) of CDFG land within the Alton Lane Preserve. Land within the remainder of this subunit is privately owned. The subunit is determined to be critical habitat because it contains features essential to the conservation of the California tiger salamander, it is occupied by the species, it represents the northernmost distribution of California tiger salamander in Sonoma County, and it is one of four breeding centers for the species. This subunit contains the essential habitat features of ponded areas which stay inundated for the minimum amount of time for the species to complete its aquatic lifecycle (PCE 1) and provides a prey base as well as space for growth and development; and upland areas which contain underground mammal burrows and similar refugia for food and shelter (PCE 2), and accessible upland habitats for dispersal (PCE 3). Special management for this subunit includes those activities outlined above. This subunit has been excluded from the final designation due to both the conservation measures being implemented by local governing agencies as well as having disproportionately high economic costs (see ''Exclusion Under Section 4(b)(2) section'' below).

Subunit 1b: (12,887 ac (5,215 ha))

This subunit is located south of Guerneville Road to Sierra Road in the central portion of the designation. Land ownership within the subunit includes approximately 260 ac (105 ha) of CDFG land. Land within the remainder of this subunit is privately owned. The subunit is determined to be critical habitat because it contains features essential to the conservation of the California tiger salamander, it is occupied by the species, it represents the largest contiguous area, it is in the center of the distribution of the Sonoma County distinct population segment of the California tiger salamander, contains the most known occurrences of breeding, and it is one of four breeding centers for the species. This subunit contains the essential habitat features of ponded areas which stay inundated for the minimum amount of time for the species to complete its aquatic lifecycle (PCE 1) and provides a prey base as well as space for growth and development; and upland areas which contain underground mammal burrows and similar refugia for food and shelter (PCE 2), and accessible upland habitats for dispersal (PCE 3). Special management for this subunit includes those activities outlined above. This subunit has been excluded from the final designation due to both the conservation measures being implemented by local governing agencies as well as having disproportionately high economic costs (see ''Exclusion Under Section 4(b)(2) section'' below).

Subunit 1c: (2,442 ac (988 ha))

This subunit is located in the southern portion of the designation near Stoney Point Road near Roblar Road and north of Pepper Road. Land within the area is privately owned. The subunit is determined to be critical habitat because it contains features essential to the conservation of the California tiger salamander, it is occupied by the species, it represents the southernmost distribution of the Sonoma County distinct population segment of the California tiger salamander, and it is one of four breeding centers for the species. This subunit contains the essential habitat features of ponded areas which stay inundated for the minimum amount of time for the species to complete its aquatic lifecycle (PCE 1) and provides a prey base as well as space for growth and development; and upland areas which contain underground mammal burrows and similar refugia for food and shelter (PCE 2), and accessible upland habitats for dispersal (PCE 3). Special management for this subunit includes those activities outlined above. This subunit has been excluded from the final designation due to both the conservation measures being implemented by local governing agencies as well as having disproportionately high economic costs (see ''Exclusion Under Section 4(b)(2) section'' below).

Subunit 1d: (776 ac (314 ha))

This subunit is located in the southern portion of the designation near Old Redwood Highway south of Cotati. Land within the area is privately owned. The subunit is determined to be critical habitat because it contains features essential to the conservation of the California tiger salamander, it is occupied by the species, it represents the southeastern most distribution of California tiger salamander in Sonoma County, and it is one of four breeding centers for the species. This subunit contains the essential habitat features of ponded areas which stay inundated for the minimum amount of time for the species to complete its aquatic lifecycle (PCE 1) and provides a prey base as well as space for growth and development; and upland areas which contain underground mammal burrows and similar refugia for food and shelter (PCE 2), and accessible upland habitats for dispersal (PCE 3). Special management for this unit includes those activities outlined above. This subunit has been excluded from the final designation due to both the conservation measures being implemented by local governing agencies as well as having disproportionately high economic costs (see ''Exclusion Under Section 4(b)(2)'' section below).

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. Such alterations include, but are not limited to: Alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical. We are currently reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency

cooperation provision of the Act are codified at 50 CFR Part 402.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports may include reasonable and prudent alternatives or reasonable and prudent measures to assist the agency in eliminating conflicts that may be caused by the proposed action. We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). Until such time as a proposed designation is finalized, any reasonable and prudent alternatives or reasonable and prudent measures included in a conference report are advisory.

If a species is listed or critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the action agency ensures that their actions do not destroy or adversely modify critical habitat.

When we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. ''Reasonable and prudent alternatives'' are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy critical habitat.

Federal activities that may affect the Sonoma County distinct population segment of the California tiger salamander or any critical habitat would require section 7 consultation. Activities on private or State lands requiring a permit from a Federal agency, such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act, a section 10(a)(1)(B) permit from the Service, or some other Federal action, including funding (e.g., Federal Highway Administration or Federal Emergency Management Agency funding), will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal and private lands that are not federally funded, authorized, or permitted do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat may also jeopardize the continued existence of the Sonoma County distinct population segment of the California tiger salamander. Federal activities that, when carried out, would adversely affect any critical habitat for the Sonoma County distinct population segment of the California tiger salamander include, but are not limited to:

(1) Actions that would regulate activities affecting waters of the United States by the Army Corps of Engineers under section 404 of the Clean Water Act;

(2) Actions by any Federal agency that change water flow regimes, or that dam, divert, or channel water;

(3) Road construction and maintenance funded or authorized by the Federal Highway Administration;

(4) Conservation measures by private landowners funded by the Natural Resources Conservation Service;

(5) Airport construction regulated by the Federal Aviation Administration;

(6) Construction of communication facilities licensed by the Federal Communications Commission; and

(7) Other activities funded by the U.S. Environmental Protection Agency, Department of Energy, Federal Emergency Management Agency, or other Federal agency.

Special management that may be needed for the Sonoma County distinct population segment of the California tiger salamander and its habitat is briefly summarized below:

(1) Manage hydrologic functioning of vernal pools and ponds. Restore and maintain natural hydrologic regimes to prevent hydrologic changes to aquatic habitats to maintain their suitability as California tiger salamander breeding habitat and restore such habitats in areas where they have become altered or destroyed.

(2) Manage water quality. Manage actions that significantly and detrimentally alter the water chemistry in the aquatic salamander habitat. Possible actions requiring such management would include intentional or unintentional release of chemical or biological pollutants into the surface water or connected groundwater at a point source or by dispersed release (non-point).

(3) Upland Habitat Management. Actions that significantly and detrimentally alter the characteristics of the upland habitat surrounding aquatic areas may need special management. Possible actions which may require special management include vegetation manipulation, road construction and maintenance, gravel mining, and urban and suburban development and infrastructure. We note that such alteration and or destruction of the surrounding upland areas which results in alteration of the hydrologic functioning of the aquatic habitat may destroy or adversely modify the aquatic habitat associated with the upland areas. As a result, these activities could eliminate or reduce the habitat necessary for the reproduction, sheltering or growth of the Sonoma County distinct population segment of the California tiger salamander.

(4) Manage nonnative aquatic species. Manage the introduction, spreading, or augmenting of detrimental nonnative aquatic species into salamander aquatic habitat. Possible actions requiring such

management would include fish stocking for sport, aesthetics, biological control, or other purposes; and release of live bait fish and nonnative tiger salamanders.

(5) Manage On- and Off-Road Use. Protect aquatic and upland areas from off-road vehicle use. Manage trails, road maintenance, and off-road vehicle access to prevent habitat degradation in order to maintain, protect, and restore California tiger salamander habitat.

(6) Manage small mammal control activities. Activities that would reduce small mammal populations to the point that there is insufficient underground refugia used by the Sonoma County distinct population segment of the California tiger salamander for foraging, protection from predators, and shelter from the elements may ultimately be detrimental to salamanders.

(7) Manage creation of dispersal barriers. Activities that create barriers impassable for salamanders, increase mortality in upland habitat between extant occurrences, or disrupt dispersal behavior may be detrimental to the salamander and may require special management. Activities that may require such management include highway and other urban infrastructure, building development, and intensively managed agricultural development (annual crops).

We consider the entire area which would be designated as critical habitat, absent exclusion under section 4(b)(2), to be occupied by the species at the time of listing based on information provided from 10(a)(1)(A) reports and occurrence data (CNDDB 2005). We consider the entire area which would be designated as critical habitat, absent exclusion under section 4(b)(2), to contain the features essential to the conservation of the Sonoma County distinct population segment of the California tiger salamander.

Exclusion Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species.

In our critical habitat designations, we use the provision outlined in section 4(b)(2) of the Act to evaluate those specific areas that contain the features essential to the conservation of the species to determine which areas to propose and subsequently finalize (i.e. designate) as critical habitat. On the basis of our evaluation, we have determined that the benefits of excluding certain lands from the designation of critical habitat for the Sonoma County distinct population segment of the California tiger salamander outweigh the benefits of their inclusion, and have subsequently excluded all lands within Sonoma County from this designation pursuant to section 4(b)(2) of the Act as discussed below.

Areas excluded pursuant to section 4(b)(2) may include those covered by the following types of plans/programs if the plans/programs provide assurances that the conservation measures they outline will be implemented and effective: (1) Legally operative Habitat Conservation Plans (HCPs) that cover the species; (2) draft HCPs that cover the species and have undergone public review and comment (i.e., pending HCPs); (3) Tribal conservation plans/programs that cover the species; (4) State conservation plans/programs that cover the species; (5) National Wildlife Refuges with Comprehensive Conservation Plans (CCPs) or other applicable programs that provide assurances that the conservation measures for the species will be implemented and effective, and; (6) Partnerships, conservation plans/easements, or other type of formalized relationship/agreement on private lands. The relationship of critical habitat to these types of areas is discussed in detail in the following paragraphs.

After consideration under section 4(b)(2), the entire area of habitat has been excluded from critical habitat for the Sonoma County distinct population segment of the California tiger salamander as a result of both conservation measures being implemented and developed by local governing agencies and disproportionately high economic costs. A detailed analysis of our exclusion of these lands under section 4(b)(2) of the Act is provided in the paragraphs that follow.

General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process

The most direct, and potentially largest regulatory benefit to the species of critical habitat is that federally authorized, funded, or carried out activities require consultation pursuant to section 7 of the Act to ensure that they are not likely to destroy or adversely modify critical habitat. There are two limitations to this regulatory effect. First, it only applies where there is a Federal nexus—if there is no Federal nexus, designation itself does not restrict actions that destroy or adversely modify critical habitat. Second, it only limits destruction or adverse modification. By its nature, the prohibition on adverse modification is designed to ensure those areas that contain the physical and biological features essential to the conservation of the species or unoccupied areas that are essential to the conservation of the species are not eroded. Critical habitat designation alone, however, does not require specific steps toward recovery.

Once consultation under section 7 of the Act is triggered, the process may conclude informally when the Service concurs in writing that the proposed Federal action is not likely to adversely affect the listed species or its critical habitat. However, if the Service determines through informal consultation that adverse impacts may occur, then formal consultation would be initiated. Formal consultation concludes with a biological opinion issued by the Service on whether the proposed Federal action is likely to jeopardize the continued existence of a listed species or result in destruction or adverse modification of critical habitat, with separate analyses being made under both the jeopardy and the adverse modification standards. For critical habitat, a biological opinion that concludes in a determination of no destruction or adverse modification may contain discretionary conservation recommendations to minimize adverse effects to primary constituent elements, but it would not contain any mandatory reasonable and prudent measures or terms and conditions. Mandatory reasonable and prudent alternatives to the proposed Federal action would only be issued when the biological opinion results in a jeopardy or adverse modification conclusion.

We also note that for 30 years prior to the Ninth Circuit Court's decision in *Gifford Pinchot*, the Service equated the jeopardy standard with the standard for destruction or adverse modification of critical habitat. The Court ruled that the Service could no longer equate the two standards and that adverse modification evaluations require consideration of impacts on the recovery of species. Thus, under the *Gifford Pinchot* decision, critical habitat designations may provide greater benefits to the recovery of a species. However, we

believe the conservation achieved through implementing larger scale management plans is typically greater than would be achieved through multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat. Management plans commit resources to implement long-term management and protection to particular habitat for at least one, and possibly other, listed or sensitive species. Section 7 consultations only commit Federal agencies to prevent adverse modification to designated critical habitat caused by the particular project and they are not committed to provide conservation or long-term benefits to areas not affected by the proposed project. Thus, any management plan which considers enhancement or recovery as the management standard will always provide as much or more benefit than a consultation for critical habitat designation conducted under the standards required by the Ninth Circuit in the *Gifford Pinchot* decision.

The information provided in this section applies to all the discussions below that discuss the benefits of inclusion and exclusion of critical habitat in that it provides the framework for the consultation process.

Educational Benefits of Critical Habitat

A benefit of including lands in critical habitat is that the designation of critical habitat serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by clearly delineating areas of high conservation value for the Sonoma County distinct population segment of the California tiger salamander. In general the educational benefit of a critical habitat designation always exists, although in some cases it may be redundant with other educational effects. For example, habitat conservation plans (or in the case here, the Conservation Strategy) have significant public input and may largely duplicate or exceed the educational benefit of a critical habitat designation. This benefit is closely related to a second, more indirect benefit; in that designation of critical habitat would inform State agencies and local governments about areas that could or should be conserved under State laws or local ordinances.

However, we believe that there would be little additional informational benefit gained from the designation of critical habitat for the exclusions we are making in this rule because these areas were included in the proposed rule as constituting essential California tiger salamander habitat. Consequently, we believe that the informational benefits are already provided even though these areas are not designated as critical habitat. Additionally, the purpose of informing State agencies and local governments about areas which would benefit from protection and enhancement of habitat for the California tiger salamander normally served by the designation of critical habitat is already well established among State and local governments, and Federal agencies for those areas which we are excluding in this rule on the basis of other implemented conservation measures and the on-going development and implementation of the Conservation Strategy.

As discussed in the ''Summary of Changes from the Proposed Rule'' section above, we have determined that all habitat in Sonoma County for the California tiger salamander (Unit 1) will not be designated as critical habitat as a result of this rulemaking process. We have reached this determination because we believe the benefits of excluding this unit from as critical habitat outweigh the benefits of designating the unit as critical habitat.

After the Sonoma County distinct population segment of the California tiger salamander was listed as an endangered species (68 FR 13498), we as well as other resource and regulatory agencies (U.S. Army Corps of Engineers, CDFG, U.S. Environmental Protection Agency) were contacted by local governmental officials from Sonoma County and the Cities of Windsor, Santa Rosa, Rohnert Park, and Cotati to strategize on how best to conserve State and Federally listed species on the Santa Rosa Plain. The Conservation Strategy is intended to direct conservation efforts for the Sonoma County distinct population segment of the California tiger salamander and several other Federally listed plant species. Although a recovery plan has not yet been prepared, recovery activities for the Sonoma County distinct population segment of the California tiger salamander would likely parallel those conservation measures identified in the Conservation Strategy. We believe that the best way to achieve the objectives outlined in the Conservation Strategy will be to use the authorities under section 4(b)(2) to exclude these lands.

Application of Exclusions Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species.

The Secretary exercises her discretion under section 4(b)(2) to exclude all essential areas from a final critical habitat designation for the following reasons: (1) The adverse impacts associated with the likely economic costs of the proposed final designation outweigh the likely conservation benefits provided by a final designation, and (2) it is highly probable that the Santa Rosa Plain Conservation Strategy will be implemented, and this strategy would provide conservation benefits that are superior to a final critical habitat designation. A final designation may also work at cross purposes to the Conservation Strategy by discouraging the involvement of local jurisdictions and private landowners without providing any counterbalancing, proactive conservation benefit.

The following discussion describes the analysis of the relative costs and benefits of a critical habitat designation. Section 4(b)(2) of the Act allows the Secretary to exclude areas from critical habitat for economic reasons or other relevant impacts if she determines that the benefits of such exclusion exceed the benefits of designating the area as critical habitat, unless the exclusion will result in the extinction of the species concerned. This is a discretionary authority Congress has provided to the Secretary with respect to critical habitat. Although economic and other impacts may not be considered when listing a species, Congress has expressly required their consideration when designating critical habitat.

Relationship of Critical Habitat to Economic Impacts—Exclusions Under Section 4(b)(2) of the Act

In conducting economic analyses, we are guided by the 10th Circuit Court of Appeal's ruling in the New Mexico Cattle Growers Association case (248 F.3d at 1285), which directed us to consider all impacts, ''regardless of whether those impacts are attributable co-extensively to other causes.'' As explained in the analysis, due to possible overlapping regulatory schemes and other reasons, there are also some

elements of the analysis that may overstate some costs.

Conversely, the Ninth Circuit has recently ruled (''*Gifford Pinchot*'', 378 F.3d at 1071) that the Service's regulations defining ''adverse modification'' of critical habitat are invalid because they define adverse modification as affecting both survival and recovery of a species. The Court directed us to consider that determinations of adverse modification should be focused on impacts to recovery. While we have not yet proposed a new definition for public review and comment, compliance with the Court's direction may result in additional costs associated with the designation of critical habitat (depending upon the outcome of the rulemaking). In light of the uncertainty concerning the regulatory definition of adverse modification, our current methodological approach to conducting economic analyses of our critical habitat designations is to consider all conservation-related costs. This approach would include costs related to sections 4, 7, 9, and 10 of the Act, and should encompass costs that would be considered and evaluated in light of the *Gifford Pinchot* ruling.

In addition, we have received several credible comments on the economic analysis contending that it underestimates, perhaps significantly, the costs associated with this critical habitat designation. Both of these factors are a balancing consideration against the possibility that some of the costs shown in the economic analysis might be attributable to other factors, or are overly high, and so would not necessarily be avoided by excluding the area for which the costs are predicted from this critical habitat designation.

We recognize that we have excluded all of the proposed critical habitat. Congress expressly contemplated that exclusions under this section might result in such situations when it enacted the exclusion authority. House Report 95–1625, stated on page 17: ''Factors of recognized or potential importance to human activities in an area will be considered by the Secretary in deciding whether or not all or part of that area should be included in the critical habitat. In some situations, no critical habitat would be specified. In such situations, the Act would still be in force and prevent any taking or other prohibited act * * *'' (emphasis supplied). We accordingly believe that these exclusions, and the basis upon which they are made, are fully within the parameters for the use of section 4(b)(2) set out by Congress.

We provided notice of availability of a DEA on October 25, 2005 (70 FR 61591) and requested comment on the potential exclusion of high cost areas. We published a subsequent notice on November 17, 2005 (70 FR 69717) in which we disclosed revised economic impacts based on a refinement of the proposed designation on which we solicited public comment. The DEA estimated the foreseeable economic impacts of the proposed critical habitat designation on government agencies and private businesses and individuals. The economic analysis identified potential costs over a 20-year period as a result of the proposed critical habitat designation, including those costs coextensive with listing. The analysis measured lost economic efficiency associated with residential and commercial development, and public projects and activities, such as economic impacts on transportation projects, the energy industry, and Federal lands. However, no Federal lands are within the proposed critical habitat boundary. The economic analysis considered the potential economic effects of actions relating to the conservation of the Sonoma County distinct population segment of the California tiger salamander, including costs associated with sections 4, 7, and 10 of the Act, and including those attributable to designating critical habitat. It further considered the economic effects of protective measures taken as a result of other Federal, State, and local laws that aid habitat conservation for the California tiger salamander in essential habitat areas. The economic analysis considered both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the ''opportunity costs'' associated with the commitment of resources to comply with habitat protection measures (e.g., lost economic opportunities associated with restrictions on land use). This analysis also addressed how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on small entities and the energy industry. This information can be used by decision makers to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, the analysis looked retrospectively at costs that have been incurred since the date the species was listed as an endangered species and considers those costs that may occur in the 20 years following a designation of critical habitat.

A copy of the final economic analysis with supporting documents are included in our administrative record and may be obtained by contacting U.S. Fish and Wildlife Service, Branch of Endangered Species (see **ADDRESSES** section).

We have considered, but are excluding from critical habitat for the Sonoma County distinct population segment of the California tiger salamander all essential habitat in the four highest cost census tracts which cumulatively account for approximately 94% of the economic impacts of the designation (Table 4).

TABLE 4.—EXCLUDED CENSUS TRACTS AND COSTS

Census tract	Adjusted welfare impact in final EA ($)
06097153300	125,612,192
06097153200	30,148,184 (including transportation costs)
06097151201	18,746,038
06097153005	9,863,633

(1) Benefits of Inclusion of the 4 Excluded Census Tracts

The principal benefit of designating critical habitat is that Federal activities that may affect such habitat are subject to consultation pursuant to section 7 of the Act. Such consultation requires every Federal agency to ensure that any action it authorizes, funds, or carries out is not likely to result in the destruction or adverse modification of critical habitat. The most direct, and potentially largest, regulatory benefit of critical habitat is that federally authorized, funded, or carried out activities require consultation pursuant to section 7 of the Act to ensure that these activities are not likely to destroy or adversely modify critical habitat.

There are two limitations to this regulatory effect. First, it only applies where there is a Federal nexus—if there is no Federal nexus, designation itself does not restrict actions that destroy or adversely modify critical habitat. Second, it only limits destruction or adverse modification. It does not encourage proactive or ''interventionist'' conservation efforts. By its nature, the prohibition on adverse modification is designed to ensure those areas that contain the physical and biological features essential to the conservation of the species or unoccupied areas that are essential to the conservation of the species are maintained. Critical habitat designation alone, however, does not

require specific steps toward recovery, especially on non-federal lands.

Once consultation under section 7 of the Act is triggered, the process may conclude informally when the Service concurs in writing that the proposed Federal action is not likely to adversely affect the listed species or its critical habitat. However, if the Service determines through informal consultation that adverse impacts are likely to occur, then formal consultation would be initiated. Formal consultation concludes with a biological opinion issued by the Service on whether the proposed Federal action is likely to jeopardize the continued existence of a listed species or result in destruction or adverse modification of critical habitat, with separate analyses being made under both the jeopardy and the adverse modification standards. For critical habitat, a biological opinion that concludes in a determination of no destruction or adverse modification may contain discretionary conservation recommendations to minimize adverse effects to primary constituent elements, but it would not contain any mandatory reasonable and prudent measures or terms and conditions. Mandatory reasonable and prudent alternatives to the proposed Federal action would only be issued when the biological opinion results in a jeopardy or adverse modification conclusion.

We also note that the decision of the Ninth Circuit in *Gifford Pinchot Task Force* v. *USFWS* must be considered in weighing the effects of designation of critical habitat. In that case, the court held the Service's regulatory definition of ''destruction or adverse modification'' was contrary to the Act because it required an analysis of the effect of the proposed Federal action on the survival of the species in addition to an analysis of the effect on recovery of the species. To the extent compliance with *Gifford Pinchot* would lead to more determinations that Federal actions destroy or adversely modify critical habitat than had previously been the case, designation of critical habitat would provide greater regulatory protections to the species' habitat.

Significant portions of the lower Santa Rosa Plain within or adjacent to the urban growth boundary are documented to be occupied by California tiger salamander. Other portions are not surveyed and may or may not be occupied. Also, there are large upland areas near breeding ponds where California tiger salamander aestivate underground. Any Federal activity adversely affecting California tiger salamander in these occupied areas will require section 7 consultations with the Service, and any non-Federal action that may take a California tiger salamander will require a Section 10 permit if the action is not already covered under a section 7 consultation.

In general, regulatory benefits of a critical habitat designation would be highest on Federal lands where most actions would be subject to section 7 review. There are no Federal lands in the Santa Rosa Plain. However, section 7 consultation likely will have a regulatory effect on many proposed actions that directly affect California tiger salamander breeding habitat due to a Federal nexus with the Clean Water Act and consultation with the Army Corps of Engineers. As described above, these consultations are likely to result in determinations of ''no jeopardy'' to the species and ''no destruction or adverse modification'' of critical habitat under the *Gifford Pinchot* standard. Upland areas or private lands where California tiger salamander have not been surveyed or observed will be subject to less and sometimes no regulation under the Act. This outcome depends on whether local jurisdictions require California tiger salamander surveys on private lands and, if so, whether California tiger salamanders are actually found on the property. If California tiger salamander are found on these upland areas, and the proposed action may take California tiger salamander, then a section 10 permit is required and consultation on critical habitat will also occur. In contrast, if California tiger salamander are not found or the landowner declines to survey for California tiger salamander, then the proposed action may occur without a section 7 or section 10 permit and there is no consultation under the Act. Under this process, it is likely that a significant amount of potential upland aestivation habitat will not be regulated under the Act because of a lack of a Federal nexus and the low likelihood that portions of these areas are currently occupied by the species. It is in cases such as this where a critical habitat designation provides little positive regulatory benefit.

Designation of critical habitat for the Sonoma County distinct population segment of the California tiger salamander would confer some limited additional regulatory benefits beyond the status quo because the Service would apply the *Gifford Pinchot* recovery standard to section 7 consultations on proposed Federal activities. This standard would ensure that the Service looks beyond the jeopardy standard when assessing a project's impact on a species' critical habitat. We determined in the economic analysis that designation of critical habitat could result in approximately $184 million in costs in these four census tracts, the majority of which are directly related to residential development impacts. We believe that the potential decrease in residential housing development that could be caused by this designation of critical habitat for the Sonoma County distinct population segment of the California tiger salamander would minimize impacts to and potentially provide some additional protection to the species, the vernal pool complexes and ponds where they reside, and the physical and biological features essential to the species' conservation (i.e., the primary constituent elements). Thus, this decrease in residential housing development would directly translate into a potential benefit to the species that would result from this designation.

However, these benefits are likely to be quite limited in relation to what the California tiger salamander requires for successful conservation on the Santa Rosa Plain. This consultation benefit would not apply to all critical habitat lands because of a lack of a Federal nexus for large portions of unsurveyed private uplands that are not immediately adjacent to breeding ponds. It would also be applied in a piecemeal, project-by-project fashion. Application of section 7 on these private lands would depend on an unpredictable combination of several factors, including the presence of a section 7 Federal nexus, the likelihood or certainty of California tiger salamander occupancy on the project site, the willingness of the landowner to survey for California tiger salamander if occupancy is unknown, the legal ability and political desire of local jurisdictions to require surveys and/or some form of consultation with the Service, and the ability to require compensatory mitigation if impacts to California tiger salamander are anticipated.

Therefore, it is reasonable to conclude that only a portion of the area that otherwise would be designated as critical habitat will likely be regulated or conserved. Some areas of potential critical habitat would be conserved through the direct regulation of Federal actions and associated private activities (e.g., a Clean Water Act permit concerning a proposed development that would fill wetlands). On the other hand, large portions of critical habitat on private lands will not be regulated under section 7 or section 10 of the Act where direct take is not likely to occur or is undeterminable, and no other Federal nexus exists. We are unable to calculate at this time the relative

amounts of land in these two respective categories. At best, a critical habitat designation, in conjunction with section 9 take prohibitions, is most likely to protect known occupied breeding sites or occupied upland areas. A critical habitat designation is least likely to protect unoccupied habitat and unsurveyed private lands with no Federal nexus and, as we discuss below, may serve to discourage California tiger salamander conservation on these areas.

Another potential benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area and thereby focus and contribute to conservation efforts by clearly delineating areas of high conservation value for certain species. Such a benefit could be substantial in geographic areas where the presence of the California tiger salamander was a relatively new or unknown phenomenon, and there was a need to educate the local community to the species' presence and conservation needs. However, such a situation does not exist anywhere in the Santa Rosa Plain. Due in large part to the extensive media attention applied to the high-profile conflicts that accompanied the listing of the species and the critical habitat proposal, there is widespread knowledge of the species' local status and conservation needs. Therefore, it is unlikely that a final critical habitat designation would provide any significant new or additional educational benefit beyond the status quo.

In sum, a final critical habitat designation would confer some additional, but limited, regulatory benefits on portions of the critical habitat above and beyond those already provided through the listing of the species. Most of these limited additional benefits would be a consequence of section 7 consultation on critical habitat to the *Gifford Pinchot* standard.

(2) Benefits of Exclusion of the Four Census Tracts

The economic analysis conducted for the refined proposal estimates that the costs associated with designating these four census tracts would be approximately $184 million. By excluding these census tracts, some of these costs will be avoided. Additionally, important public sector transportation projects will avoid the costs associated with critical habitat designation.

We believe that the required future recovery planning process would provide at least equivalent educational value to the public, State and local governments, scientific organizations, and Federal agencies by providing information about habitat that contains features considered essential to the conservation of the Sonoma County distinct population segment of the California tiger salamander, and in facilitating conservation efforts through heightened public awareness of the plight of the listed species. Recovery plans would contain explicit objectives for ongoing public education, outreach, and collaboration at local, State, and Federal levels, and between the private and public sectors to guide recovery of the Sonoma County distinct population segment of the California tiger salamander.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We believe that the benefits from excluding these four census tracts from the designation of critical habitat—avoiding the potential economic and human costs, both in dollars and jobs, predicted in the economic analysis—exceed the educational and regulatory benefits which could result from including those lands in this designation of critical habitat.

We have evaluated and considered the potential economic costs on the residential development industry and public sector transportation projects relative to the potential benefit for the Sonoma County distinct population segment of the California tiger salamander and its primary constituent elements derived from the designation of critical habitat. We believe that avoiding the potential economic impact of up to approximately $184 million on the development industry and public sector projects significantly outweighs the potential conservation and protective benefits for the species and the primary constituent elements that would be derived from the designation of these four census tracts as critical habitat.

Additionally, we believe that the recovery planning process provides equivalent educational value to the public, State and local governments, scientific organizations, and Federal agencies in providing information about habitat that contains those features considered essential to the conservation of the Sonoma County distinct population segment of the California tiger salamander, and in facilitating conservation efforts through heightened public awareness of the plight of the listed species. Recovery plans would contain explicit objectives for ongoing public education, outreach, and collaboration at local, State, and Federal levels, and between the private and public sectors to guide recovery efforts for the Sonoma County distinct population segment of the California tiger salamander and would bring funding for these efforts. We therefore find that the benefits of excluding the four census tracts from this designation of critical habitat outweigh the benefits of including them in the designation.

Relationship of Critical Habitat to Current and Proposed Conservation Efforts—Application of Section 4(b)(2)

We have considered, but are excluding, lands within the refined designation that fall within the boundaries of the draft Conservation Strategy. We believe the benefits of excluding lands within this draft Conservation Strategy outweigh the benefits of including them. The following represents our rationale for excluding these areas. Taken together with the four census tracts excluded above for economic reasons, the result is that we are not designating any critical habitat for the Sonoma County distinct population segment of the California tiger salamander at this time on the basis of both economics and the proactive conservation benefits conferred by the locally developed conservation strategy.

Since the listing of the Sonoma County distinct population segment of the California tiger salamander, Federal, State, and local officials have struggled with how best to manage the unique conservation challenge posed by this species. The salamander occurs almost exclusively on undeveloped, privately owned lands within an approved urban growth boundary (UGB) or within areas adjacent to the UGB. Prior to the listing, significant local planning efforts had been completed, and much of the remaining salamander habitat within or adjacent to the UGB had been designated for various types of development.

Pursuant to section 4(b)(2), we analyzed whether the benefits of designating these lands as critical habitat were outweighed by the benefits of excluding these lands from a final designation. In the following section, we evaluate a ''without critical habitat'' scenario and compare it to a ''with critical habitat'' scenario. The difference between the two scenarios measured the net negative or positive impacts attributable to the designation of critical habitat. We paid particular attention to the following issues:

- The degree to which a critical habitat designation would confer regulatory conservation benefits on these species (e.g. high, medium, low);

• Whether the designation would educate members of the public such that conservation efforts would be enhanced;

• Whether a critical habitat designation would have a positive, neutral, or negative impact on local support for salamander conservation, including the finalization and implementation of the Conservation Strategy;

• To what extent a critical habitat designation is likely to encourage or discourage future cooperative efforts with local landowners and officials; and,

• The degree to which the Conservation Strategy provides a better conservation alternative to critical habitat and the likelihood it will be implemented.

If a critical habitat designation results in a quantifiable reduction in the likelihood that existing or future voluntary, cooperative conservation activities will be carried out on non-federal lands, and at the same time fails to confer a counter-balancing positive regulatory or educational benefit to the conservation of the species, then the benefits of excluding such areas from critical habitat outweigh the benefits of including them.

The designation of critical habitat on non-federal lands can have both negative and positive impacts on the conservation of listed species (Bean 2002). There is a growing body of documentation that some regulatory actions by the Federal government, while well-intentioned and required by law, can under certain circumstances have unintended negative consequences for the conservation of species on non-federal lands (Bean 2002; Brook *et al.* 2003; James 2002; Koch 2002; Wilcove *et al.* 1996). Some landowners fear a decline in value of their properties because of their belief that the Act may restrict future land-use options where threatened or endangered species are found. Consequently, endangered species are perceived by many landowners as a financial liability, which sometimes results in anti-conservation incentives to these landowners (Brook *et al.* 2003, Main *et al.* 1999).

According to some researchers, the designation of critical habitat on private lands significantly reduces the likelihood that many landowners will support and carry out conservation actions (Bean 2002; Brook *et al.* 2003; Main *et al.* 1999). The magnitude of this negative outcome is greatly amplified in conservation situations, such as on privately-owned lands, where it is insufficient simply to prohibit harmful activities. Instead, it is necessary in most cases to encourage and carry out active management measures to prevent extinctions and promote recovery (Bean 2002). Consideration of this concern is especially important in areas where recovery efforts require access and landowner permission for survey and restoration efforts. Simply preventing ''harmful activities'' will not slow the extinction of listed species or promote their recovery. Proactive, voluntary conservation efforts are necessary to prevent the extinction and promote the recovery of these species (Wilcove and Lee 2004, Shogren *et al.* 1999). It is widely acknowledged that conservation of the Sonoma County distinct population segment of the California tiger salamander will require proactive restoration efforts.

(1) Benefits of Inclusion of the Excluded Areas

The benefits of inclusion of the excluded areas as critical habitat were described in the preceding section.

(2) Benefits of Exclusion of the Excluded Areas—Other Relevant Impacts

The salamander occurs almost exclusively on undeveloped, privately owned lands within an approved urban growth boundary in Sonoma County. Prior to the listing, significant local planning efforts had been completed, and much of the remaining salamander habitat within the growth boundary had been designated for various types of development. Because of the salamander's occurrence on private lands mostly designated for development, the primary challenge facing Federal, State, and local officials is how best to reconcile the goals and requirements of the Federal Endangered Species Act with the economic and social needs of the local communities in Sonoma County.

Approximately two years ago, a group of Federal, State, and local officials and stakeholders initiated an effort to address this challenge. Local biologists with the Service, the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, and the California Department of Fish and Game joined with local representatives of the cities of Santa Rosa, Cotati, Rohnert Park, Sonoma County, the North Coast Regional Water Quality Control Board, and the environmental and development communities. All parties recognized that a court-ordered Federal designation of critical habitat would likely further polarize local conservation efforts, and that a regional scientific effort with broad local support of private landowners had the highest likelihood of achieving conservation of the California tiger salamander and other listed species on the Santa Rosa Plain.

This group developed the Conservation Strategy, a comprehensive plan to provide for California tiger salamander conservation while also identifying a predictable process whereby certain public and private development projects can proceed. The Conservation Strategy was published in draft form and provided to the public for review and comment earlier in 2005. The Conservation Strategy also received extensive peer review from knowledgeable scientists. For the sake of brevity, the Conservation Strategy document (August 3, 2005) is incorporated herein by reference, while the main objectives of the Conservation Strategy are described below:

(1) Provide for the long-term survival and recovery of the California tiger salamander and listed plant species by establishing and supporting a system of preserves, mitigation banks, and restoration areas.

(2) Ensure that projects impacting extant California tiger salamander subpopulations are minimized and mitigated to the maximum extent possible.

(3) Identify and maximize the potential for restoration of degraded habitat areas, and add these to the preserve system.

(4) Fund monitoring efforts to make sure that California tiger salamander conservation areas are adaptively managed to account for changing conditions and new information.

(5) Fund monitoring efforts to make sure that the provisions of the Conservation Strategy are properly implemented and that its terms are enforced.

(6) Provide for a cost effective, predictable, and streamlined process for private and public development projects under the Act, and;

(7) Ensure that the Conservation Strategy for California tiger salamander is compatible with local urban planning efforts and, likewise, ensure that changes to local planning efforts are compatible with ongoing California tiger salamander conservation.

Final completion and implementation of the Conservation Strategy will require several more steps to comply with State and local government approval processes. We have some concern that the strategy is not yet completed and under implementation, but these concerns are alleviated by the passage of resolutions by the local jurisdictions (November 9, 2005) and subsequent approval of a planning agreement committing them to complete and

implement the strategy within the next 18–24 months as these approval processes are completed. In addition, these jurisdictions have agreed to implement interim conservation measures until the Conservation Strategy is implemented to ensure that current or initiated actions proceed consistent with the biological objectives of the Conservation Strategy. These interim measures subject actions affecting California tiger salamander and its habitat to Service and CDFG review, and they provide mitigation for unavoidable impacts to California tiger salamander. These measures are described in greater detail later in this section.

Implementation of the Conservation Strategy offers the best possible opportunity to reconcile the goals of the Federal Endangered Species Act with the economic and social planning goals of the local communities. We are encouraged by the passage of the resolutions and the approval of the planning agreement by all of the affected local jurisdictions and believe that final implementation of the Conservation Strategy is very likely. We are also encouraged by the tremendous show of good faith by all of the agencies and local entities that have participated in this process as part of the Conservation Strategy team, and the generous commitment of their time and effort over the last two years. This large investment of personnel resources by these many entities reflects a serious commitment and implies a high likelihood that the strategy will be finalized and implemented.

Further, it is likely that a designation of critical habitat in the face of this planning effort would have a chilling effect on the participation of at least some of these local entities and stakeholders. Several comments received from various jurisdictions expected that a critical habitat designation would encourage participants to leave the cooperative process that has been established and may cause the breakdown of the Conservation Strategy. Likewise, it is probable that local landowners affected by a final critical habitat designation process would revert to the more traditional ''permit-by-permit'' approval process, which would make planning for long-term California tiger salamander conservation much more difficult on a landscape scale, as described earlier.

In summary, we conclude that the designation of critical habitat for the Sonoma County distinct population segment of the California tiger salamander would have negative impacts on the finalization and implementation of the Santa Rosa Plain Conservation Strategy. Avoiding these negative impacts is a benefit of excluding these lands from the final critical habitat designation.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion for Proposed Critical Habitat

As discussed in the overview to this section, we analyzed whether the benefits of designating these lands as critical habitat were outweighed by the benefits of excluding these lands from a final designation. We evaluated a ''without critical habitat'' scenario and compared it to a ''with critical habitat'' scenario. The difference between the two scenarios measured the net negative or positive impacts attributable to the designation of critical habitat.

In general, we believe the conservation achieved through implementing habitat conservation plans (HCPs), approved conservation agreements, or other applied habitat management strategies such as the Conservation Strategy is typically greater than would be achieved through multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat. Management plans commit resources to implement long-term management and protection to particular habitat for at least one and possibly other listed or sensitive species. Section 7 consultations only commit Federal agencies to prevent adverse modification to critical habitat caused by the particular project, and they are not committed to provide conservation or long-term benefits to areas not affected by the proposed, site-specific project. Thus, any HCP or conservation strategy which establishes long-term enhancement or recovery as the management standard, and that ensures implementation of compensatory mitigation where appropriate, will always provide as much or more benefit than a consultation for critical habitat designation conducted under the standards required by the Ninth Circuit in the *Gifford Pinchot* decision.

Therefore, we assign relatively little weight to the benefits of designating this area as critical habitat when compared to the approach embodied by the Conservation Strategy. This strategy provides the highest likelihood of conserving habitat for California tiger salamander and listed plants in Sonoma County. The need to maintain and expand recent gains in cooperative conservation efforts in Sonoma County for the California tiger salamander and listed plants is crucial to the long-term effectiveness of California tiger salamander recovery. Under the best of circumstances, a critical habitat designation would only provide piecemeal, project-by-project conservation benefits to California tiger salamander by prohibiting adverse modification of designated critical habitat. It would not provide a proactive or distinct population segment-wide recovery benefit to the species achievable under larger-scale conservation plans, which benefit from economies of scale through participation of multiple landowners and project proponents in partnership with one or more local jurisdictions in a relatively large geographic area. Such larger-scale plans are more effective at protecting and managing strategically situated habitat areas of a size that can achieve long-term conservation for the species than a project-by-project approach. The most important benefits provided by the Conservation Strategy, in comparison to a designation of critical habitat, can be summarized as follows:

(1) The Conservation Strategy reconciles local growth plans (e.g., an approved urban growth boundary) with the conservation goals of the Federal Endangered Species Act. A critical habitat designation has not been reconciled with local plans, and according to multiple public comments by knowledgeable officials is likely to not be supported by local landowners and government officials. Therefore, the Conservation Strategy has a higher likelihood of successfully providing for the conservation of California tiger salamander because it has been embraced by the local community through their elected officials.

(2) A tremendous amount of local planning resources and public participation has already been expended in completing the most recent round of urban growth planning in Sonoma County. A decision such as a Federal critical habitat designation could dramatically affect these boundaries and should, wherever possible and appropriate, be flexible to accommodate locally developed and approved planning processes. This flexibility makes economic, social, and conservation sense.

(3) The Conservation Strategy has created an atmosphere of partnership by bringing together a broad coalition of government officials, local developers, environmentalists, and landowners. A critical habitat designation will likely polarize many of these stakeholders and decrease the likelihood that meaningful cooperative conservation will be

achieved for the California tiger salamander.

(4) The Conservation Strategy provides a ''proactive'' conservation strategy that actively encourages California tiger salamander conservation for all types of California tiger salamander lands, including unoccupied or unsurveyed lands and agricultural lands. Critical habitat provides ''prohibitive'' protections in portions of the species'' range, but it does not encourage proactive activities. Therefore, the Conservation Strategy has a higher likelihood of achieving conservation of California tiger salamander on private lands, and it has a higher likelihood of helping re-establish California tiger salamander on unoccupied lands.

(5) The Conservation Strategy has a higher likelihood of achieving broader landscape-level conservation for the California tiger salamander and listed plants. The critical habitat designation, in contrast, would likely result in piecemeal conservation efforts that would be influenced by the order in which permit requests are submitted to Federal and other agencies.

(6) The Conservation Strategy will identify funding mechanisms to provide for California tiger salamander mitigation and conservation. Critical habitat has no funding mechanisms for California tiger salamander mitigation costs and proactive conservation activities.

(7) The Conservation Strategy provides ongoing educational benefits that surpass any of those that would be provided by a final critical habitat designation.

For the reasons described above, we have determined that the benefits of designating critical habitat for the Sonoma County distinct population segment of the California tiger salamander are relatively small, while the benefits of not designating proposed critical habitat and proceeding with the Conservation Strategy are more significant.

(4) Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these lands will not result in the extinction of the Sonoma County distinct population segment of the California tiger salamander. Many of these areas are considered occupied habitat. Actions which might adversely affect the species are expected to have a Federal nexus, and would thus undergo a section 7 consultation with the Service. The jeopardy standard of section 7, and routine implementation of habitat preservation through the section 7 process, as discussed in the economic analysis, provide assurance that the species will not go extinct. In addition, the species is protected from take under section 9 of the Act. The exclusion leaves these protections unchanged from those that would exist if the excluded areas were designated as critical habitat.

In fact, we believe the exclusion of these areas from a critical habitat designation will actually improve both its short term and long term conservation opportunities and will reduce its likelihood of extinction. Implementation of the ''interim measures'' and the Conservation Strategy will provide an opportunity for maintaining and increasing salamanders in certain portions of the Santa Rosa Plain, while a critical habitat designation will likely not prevent the continued slow demise of the population as unmanaged fragmentation occurs due to piecemeal development.

(5) Reconsideration of This Decision

Necessarily, in balancing the benefits of inclusion against the benefits of exclusion, we must make forecast about future occurrences. Our forecasts are based on the best information currently available. We recognize that our information is imperfect, and therefore our forecasts may be imperfect. To the extent that our analysis is not borne out, we will consider further rulemaking in the future. For example, if the Conservation Strategy is not finalized or implemented in a reasonable amount of time, or the interim measures prove to be less effective at conserving the California tiger salamander than expected, our current analysis will likely prove to have significantly understated the benefits of inclusion. Therefore, if we subsequently determine, based on new information, that the benefits of including a particular area are not outweighed by the benefits of excluding it, we will promptly publish a proposed rule to revise the critical habitat to add that area, and after public comment, add that area to the designation, if appropriate.

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific information available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species concerned.

Following the publication of the proposed critical habitat designation, we conducted an economic analysis to estimate the potential economic effect of the designation. The draft analysis was made available for public review on October 25, 2005 (70 FR 61591), and we accepted comments on the draft economic analysis until November 14, 2005. We reopened the comment period on November 17, 2005 to allow all interested parties an opportunity to comment simultaneously on the proposed rule and a refinement of the original which we were considering (70 FR 69717). We accepted comments until November 28, 2005.

The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the designation of critical habitat for the Sonoma County distinct population segment of the California tiger salamander. This information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. This economic analysis considers the economic efficiency effects that may result from the designation, including habitat protections that may be co-extensive with the listing of the species. It also addresses distribution of impacts, including an assessment of the potential effects on small entities, the energy industry, transportation projects, and Federal lands. This information can be used by the Secretary to assess whether the effects of the designation might unduly burden a particular group or economic sector.

This analysis focuses on the direct and indirect costs of the rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in the analysis as they are considered to be part of the regulatory and policy baseline.

We received comments on the draft economic analysis of the proposed designation. Following the close of the comment period, we considered those comments and prepared responses to comments (see Responses to Comments section above).

The November 17, 2005, notice (70 FR 69717) reopening the comment period provides a detailed economics section that shows an economic impact on land development of $195,863,729. The revised impact on transportation projects is $426,000. The total revised cost of designation is thus $196,289,729, or $17,316,226 annualized over 20 years. In the event that portions of critical habitat with the urban growth boundaries are excluded, the cost drops to $128,008,620.

We are not designating any critical habitat for the Sonoma County distinct population segment of the California tiger salamander. We are excluding all areas under 4(b)(2) (see Exclusions section) so there are no costs associated with this rulemaking process.

A copy of the economic analysis with supporting documents are included in our administrative record and may be obtained by contacting U.S. Fish and Wildlife Service, Branch of Endangered Species (see **ADDRESSES** section) or for downloading from the Internet at *http://www.fws.gov/sacramento.*

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but will not have an annual effect on the economy of $100 million or more or affect the economy in a material way. Due to the tight timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule. As explained above, we prepared an economic analysis of this action. We used this analysis to meet the requirement of section 4(b)(2) of the Act to determine the economic consequences of designating specific areas as critical habitat. We also used it to help determine whether to exclude any area from critical habitat, as provided for under section 4(b)(2), if we determine that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless we determine, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA) (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a statement of factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA also amended the RFA to require a certification statement.

Small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; as well as small businesses. Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule, as well as the types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (e.g., housing development, grazing, oil and gas production, timber harvesting). We apply the ''substantial number'' test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define ''substantial number'' or ''significant economic impact.'' Consequently, to assess whether a ''substantial number'' of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities conducted, funded, or permitted by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the California tiger salamander. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities.

Had we designated critical habitat, it would not have been expected to result in significant small business impacts since revenue losses would have been less than one percent of total small business revenues in affected areas. Large businesses greatly dominate greenfield development, and it was estimated that no more than a single small business would be affected annually as a consequence of designation.

In general, two different mechanisms in section 7 consultations could lead to additional regulatory requirements for the single small business, on average, that may be required to consult with us each year regarding their project's impact on California tiger salamander and its habitat. First, if we conclude, in a biological opinion, that a proposed action is likely to jeopardize the continued existence of a species or adversely modify its critical habitat, we can offer ''reasonable and prudent alternatives.'' Reasonable and prudent alternatives are alternative actions that can be implemented in a manner consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that would avoid jeopardizing the continued existence of listed species or result in adverse modification of critical habitat. A Federal agency and an applicant may elect to implement a reasonable and prudent alternative associated with a biological opinion that has found jeopardy or adverse modification of

critical habitat. An agency or applicant could alternatively choose to seek an exemption from the requirements of the Act or proceed without implementing the reasonable and prudent alternative. However, unless an exemption were obtained, the Federal agency or applicant would be at risk of violating section 7(a)(2) of the Act if it chose to proceed without implementing the reasonable and prudent alternatives.

Second, if we find that a proposed action is not likely to jeopardize the continued existence of a listed animal or plant species, we may identify reasonable and prudent measures designed to minimize the amount or extent of take and require the Federal agency or applicant to implement such measures through non-discretionary terms and conditions. We may also identify discretionary conservation recommendations designed to minimize or avoid the adverse effects of a proposed action on listed species or critical habitat, help implement recovery plans, or to develop information that could contribute to the recovery of the species.

Based on our experience with consultations pursuant to section 7 of the Act for all listed species, virtually all projects—including those that, in their initial proposed form, would result in jeopardy or adverse modification determinations in section 7 consultations—can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. These measures, by definition, must be economically feasible and within the scope of authority of the Federal agency involved in the consultation. We can only describe the general kinds of actions that may be identified in future reasonable and prudent alternatives. These are based on our understanding of the needs of the species and the threats it faces, as described in the final listing rule and this notice of rulemaking. The types of Federal actions or authorized activities that we have identified as potential concerns are:

(1) Regulation of activities affecting waters of the United States by the Corps of Engineers under section 404 of the Clean Water Act;

(2) Regulation of water flows, damming, diversion, and channelization implemented or licensed by Federal agencies;

(3) Road construction and maintenance, right-of-way designation, and regulation of agricultural activities;

(4) Hazard mitigation and post-disaster repairs funded by the FEMA; and

(5) Activities funded by the EPA, U.S. Department of Energy, or any other Federal agency.

It is likely that a developer or other project proponent could modify a project or take measures to protect California tiger salamander. The kinds of actions that may be included if future reasonable and prudent alternatives become necessary include conservation set-asides, management of competing nonnative species, restoration of degraded habitat, and regular monitoring. These are based on our understanding of the needs of the species and the threats it faces, as described in the final listing rule and proposed critical habitat designation. These measures are not likely to result in a significant economic impact to project proponents.

In summary, we have considered whether this action would result in a significant economic effect on a substantial number of small entities. We have determined that it would not affect a substantial number of small entities because we are excluding areas which otherwise would be designated. A regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C 801 et seq.)

Under SBREFA, this action is not a major rule. We are excluding all areas from critical habitat, so there are no economic impacts attributable to a critical habitat designation.

Executive Order 13211

On May 18, 2001, the President issued Executive Order (E.O.) 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This final rule does not designate critical habitat for the California tiger salamander and is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

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

(a) This action will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, Tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities who receive Federal funding, assistance, permits or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) We do not believe that this action will significantly or uniquely affect small governments because it will not produce a Federal mandate of $100

million or greater in any year, that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. As such, a Small Government Agency Plan is not required.

Federalism

In accordance with Executive Order 13132, the action does not have significant Federalism effects. The rule does not designate any critical habitat, and a Federalism assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the action does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are not designating any critical habitat with this action.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

It is our position that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of Interior's Manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We are not designating any critical habitat in this rule, and no Tribal lands are involved.

References Cited

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor, Sacramento Fish and Wildlife Office (see **ADDRESSES** section).

Author(s)

The primary author of this package is the staff of the Sacramento Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

■ Accordingly, we amend Part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise

■ 2. In § 17.95, amend paragraph (d) by adding an entry for California tiger salamander (*Ambystoma californiense*) in Sonoma County following the entries for ''California tiger salamander in Santa Barbara County'' and ''Central Population of California tiger salamander'' read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(d) *Amphibians.*

* * * * *

California Tiger Salamander (*Ambystoma californiense*)

* * * * *

California Tiger Salamander in Sonoma County

Pursuant to section 4(b)(2) of the Act, we have excluded all areas determined to meet the definition of critical habitat under section 4(b)(2) of the Act for California tiger salamander in Sonoma County. Therefore, no specific areas are designated as critical habitat for this species.

* * * * *

Dated: December 1, 2005.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 05–23701 Filed 12–13–05; 8:45 am]

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Federal Register

Wednesday,
December 14, 2005

Part IV

Department of Agriculture

Agricultural Marketing Service

7 CFR Parts 1124 and 1131

Milk in the Pacific Northwest and Arizona-Las Vegas Marketing Areas; Final Decision on Proposed Amendments to Marketing Agreement and to Orders; Proposed Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1124 and 1131

[Docket No. AO–368–A32, AO–271–A37; DA–03–04B]

Milk in the Pacific Northwest and Arizona-Las Vegas Marketing Areas; Final Decision on Proposed Amendments to Marketing Agreement and to Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This document is the final decision proposing to adopt changes to provisions of the producer-handler definitions of the Pacific Northwest and Arizona-Las Vegas orders as contained in a Recommended Decision published in the **Federal Register** on April 13, 2005. This document is subject to approval by producers.

FOR FURTHER INFORMATION CONTACT: Jack Rower, Marketing Specialist or Gino Tosi, Associate Deputy Administrator for Order Formulation and Enforcement, USDA/AMS/Dairy Programs, Order Formulation and Enforcement Branch, STOP 0231-Room 2971, 1400 Independence Avenue SW., Washington, DC 20250–0231, (202) 720–2357 or (202) 690–1366, e-mail addresses: *jack.rower@usda.gov* or *gino.tosi@usda.gov.*

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

The amendments to the rules proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. If adopted, the proposed amendments would not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under Section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this final decision will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a ''small business'' if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a ''small business'' if it has fewer than 500 employees. For the purposes of determining which dairy farms are ''small businesses,'' the $750,000 per year criterion was used to establish a milk marketing guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most ''small'' dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500 employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

Producer-handlers are defined as dairy farmers that process only their own milk production. These entities must be dairy farmers as a pre-condition to operating processing plants as producer-handlers. The size of the dairy farm determines the production level of the operation and is the controlling factor in the capacity of the processing plant and possible sales volume associated with the producer-handler entity. Determining whether a producer-handler is considered small or large business must depend on its capacity as a dairy farm where a producer-handler with annual gross revenue in excess of $750,000 is considered a large business.

The amendments would place entities currently considered to be producer-handlers under the Pacific Northwest or the Arizona-Las Vegas orders on the same terms as all other fully regulated handlers provided they meet the criteria for being subject to the pooling and pricing provisions of the two orders. Entities currently defined as producer-handlers under the terms of these orders will be subject to the pooling and pricing provisions of the orders if their route disposition of fluid milk products is more than 3-million pounds per month.

Producer-handlers with route disposition of less than 3-million pounds during the month will not be subject to the pooling and pricing provisions of the orders. To the extent that current producer-handlers for each order have route disposition of fluid milk products outside of the marketing areas, such route disposition will be subject to an order's pooling and pricing provisions if total in-area route disposition causes them to become fully regulated.

Assuming that some current producer-handlers will have route disposition of fluid milk products of more than 3-million pounds during the month, such producer-handlers will be regulated subject to the pooling and pricing provisions of the orders like other handlers. Such producer-handlers will account to the pool for their uses of milk at the applicable minimum class prices and pay the difference between their use-value and the blend price of the order to the order's producer-settlement fund.

While this may cause an economic impact on those entities with more than 3-million pounds of route sales who currently are considered producer-handlers by the two orders, the impact is offset by the benefit to other small businesses. With respect to dairy farmers whose milk is pooled on the two marketing orders, such dairy farmers who have not heretofore shared in the additional revenue that accrues from the marketwide pooling of Class I sales by producer-handlers will share in such revenue. This will have a positive impact on 486 small dairy farmers in the Pacific Northwest and Arizona-Las Vegas marketing areas. Additionally, all handlers who dispose of more than 3-million pounds of fluid milk products per month will pay at least the announced Federal order Class I price for such use. This will have a positive impact on 18 small regulated handlers.

To the extent that current producer-handlers in the Pacific Northwest and the Arizona-Las Vegas orders become subject to the pooling and pricing provisions, such will be determined in their capacity as handlers. Such entities will no longer have restrictions applicable to their business operations that were conditions for producer-handler status and exemption from the

pooling and pricing provisions of the two orders. In general, this includes being able to buy or acquire any quantity of milk from dairy farmers or other handlers instead of being limited by the current constraints of the two orders. Additionally, the burden of balancing their milk production is relieved. Milk production in excess of what is needed to satisfy their Class I route disposition needs will receive the minimum price protection established under the terms of the two orders. The burden of balancing milk supplies will be borne by all producers and handlers who are pooled and regulated under the terms of the two orders.

During September 2003, the Pacific Northwest had 16 pool distributing plants, 1 pool supply plant, 3 cooperative pool manufacturing plants, 7 partially regulated distributing plants, 8 producer-handler plants and 2 exempt plants. Of the 27 regulated handlers, 16 or 59 percent were considered large businesses. Of the 691 dairy farmers whose milk was pooled on the order, 223 or 32 percent were considered large businesses. If these amendatory actions are not undertaken, 68 percent of the dairy farmers (468) in the Pacific Northwest order who are small businesses will continue to be adversely affected by the operations of large producer-handlers.

For the Arizona-Las Vegas order, during September 2003 there were 3 pool distributing plants, 1 cooperative pool manufacturing plant, 18 partially regulated distributing plants, 2 producer-handler plants and 3 exempt plants (including an exempt plant located in Clark County Nevada) operated by 22 handlers. Of these plants, 15 or 68 percent were considered large businesses. Of the 106 dairy farmers whose milk was pooled on the order, 88 or 83 percent were considered large businesses. If these amendatory actions are not undertaken, 17 percent of the dairy farmers in the Arizona-Las Vegas order who are small businesses will continue to be adversely affected by large producer-handler operations.

In their capacity as producers, 7 producer-handlers would be considered as large producers as their annual marketing exceeds 6-million pounds of milk. Record evidence indicates that for the Pacific Northwest marketing order at the time of the hearing, four producer-handlers would potentially become subject to the pooling and pricing provisions of the order because of route disposition of more than 3-million pounds per month within the marketing area. For the Arizona-Las Vegas order, one producer-handler would be considered a large producer because its annual marketing exceeds 6-million pounds of milk and potentially subject to the pooling and pricing provisions of the order because of route disposition exceeding 3-million pounds per month.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that these proposed amendments would have minimal impact on reporting, recordkeeping, or other compliance requirements for entities currently considered producer-handlers under the Pacific Northwest and the Arizona-Las Vegas marketing orders because they would remain identical to the current requirements applicable to all other regulated handlers who are currently subject to the pooling and pricing provisions of the two orders. No new forms are proposed and no additional reporting requirements would be necessary.

This notice does not require additional information collection that requires clearance by the Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the forms are routinely used in most business transactions. Forms require only a minimal amount of information which can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

Prior documents in this proceeding:

Notice of Hearing: Issued July 31, 2003; published August 6, 2003 (68 FR 46505).

Correction to Notice of Hearing: Issued August 20, 2003; published August 26, 2003 (68 FR 51202).

Notice of Reconvened Hearing: Issued October 27, 2003; published October 31, 2003 (68 FR 62027).

Notice of Reconvened Hearing: Issued December 18, 2003; published December 29, 2003 (68 FR 74874).

Recommended Decision: Issued April 7, 2005; published April 13, 2005 (70 FR 19636).

Preliminary Statement

A public hearing held on proposed amendments to the marketing agreement and order regulating the handling of milk in the Pacific Northwest and Arizona-Las Vegas marketing areas. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900), at Tempe, Arizona, beginning on September 23, 2003; reconvened, and continuing at Seattle, Washington, on November 17, 2003; and reconvened and concluding at Alexandria, Virginia, on January 23, 2004, pursuant to a notice of hearing issued July 31, 2003, and a correction to the notice issued August 23, 2003, and notices of reconvened hearings issued October 27, 2003, and December 18, 2003.

Upon the basis of the evidence introduced at the hearing and the record thereof, the Administrator, on April 7, 2005, issued a Recommended Decision containing notice of the opportunity to file written exceptions thereto.

The material issues, findings, conclusions, and rulings of the Recommended Decision are hereby approved and adopted and set forth herein. The material issue on the record of hearing relate to:

1. The regulatory status of producer-handlers.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. The Regulatory Status of Producer-Handlers

Amendments to the producer-handler definitions of the Pacific Northwest and the Arizona-Las Vegas milk marketing orders are adopted. This decision will result in all producer-handlers with in-area route disposition of more than 3-million pounds of fluid milk products per month being subject to the pooling and pricing provisions of the applicable order. This action will cause some current producer-handlers to become subject to the pooling and pricing provisions of the orders.

Currently, the Pacific Northwest and the Arizona-Las Vegas milk marketing orders provide separate but similar definitions that describe and define a special category of handler known as producer-handlers. While there are specific differences in how each order defines and describes producer-handlers, both orders—as do all Federal milk marketing orders—exempt producer-handlers from the pooling and pricing provisions of the orders.

Exemption from the pooling and pricing provisions of the orders essentially means that the minimum class prices established under the orders that handlers must pay for milk are not applicable to producer-handlers and producer-handlers receive no minimum

price protection for surplus milk disposed of within either order's marketing area. Producer-handlers enjoy keeping the entire value of their milk production disposed of as fluid milk products in the marketing area to themselves and do not share this value with other dairy farmers whose milk is pooled on either of the two orders.

However, producer-handlers are subject to strict definitions and limitations in their business practices. Both orders limit the ability of producer-handlers to buy or acquire milk that may be needed from dairy farmers or other handlers. Additionally, producer-handlers bear the entire burden of balancing their own milk production. Milk production in excess of what is needed to satisfy their Class I route disposition needs will receive whatever price they are able to obtain. Such milk does not receive the minimum price protection of the order.

It is the exemption from the pooling and pricing provisions of the Pacific Northwest and Arizona-Las Vegas orders that is the central issue of this proceeding. While producer-handlers are exempt from the pooling and pricing provisions of the two orders, they are ''regulated'' to the extent that producer-handlers submit reports to the Market Administrator who monitors producer-handler operations to ensure that such entities are in compliance with the conditions for such regulatory status. For the purposes of brevity and convenience, this decision will refer to those handlers who are subject to the pooling and pricing provisions of the orders as ''fully regulated handlers'' in contrast to producer-handlers.

Overview of the Proposals

This proceeding considered three proposals seeking the application of each order's pooling and pricing provisions, or full regulation, of producer-handlers when their route disposition of fluid milk products in the marketing areas exceeded 3-million pounds per month. These proposals were published in the hearing notice as Proposals 1, 2 and 3. Proposal 1 is applicable to the Pacific Northwest milk marketing order. Proposal 3 is applicable to the Arizona-Las Vegas milk marketing order. Proposal 2, applicable to only the Pacific Northwest order, is identical to Proposal 1 but also seeks to limit a producer-handler from distributing fluid milk products to a wholesale customer who is served by a fully regulated or partially regulated distributing plant in the same-sized package with a similar label during the month. In this regard, Proposal 2 would make the producer-handler definition for the Pacific Northwest order more like the current Arizona-Las Vegas order.

A fourth proposal, published in the hearing notice as Proposal 4, seeking to prevent the simultaneous pooling of the same milk on the Arizona-Las Vegas milk marketing order and on a state-operated order that provides for marketwide pooling, (commonly referred to a ''double-dipping'') was addressed in a separate final rule that was issued November 18, 2005 (70 FR 70991) and will become effective on January 1, 2006.

Summary of Testimony

Proposal 3 received testimony by a witness appearing on behalf of United Dairymen of Arizona (UDA). UDA is a dairy cooperative supplying approximately 88 percent of the milk in the Arizona-Las Vegas milk marketing order (Order 131). The UDA witness testified in support of establishing a 3-million pound limit in route disposition of fluid milk products for producer-handlers in the marketing area, which, if exceeded, would cause the producer-handler to become subject to the pooling and pricing provisions of the order. The witness was of the opinion that the current producer-handler definition contradicts the overall purposes of the Federal milk order program to establish uniform prices among all handlers and the marketwide sharing of revenue among all producers who supply the market.

The UDA witness asserted that Sarah Farms is the largest producer-handler in the Order 131 marketing area and avoids the classified pricing and pooling requirements applicable to all other handlers. The witness characterized this as the operation of an individual handler pool within a marketwide pool. The witness stated that UDA is aware that historically Federal orders have exempted producer-handler operations from the pricing and pooling provisions of orders because they were small and had little impact in the marketplace. The witness contrasted this historical perspective with Sarah Farms, recognized as the largest producer-handler in Order 131, by citing a trade journal article that ranked Sarah Farms as the second largest U. S. dairy farm with 13,000 cows in 1995.

The witness testified that UDA estimates Sarah Farms' Class I sales within the Order 131 marketing area are about 12 million pounds per month. Because of Sarah Farms' exemption from the pooling and pricing provisions of the order, the witness estimated a loss in revenue to producers who pool milk on the order at about $11,586,589 over the period of January 2000 through July 2003, or about a 10–14 cents per hundredweight (cwt) impact on the order's blend price. In addition, the witness estimated lost revenue of about $3 million, or about a 10-cent per cwt lower blend price for the period of September 1997 through January 1999.

A second witness appearing on behalf of UDA also testified in support of Proposal 3. This witness explained that the proposed 3-million pound route disposition limit on producer-handlers was partly based on provisions of the Fluid Milk Promotion Act which requires an assessment for the promotion of fluid milk when a handler's sales are greater than 3-million pounds per month. The witness said that producer-handlers who have the ability to enjoy this level of route disposition should not be exempted from pooling and pricing provisions and that their continued exemption poses a serious threat to orderly marketing and the operation of the Federal milk order program.

The second UDA witness claimed that in December 1994, Sarah Farms was considered an insignificant factor within the Order 131 marketing area because their monthly raw milk production was less than 5 million pounds, of which less than 1.3 million pounds of Class I products were distributed within the marketing area. Relying on Market Administrator statistics, the witness added that by 1996, UDA estimated that Sarah Farms' monthly Class I route disposition had increased to more than 6 million pounds. The witness also testified that from late 1998 until this proceeding, Sarah Farms had been one of only two producer-handlers selling Class I products in the marketing area. Relying on Market Administrator statistics, the witness estimated that Sarah Farms' Class I route sales within Order 131 had increased from about 7 million pounds per month to as much as 15 million pounds per month by 2002.

A witness appearing on behalf of the Kroger Company (Kroger), a fully regulated handler under the Pacific Northwest milk marketing order (Order 124) and Order 131, testified in support of Proposals 1, 2, and 3. The witness said that changes in marketing conditions in both orders necessitate changes in how the orders define producer-handlers. In the opinion of the witness, producer-handlers enjoy a competitive sales advantage by being exempted from the pooling and pricing provisions of both orders. The witness explained that producer-handlers have a sales advantage because they have the flexibility to set their internal raw milk

price at a level well below the announced Federal order minimum Class I price that fully regulated handlers must pay.

The Kroger witness also testified that regulated handlers in Orders 124 and 131 have been forced to respond to competitive situations with producer-handlers in supplying retail grocery outlets. This was due in part to the competitive sales advantage producer-handlers have in being able to lower their price to retailers while still maintaining an adequate profit margin, the witness explained. The witness said that Kroger's retail outlets could not do this competitively without eroding their profit margins. Because of these competitive situations, the witness concluded that producer-handlers exceeding more than 3 million pounds per month in Class I sales was a reasonable estimate of when producer-handlers are in direct competition with fully regulated handlers and should therefore receive the same regulatory treatment. The same regulatory treatment of producer-handlers as fully regulated handlers above this threshold would, according to the witness, re-establish equity among handlers competing for Class I sales in these two marketing areas.

The Kroger witness was of the opinion that the volume of producer-handler route disposition was a key aspect of the disorderly marketing conditions in Orders 124 and 131. However, the witness indicated that a producer-handler's processing plant size alone was not necessarily an accurate indicator of processing plant efficiency. The witness testified that smaller plants can be very competitive. In this regard, the witness said that Kroger's largest plant was not its most efficient bottling plant.

A witness appearing on behalf of Western United Dairymen (WUD), the largest dairy farmer association in California representing approximately 1,100 of California's 2,000 dairy farmers, testified in support of Proposals 1 and 3. The witness expressed the opinion that a primary reason for the exemption of producer-handlers from the pricing and pooling provisions of Orders 124 and 131 had been because these entities were customarily small businesses that operate self-sufficiently and do not have a significant impact in the marketplace. The WUD witness testified that the regulatory exemption for producer-handlers has been largely unchanged in the Federal order system for more than 50 years. The witness explained that there had been no significant demonstration of unfair advantages accruing to producer-handlers because they are responsible for balancing their fluid milk needs and cannot transfer balancing costs to other pooled market participants.

The WUD witness also testified that some producer-handlers were becoming much larger than fully regulated fluid processors in Orders 124 and 131. The witness was of the opinion that large producer-handlers were effectively taking greater and greater shares of the Class I market in both orders and caused pooled milk to be forced into lower-valued manufacturing uses. According to the witness, these outcomes are having a direct negative impact on handlers and producers in both orders and are generating instability in the Federal milk marketing order system.

The WUD witness asserted that when producer-handler sales growth threatened the sales of fully regulated handlers under California's State-wide regulatory system, the State acted to maintain and protect their pooling and pricing system by placing a limit on the volumes of sales producer-handlers could have within the State before becoming fully regulated. The witness was of the opinion that the Federal order program also needs to act by adopting the proposed amendments to similarly limit the sales volume of producer-handlers.

A witness appearing on behalf of the Alliance of Western Milk Producers (Alliance), an organization representing California cooperatives, also testified in support of Proposals 1, 2, and 3. The witness indicated that how the Federal order program deals with the producer-handler issue is of interest to California dairy farmers because changes in Orders 124 and 131, which border California, will have a direct impact on the State's milk marketing and regulatory program. The witness was of the opinion that producer-handlers have a tremendous competitive advantage in the marketplace because they are not subject to minimum pricing and are thereby able to avoid a pooling obligation to share their Class I revenue with all pooled market participants. The witness asserted that unless some limitation is put on the route sales volume of producer-handlers, it may encourage new producer-handlers to enter the market and further erode the equitable pricing principles relied on by the Federal milk order program.

A witness appearing on behalf of Northwest Dairy Association (NDA) testified in support of Proposals 1 and 2. The witness provided a business example demonstrating how producer-handlers enjoy a pricing and marketing advantage by being exempt from the pooling and pricing provisions of Order 124. Relating past business experiences as a fully regulated handler known as Sunshine Dairy, the witness explained how business was lost to a producer-handler competitor. The witness attributed this loss of business to the competitive sales advantage enjoyed by producer-handlers resulting from their exemption from the pooling and pricing provisions of the order.

The NDA witness testified that as a fully regulated handler known as Sunshine Dairy they had also lost a small customer who, at that time, was buying about 25,000 gallons of milk per week. The witness said that this customer grew to constitute more than 10 percent of its fluid milk sales volume. According to the witness, even though they had provided great service and products, they lost the account because the customer could save hundreds of thousands of dollars a year by procuring milk from a producer-handler. According to the witness, Sunshine Dairy lost this account because the producer-handler was able to price its milk at a level below the minimum Federal order Class I price. The witness also testified that the producer-handler subsequently lost this account to a fully regulated handler that was of national scope.

The NDA witness expressed the opinion that the goal of the Federal Order system is to maintain order in the market. In this regard, the witness testified that handlers should not be exempt from the pooling and pricing provisions of an order because they own their cows and produce their own milk supply when other handlers are not exempted. The witness stressed that such an exemption is unfair, noting that the vast majority of dairy farmers should not receive smaller paychecks for the same product as producer-handlers because they lack a processing plant.

A witness appearing on behalf of Maverick Milk Producers Association (Maverick), a cooperative of dairy farmers located in Arizona that markets its milk in California and Arizona, testified in support of Proposal 3. The witness testified that all handlers who market their milk in Order 131 should be subject to the pooling and pricing provisions of the order, including producer-handlers. The witness inferred from Market Administrator statistics that the largest producer-handler in Order 131, Sarah Farms, had cost Maverick members in excess of $1.2 million in revenue since 1999 because Sarah Farms had not been subject to the pooling and pricing provisions of the order. The witness testified that the estimated loss of revenue to the Order 131 pool was based on an assumption

that Sarah Farms produced about 18 million pounds of milk per month that would have been pooled as Class I milk.

A former executive and co-owner of Vitamilk, an independent handler no longer operating as a going concern, formerly located in Seattle, Washington, appeared on behalf of Dairy Farmers of America (DFA) and testified in support of Proposals 1 and 2. This DFA witness testified that in seeking alternative markets for its milk products, Vitamilk began to compete with producer-handlers for school milk supply contracts through one of its wholesale distributors. However, their bid attempts were unsuccessful, the witness testified, because the school district sought fixed-price contracts for packaged fluid milk which they could not supply in competition with a producer-handler. While conceding that Vitamilk was inexperienced in bidding for school-lunch business, the witness asserted that the fixed price contract offered by the producer-handler was below the combined value of the Federal order Class I price plus Vitamilk's cost allocations to marketing, processing, distribution, overhead, distributor profit, and risk.

This DFA witness explained that Vitamilk tried to retain other customers by lowering their prices in an effort to keep and gain sales volume even though the price represented no contribution to covering their indirect costs. The witness testified that prices offered by a local producer-handler were 11 to 12 cents per gallon below Vitamilk's best net price to distributors. According to the witness, even though Vitamilk's customers reported satisfaction with the company's service and other non-price attributes, the producer-handler's ability to provide fluid milk products at a lower cost resulted in the loss of customer accounts. The witness asserted that the loss of accounts was caused largely by the producer-handler's inability to price Class I products below what a fully regulated Class I handler could price its products. In addition, the witness testified that in 2003 Vitamilk even attempted to sell its Class I products at prices below breakeven and was still unable to find a price whereby it could successfully recapture business lost to a producer-handler.

A witness appearing on behalf of Shamrock Foods Company (Shamrock), a fully regulated handler located in Arizona and Colorado, testified in support of Proposal 3. The witness maintained that Shamrock is at a competitive disadvantage with producer-handlers because Shamrock is required to pay the Federal order Class I price for milk while producer-handlers are exempt from the pricing and pooling provisions of Order 131. According to the witness, the price of Class I products offered to wholesale customers by producer-handlers can be lower than what Shamrock can offer profitably and that Sarah Farms, a producer-handler of the order, has been able to raid their customer base. Furthermore, the witness said that Shamrock's ability to maintain its policy of equitable pricing among its customers, be able to hold its prices fairly constant to maintain customer loyalty, and avoid bidding against itself for its own customers is undermined because of the producer-handler pricing advantage over fully regulated handlers. The witness said Shamrock is unable to quickly adjust their business practices to meet such competition because of their size and because of different regulatory treatment.

The Shamrock witness was of the opinion that the producer-handler exemption from minimum pricing and pooling provisions threatens the economic viability of Order 131. For example, the witness explained that major customers such as Safeway, Kroger, Wal-Mart and strong independents like Costco, Bashas and Sam's Club buy milk on a wholesale basis to resell to retail consumers. The witness noted that these customers seek the opportunity to buy milk at prices similar to those offered by the producer-handler—at prices below the Federal order Class I price. The witness testified that if Proposal 3 or some other restriction limiting route disposition volume is not adopted, either there will have to be an expansion of producer-handler supplies by expanding their farms or existing fully regulated handlers will need to reorganize their business practices to develop their own-farm production and become a producer-handler to remain competitive.

The Shamrock witness offered testimony regarding market research they routinely conduct through on-going surveys of retail grocery stores in Order 131. The witness explained that Shamrock salespersons do this to gather market intelligence on their competitors. According to the witness, Shamrock's marketing research indicated that prices for bottled fluid milk offered by Sarah Farms was typically 6 to 8 cents a gallon below their price—equating to about 48 to 64 cents on a per cwt basis. The witness testified that their market research also revealed that Sarah Farms' production and route disposition had grown from approximately 8 million pounds in 1998 to nearly 17.2 million pounds by 2003.

The Shamrock witness concluded that a sales volume limitation of 3 million pounds per month for producer-handlers was reasonable because a 3 million pound limit would represent about three percent of the total Class I sales in the Order 131 marketing area. In addition, the witness testified that a plant which processes 3 million pounds per month is an indicator of a very efficient plant operation. From these views, the witness concluded that a producer-handler with route disposition in excess of 3 million pounds per month is able to fully exploit economies of size and should therefore be treated the same as fully regulated handlers.

The Shamrock Foods witness conceded that there are additional challenges faced by producer-handlers in terms of managing milk supplies and disposing of surplus milk which fully regulated handlers do not face. The witness also acknowledged that there are costs associated with managing marketing risk, including the disposal of surplus milk production. However, the witness was of the opinion that these costs are more than covered by the competitive advantages that exist by being exempt from the pooling and pricing provisions of the order. One example the witness provided was that a producer-handler can balance its supply by selling fluid milk products into an unregulated area such as California.

A witness appearing on behalf of Shamrock Farms, which is affiliated with Shamrock Foods, testified in support of Proposal 3. Shamrock Farms milks 6,500 cows and is located in Maricopa County, Arizona. The witness testified that Shamrock Farms has always been a pooled producer on Order 131 and its predecessor order. The witness asserted that Sarah Farms operates dairy farms with approximately 10,000 to 12,000 milking cows. While the witness conceded the lack of hard data to confirm this assertion, the witness arrived at this estimate of farm size by counting the number of milk tankers per day that delivered to the Sarah Farms' plant in Yuma, Arizona.

A consultant witness appearing on behalf of Dairy Farmers of America (DFA), proponents of Proposals 1, 2, and 3, had prepared a study that analyzed and compared the value of raw milk to a large producer-handler with the cost of milk to fully regulated handlers and described the economic impact of competition between these two business entities. The study conducted by this witness was based on a proprietary database of 150 milk processing plants owned by businesses for which this witness' company performed accounting

and other consulting services. According to the witness, 20 plants were selected as being representative of the costs for 6 different size classes of bottling plants. The witness explained that the plant cost data was adjusted by applying regional consumer price index (CPI) factors as published by the U.S. Department of Labor. According to the witness, this method of adjusting data, the selection of relevant plants, the analytic methods employed in conducting the study, and the interpretation of the study results were all based on Generally Accepted Accounting Principles (GAAP).

The DFA consultant witness acknowledged that while the study of plant costs was based on actual plant data acquired from fully regulated handlers, the study did not include data from plants located in either the Pacific Northwest or the Arizona-Las Vegas marketing areas. The witness also acknowledged that the data for the smallest plants in the study were taken from producer-handler plants located in western Pennsylvania, an area not regulated by a Federal milk marketing order. The witness also explained that the study's actual data could not be offered for inspection and examination in this proceeding because individual plant cost and related information were proprietary, adding that this also explained why the data used in the study were averaged. The witness further testified that the selection of appropriate plants for inclusion in the study from all of the plants in the witness' proprietary database was based on professional judgment and experience.

The DFA consultant witness explained that the analysis of the data derived for the Northwest or the Arizona-Las Vegas marketing areas suggests that as plant volumes increase per unit processing costs decrease and that the highest per unit processing costs are found at the smallest plant sizes. At large plant sizes, the witness contrasted, a processor, regardless of regulatory status, can increase milk processing volume at a nominal additional per unit cost.

Relating an additional example of the study's findings, the DFA consultant witness testified that, other things being equal, a hypothetical plant bottling 3 million pounds of milk per month in 2-gallon pack containers would have per unit processing costs that were significantly higher than a plant producing 20 million pounds of milk per month in the same size container packs. In addition, the witness testified that the study suggests that where a large producer-handler and a handler subject to the pooling and pricing provisions of an order compete for route sales, the producer-handler will always have a price advantage which could be as large as the difference between the Federal order Class I price and the order's blend price. The witness also said that the examination across all types of retail outlets reveals that a producer-handler will always have a price advantage in competing with fully regulated handlers.

The consultant witness for DFA provided a comparative cost analysis of servicing a warehouse store account by a fully regulated fluid milk plant and a large producer-handler using actual retail prices for 2-percent milk in Phoenix, Arizona, during January through June 2003. The witness testified that based on the study's data and assumptions, a large producer-handler can service such an account and return a substantial above-market premium over the producer blend price. However, the study reveals that the handler paying the Class I price for its raw milk supply will have little or no margin, the witness contrasted. The producer-handler's raw milk cost advantage, the witness said, allows it to service these stores profitably at a price that cannot be matched by a fully regulated handler. The witness concluded that producer-handlers are in a position to acquire any account they choose to service by offering a price which the regulated plant cannot meet.

In other testimony, the DFA consultant witness provided a pro-forma income statement for a regulated handler in Order 124 developed using certain assumptions about costs, prices and income. The witness demonstrated through an analysis of the pro-forma income statement that a large producer-handler would be able to successfully compete with fully regulated handlers if regulated. The witness concluded from this analysis that a successful producer-handler would be economically viable even if it were subject to the order's pooling and pricing provisions.

The DFA consultant witness testified that the cost data used in the study's pro-forma income statement example was generated using statistical methods based on one month's representative data for similar sized regulated handlers and assumed that producer-handlers and regulated handlers employed union labor and operated within collective bargaining agreements. The witness testified that based on own business experience, the characterization of labor costs would be representative of large fully regulated handler operations in the Pacific Northwest or the Arizona-Las Vegas marketing areas. In contrast, the witness indicated no direct knowledge of the costs of labor employed by producer-handlers in Orders 124 or 131. The witness did conclude that use of non-union labor by producer-handlers would provide them with a clear cost advantage over similar or larger size fully regulated handlers that typically employed unionized labor.

The DFA consultant witness was of the professional opinion that current Federal order regulations provide producer-handlers with a significant cost advantage that cannot be matched by fully regulated handlers that are subject to pooling and pricing regulations. If the proposal to place a 3 million pound per month volume limit on producer-handlers route disposition is adopted, it will eliminate what the witness described as an unfair economic advantage for large producer-handlers while serving to protect a more modest pricing advantage for small producer-handlers.

In additional testimony, the consultant witness for DFA acknowledged the difficulty in reconciling the 150,000 pound per month route disposition limit established for exempt plants with the proposed 3 million pound per month limit for producer-handlers. According to the witness, the difference in these two limits are for two distinctly different entities and can be rationalized by the Department by acknowledging a value commensurate with milk production risks incurred by a producer-handler that are not incurred by handlers who buy milk from dairy farmers. A handler who buys milk from dairy farmers does not incur the production risks associated with operating a farm enterprise, the witness said. In this regard, the witness acknowledged that the study focused only on plant processing costs and not on the cost of producing milk in the farm enterprise function of a producer-handler.

A witness representing Dean Foods (Dean) testified in support of proposals establishing a volume limit on producer-handler route disposition. The witness testified that while Dean Foods does not operate bottling plants in either Orders 124 or 131, they do operate fluid milk plants in many States regulated by Federal milk marketing orders and in areas not subject to Federal milk order regulation. The witness testified that where Dean faces competition from plants that do not pay regulated minimum prices, Dean is affected. The witness stressed that milk bottling plants need to have equitable raw milk costs for the Federal milk order system to remain valid.

The Dean witness said that competitiveness and efficiency are not necessarily a function of processing plant size. On this theme, the witness provided an example where a small, fully regulated milk bottler in Bryan, Texas, successfully bid to supply a Texas state prison against a much larger Dean plant. The witness testified that the Bryan plant had processing capacity of less than 3 million pounds per month but was more efficient than the Dean plant and that because of its management structure, it could adjust more quickly to changing market conditions.

A witness appearing on behalf of the National Milk Producers Federation (NMPF) testified in support of Proposals 1 and 3. The witness was of the opinion that productivity increases resulting from technological advances and the growth of dairy farms enable large producers to capture sufficient economies of scale in processing own-farm milk and thereby compete effectively with established, fully regulated handlers. In light of this, the witness testified that such producers can disrupt the orderly marketing of milk in a market, adding that dairy farmers ''turned producer-handlers'' could grow across a market causing even greater disruption to orderly marketing in other Federal milk marketing orders.

The witness asserted that NMPF's own analysis, and a plant study by Cornell University revealed that larger fluid milk bottling plants have exhibited decreasing processing costs on a per gallon basis as the size of processing facilities increase. The witness explained that as the scale of processing plants increase, average processing costs tend to remain fairly constant, with the lowest per unit cost levels being exhibited over a relatively wide range of processing capacities. The witness testified that the lower per unit processing cost advantages of larger plant sizes tend to be greatest for very large processing plants rather than among smaller plants. The witness said that significant cost and other competitive advantages attributed to economies of scale in fluid milk processing become evident at about the 3-million pound per month processing level.

According to the NMPF witness, the exemption of producer-handlers from the pooling and pricing provisions of Orders 124 and 131 allows producer-handlers to effectively pay the equivalent of the blend price for milk at their plants, a price lower than the Class I price that fully regulated competitors pay. The witness testified that by using the economic concept of ''transfer pricing,'' the maximum price that a producer-handler ''pays'' for transferring milk from its farm production enterprise to its processing enterprise can be estimated even though the producer-handler does not actually sell raw milk to itself. According to the witness, transfer pricing in the context of the producer-handler issue, predicts that the price of milk assigned to milk from the producer-handler farm enterprise essentially becomes the price at which milk could be sold to a regulated handler—the Federal order blend price. Accordingly, the witness asserted that a producer-handler's advantage in raw milk procurement for processing, as compared to fully regulated handlers, would be the difference between the Federal order Class I price and the order's blend price.

The NMPF witness testified that their analysis reinforces the findings of the consultant witness for DFA regarding the magnitude of the pricing advantage producers-handlers enjoy over handlers who are subject to the pooling and pricing provisions of a Federal order. While noting that the DFA consultant witness' study used aggregated data that does result in a significant loss of information for analytical purposes, the witness stressed that even with this limitation it nevertheless remains the best data available to rely upon.

The NMPF witness was of the opinion that the producer-handler exemption from an order's pooling and pricing provisions also creates inequity among producers because it reduces the amount of milk pooled as a Class I use of milk, which in turn, lowers the total revenue of the marketwide pool to be shared among pooled producers. According to the witness, this threatens orderly marketing. The witness related that farms with over 3 million pounds of monthly production represent about 15 percent of the U.S. milk supply and may represent some 40 percent of U.S. fluid milk sales. According to the witness, the steadily increasing number of farms with this magnitude of monthly milk production suggests that large producers could exploit the producer-handler provision and thus further erode equity to both producers and handlers across the entire Federal milk marketing order system.

The NMPF witness stated that the 3 million pound per month route disposition limit proposed for producer-handlers as part of Proposals 1 and 3 is also consistent with the promotion assessment exemption of the Fluid Milk Promotion Program. According to the witness, the promotion exemption limit set by Congress was based on the impact that a handler had in a marketing area. Below 3 million pounds per month route disposition, the witness said, the impact of an individual handler is negligible and therefore rationalizes why smaller handlers are exempt from fluid milk promotion assessments.

A witness appearing on behalf of DFA testified in support of Proposals 1, 2, and 3. The witness viewed the exemption of producer-handlers from the pooling and pricing provisions of Federal orders as a loophole that threatens the economic viability of the Federal milk order system and the economic well-being of pooled producers. This witness, like the NMPF witness, testified that a growing interest by large dairy farmers in becoming producer-handlers is a major factor in DFA's interest in seeking to amend the producer-handler definition in the Pacific Northwest or the Arizona-Las Vegas orders. The witness testified that the exemption from the pooling and pricing provisions of these orders provides producer-handlers with a competitive advantage over fully regulated handlers by effectively permitting producer-handlers to purchase milk at an internal price at or below the Federal order blend price while fully regulated handlers must pay the usually higher Class I price for milk. According to this DFA witness, the difference between the Class I price and the Federal order blend price represents a significant windfall generated solely by the regulatory exemptions accorded to producer-handlers.

The DFA witness summarized that the proposed 3 million pound per month limitation on route disposition is based on four considerations. According to the witness, the proposed limit is: (1) Consistent with the minimum volume of milk sales that triggers the fluid milk promotion assessment for handlers; (2) the level at which producer-handlers achieve competitive equity with fully regulated handlers in terms of plant processing efficiency; (3) the level of route disposition that has a significant impact on the pool value of milk; and (4) the level of route disposition that has a significant impact on the order's pooled producers and fully regulated handlers. The witness indicated that if a producer-handler's volume is sufficient to reduce a pool's value by a penny (1 cent) per hundredweight it is significant and is of sufficient magnitude to warrant ending producer-handler exemption from the pooling and pricing provisions of the orders. The witness also concluded from the study conducted by the consultant witness for DFA that when a producer-handler reaches a 3 million pound per month

distribution level, not only does the producer-handler reach similar plant processing cost efficiencies but it is also of sufficient size to service a considerable number of retail outlets on a competitive par with fully regulated handlers. According to the witness, continuing the exemption from an order's pooling and pricing provisions beyond the 3 million pound sales volume level causes serious market disruptions.

The DFA witness also testified that the exemption of producer-handlers from the pooling and pricing provisions of the orders is encouraging large producers to consider becoming producer-handlers in both Orders 124 and 131 and in other Federal order marketing areas. As an example, the witness testified that some retail outlets now seek packaged fluid milk supplies from producer-handlers in an effort to obtain lower cost milk supplies. The witness was of the opinion that without a limit on route disposition volume, producer-handlers will displace pooled producers and fully regulated handlers as the dominant suppliers of fluid milk not only in the Pacific Northwest and Arizona-Las Vegas marketing areas, but ultimately throughout all other Federal milk marketing areas. The witness cautioned that the potential for the growth of producer-handlers gives rise to considering lowering Class I milk prices as a means to counter the competitive price advantage that producer-handlers are afforded by regulatory exemption from pooling and pricing provisions.

The DFA witness testified that the current producer-handler definition creates market disorder because it disrupts the flow of Class I milk from pooled producers to regulated handlers. In addition, the witness testified that pooled producers effectively subsidize the balancing costs of producer-handlers. In the opinion of the witness, these outcomes are destabilizing and are producing disorder in both the Pacific Northwest and Arizona-Las Vegas marketing areas. In further explanation of these points, the witness expressed concern about the loss of Class I revenue that would otherwise accrue to pooled producers. As an example, relying on Market Administrator data in making professional inferences, the witness testified that the largest producer-handler in the Order 131 marketing area, Sarah Farms, had monthly route disposition in the range of 12.1 to 19.1 million pounds. According to the witness, the value of the sales revenue lost to the Order 131 pool by not subjecting Sarah Farms to the pooling and pricing provisions of the order averaged some $317,000 per month, or the equivalent of 12.5 cents per cwt.

The DFA witness testified that the producer-handler price advantage over fully regulated handlers provides a powerful incentive for customers to purchase milk from producer-handlers rather than fully regulated handlers. The witness testified that producer-handlers have as much as a 15-cent per gallon advantage over fully regulated handlers in Order 131. According to the witness, the advantage is based on the difference between the Order 131 Class I price and the order's blend price which ranged from 15.9 to as much as 18.3 cents per gallon during the period of January 2000 through July 2003.

The DFA witness related that wholesale milk buyers base procurement decisions on tenths and even hundredths of a cent differences in the price per gallon, indicating that price differences of more than 15 cents per gallon overwhelmingly favors the producer-handler in head-to-head price competition. The witness testified that lower-priced packaged fluid milk products from producer-handlers is used by wholesale buyers of milk as leverage in daily price negotiations with fully regulated handlers and is a form of disorderly marketing. Such market disorder, the witness said, causes all processors to receive lower prices for their packaged fluid milk products.

The DFA witness also expressed the opinion that the plant costs faced by a large producer-handler are similar to those faced by fully regulated handlers even though the witness had no direct knowledge of individual producer-handler businesses in Order 124 or 131. While agreeing with the characterization that producer-handlers are a single and seamless milk production and processing enterprise, the witness asserted that higher balancing and operational costs attributable to producer-handler operations are not significantly different than those associated with fully regulated handlers of the same processing plant size. The witness further asserted that the producer-handler price advantage combined with the ability to increase production volume at negligible additional costs per unit exaggerates the advantage to a point where a producer-handler can increase market share nearly at will.

Through a series of examples depicting scenarios of different plant sizes, the DFA witness testified that producer-handlers with 80 and 90 percent Class I utilization could operate profitably in spite of higher balancing costs associated with operating as a producer-handler. The witness explained that a large producer-handler experiencing increasing returns to its operation could continue to grow in size until it controlled a substantial share of the Class I market. The witness testified that a producer-handler with route disposition of 3 million pounds per month could supply a small regional grocery chain but likely would not be able to diversify its marketing risk with sales to other customers.

According to the DFA witness, if producer-handlers are allowed to gain Class I sales without restraint, fully regulated handlers and pooled producers would likely come to view Federal milk marketing orders as ineffective. According to the witness, under these conditions producers possibly would seek to terminate the orders. The DFA witness characterized this potential scenario as a form of market disorder.

The DFA witness said that rising interest in the producer-handler option by large dairy farmers challenges the long-term viability of the entire Federal milk order system. The witness did acknowledge that no new producer-handler operations have entered either the Order 124 or 131 marketing areas in recent years. The witness also acknowledged that market information kept by the Department shows that the volume of sales by producer-handlers had declined nationally from 1.47 billion pounds per year to 1.16 billion pounds per year between 1988 and 1998.

The DFA witness offered modifications to Proposal 1 that would also be applicable to Proposal 3. Basically, in addition to limiting a producer-handlers route disposition to less than 3 million pounds per month, the modification made extensive changes in terminology as to how producer-handlers are defined. The intent of these modifications, the witness said, is to clarify that the burden of proof and the responsibility for providing all the details to substantiate proof to the Market Administrator for producer-handler status rests with the producer-handler.

The DFA witness testified that Market Administrators will continue to be relied upon by Federal orders to use their discretion in determining producer-handler status. According to the witness, the proposed modifications for the producer-handler definitions are expected to provide flexibility for a Market Administrator to investigate and audit proposed producer-handler operations and to ensure qualification requirements are met. In addition, the witness said that if Proposals 1 and 3 are adopted, it was reasonable that

existing producer-handlers in Orders 124 and 131 be given a period of time to adjust their operations to the proposed producer-handler requirements.

Another witness appearing on behalf of DFA testified in support of Proposals 1 and 3 on the basis that small and average-sized dairy farmers, including producer-handlers with milk production below 3 million pounds of milk per month, have higher production costs than larger dairy farms. The witness said that very large dairy farms tend to have management expertise and business sophistication, access to capital, access to veterinary services, and economies of size and scale that tend to lower their per unit costs of milk production. This DFA witness testified that a dairy farm would need approximately 1,800 cows to achieve a 3 million pound per month level of production available for bottling and route disposition.

The DFA witness did not know if 3 million pounds of route disposition per month was the precise number above which producer-handlers should become subject to the pricing and pooling provisions of Orders 124 and 131. Similarly, the witness did not know what economic impact adopting Proposals 1 and 3 would have on producer-handlers in the respective marketing areas. The witness did relate having knowledge of interest being expressed by dairy farmers who had monthly production in excess of 3 million pounds per month seeking possible producer-handler status.

A witness representing Northwest Dairy Association (NDA) testified that they market the milk of 603 milk producers traditionally associated with Order 124. The witness said that NDA also is the parent company of WestFarm Foods, an operator of three distributing plants located in Seattle, Washington, and Portland and Medford, Oregon. The witness added that NDA also operates four milk manufacturing plants in the Order 124 marketing area. The witness testified that while NDA does not have a direct connection to Order 131, it indirectly shares similar concerns with the proponents of Proposal 3 in that they share a border with California and share similar concerns regarding the Federal and State milk order systems. In addition, the witness noted that Order 124 has the second largest volume of producer-handler milk marketings of any Federal order—second only to Order 131.

The NDA witness was also appearing on behalf of Tillamook County Creamery Association, Farmers Cooperative Creamery, Inland Dairy, and Northwest Independent Milk Producers, hereinafter collectively referred to as NDA, in support of Proposals 1, 2, and 3. The witness testified that the producer-handler exemption from the pooling and pricing provisions of Order 124 provides an unfair competitive advantage to producer-handlers at the expense of pooled producers and fully regulated handlers. According to the witness, the historical justifications for exempting producer-handlers because such entities are small operators without significant market impact on prices and they do not provide significant competition with fully regulated handlers are no longer warranted. The witness testified that producer-handlers in Order 124 are now a significant force in the marketing area and are likely to continue to increase in size and market significance. The witness noted that Congress had effectively supported the Department's long-standing producer-handler exemption from pooling and pricing provisions of Federal orders since the 1960's. The witness stated that only a few large producer-handlers currently operate in the Order 124 marketing area.

The witness indicated agreement with other proponent testimony that a producer-handler's raw milk cost was the Federal order blend price. According to the witness, the blend price represents an alternative market price available to a producer-handler. Accordingly, the witness asserted, the only reason a producer-handler would seek to continue an exemption from an order's pooling and pricing provisions would be to maintain a competitive advantage. The witness related that from a producer viewpoint the competitive advantage is the ability to retain the entire Class I value and from the handler viewpoint the competitive advantage is not accounting to the pool at the order's Class I price. The witness estimated the producer-handler advantage over the period of January 2000 through October 2003 to be the difference between the Order 124 Class I and blend prices which averaged about 15.4 cents per gallon or $1.79 per cwt.

The NDA witness asserted that during a period of rapidly rising milk prices, producer-handlers also have a competitive advantage by being able to enter into long-term fixed price contracts in a way fully regulated handlers cannot. In the opinion of the witness, by offering relatively long-term fixed price contracts, a producer-handler may be able to attract and retain customers using a pricing policy unavailable to fully regulated handlers. The witness stated that this represents a form of disorderly marketing.

According to the NDA witness, producer-handlers use pooled producers and pooled handlers to balance their milk supply. The witness testified that ''balancing off of the pool'' involves producer-handlers selling milk to retail outlets until their milk supply is exhausted with retail outlets buying additional milk supplies from fully regulated handlers to meet the shortfall. According to the witness, the fully regulated handler is not only the residual milk supplier but also effectively has the burden of balancing the Class I needs of the market not fulfilled by the producer-handler. Consequently, these burdens are transferred to the market's pooled producers by the regulated handlers. According to the witness, this tactic allows a producer-handler to maximize its revenue by obtaining the highest price available while essentially avoiding any costs of surplus milk disposal in lower-valued uses. This advantage is amplified, the witness said, when a producer-handler is able to balance its milk production and sales into areas not regulated by a Federal milk marketing order.

The NDA witness testified that the proposed 3 million pound per month route disposition limit for producer-handlers is also based on political considerations and on an intuitive notion. The witness explained that processing plants smaller than 3 million pounds per month are exempted by Congress from the 20-cent per hundredweight processor-funded fluid milk promotion program. As a result, the witness related that the proponents are of the opinion that this level would also prove to be acceptable in the context of its application to handlers regulated under the terms of a milk marketing order. In addition, the witness testified that NDA's subsidiary's (WestFarm Foods) own study of processing plant size and costs suggests that the DFA plant size and cost study may actually understate when plant processing cost efficiencies are gained. According to the witness, NDA's study suggests that this occurs at about the 2.5-million pound per month level indicating that plants of this size and larger lower their processing costs by about 10 cents per gallon. The witness related that a plant processing 3 million pounds per month would have a cost savings of approximately 11.4 cents per gallon. Accordingly, the witness concluded that producer-handler plants that dispose of Class I milk products in excess of 3 million pounds per month should therefore become subject to the pooling and pricing provisions of Order

124. The witness said this would ensure that all similar handlers would have the same raw milk costs.

The NDA witness also testified in support of Proposal 2. The witness viewed this as preventing producer-handlers from expanding the benefit of their regulatory status by balancing their supply on the market's pooled producers and at the same time tending to ensure that fully regulated handlers would not become residual suppliers of fluid milk products to the market.

The NDA witness speculated that the investment required for a processing plant to produce only milk packaged in gallons is relatively small when compared to a very large dairy farmer's existing investment in land, livestock, and equipment. The witness was of the opinion that the potentially higher returns on the additional investment for a processing plant producing only gallon containers of packaged fluid milk would be attractive to very large dairy farmers such that it would encourage large producers to become producer-handlers. According to the witness, such a scenario threatens the economic attractiveness of the Federal order program and the prevailing structure of the dairy industry.

While the NDA witness testified only to conditions affecting Order 124, the witness did indicate fluid milk marketing has been undergoing considerable structural changes for many years that are national in scope. The structural changes taking place throughout the dairy industry are most markedly exhibited by consolidation in the production, processing, marketing, and distribution of dairy products, the witness said. As an example, the witness illustrated that Vitamilk's decision to go out of business was a direct result of the acquisition of its two largest grocery store customers by Safeway and Kroger. The witness noted that Safeway and Kroger are both national companies that also process milk as fully regulated handlers for their own stores and other customers. The witness was of the opinion that Vitamilk could not find other profitable business because it was unable to compete effectively with existing producer-handlers and other competitors in the Pacific Northwest after losing a significant portion of its business by the Safeway and Kroger acquisition of their customers. The witness was of the opinion that as consolidation continues within the dairy industry, a Class I handler may find a declining number of marketing alternatives and thus give rise to market disorder. The witness was of the opinion that fully regulated handlers could be displaced by producer-handlers.

The NDA witness testified that the rise of warehouse and very high volume ''super stores'' also has contributed to the structural changes in the dairy industry with packaged fluid milk products being supplied as cheaply as possible. According to the witness, ''super stores'' and warehouse stores are able to exert market power in obtaining the lowest market prices available for fluid milk products at the wholesale level.

The NDA witness testified that there are approximately 800 pooled producers on the Pacific Northwest order. According to the witness, all of these producers are small businesses who would receive a benefit in the range of 2.4—4 cents per hundredweight for their milk if Proposal 1 were adopted. An increase in producer income would result, the witness said, from the sharing of Class I revenue by pooling the largest producer-handlers in the marketing area who individually have route disposition in excess of 3 million pounds per month. According to the witness, the additional total Class I revenue that would accrue to the Order 124 pool would be in the range of $2.8—$4.0 million per month.

The NDA witness addressed concerns regarding instances where handlers and dairy farmers have made investments based on the provisions of a Federal milk order. In rationalizing concerns about the impact a change in regulation may have on business decisions using current order provisions, the witness noted several past Federal order decisions where regulatory changes had an impact on persons that had built and designed their business practices on existing order provisions. For example, the witness noted that the elimination of the ''bulk tank handler'' provision in the Western milk marketing order by a tentative final decision would have effectively reduced the value that proprietary bulk tank handlers could assign to their facilities. In addition, the witness related how the implementation of Federal milk order reform eliminated individual handler pools and reduced the value of those investments. According to the witness, these changes occurred as a matter of course with the operators of those facilities absorbing the actual costs of the regulatory changes. The witness also testified that the elimination of ''double dipping'' in the Upper Midwest, Central, Mideast, Northeast, Pacific Northwest, and Western orders had negative impacts on the investments made by operators who were able to take advantage of those regulatory features before they were changed. These changes were made without compensation to those operators who engaged in the practice of double dipping.

The NDA witness testified that opponents to placing a route disposition limit on producer-handlers incorrectly argue that as vertically integrated enterprises, producer-handlers face more risks and higher costs than do pooled producers and fully regulated handlers. The witness asserted that the Federal order program does not incorporate a value for risk in its regulatory framework. In addition, the witness noted that some producer-handlers are continuing to stay in business even as the total number of producer-handlers has declined in the last several years in the Order 124 marketing area. The witness related historical data from Market Administrator sources indicating that 10 of the 11 producer-handlers which have gone out of business in recent years in the Order 124 marketing area had monthly route disposition of less than 3 million pounds.

In other testimony, the NDA witness conceded that no handler is exempt from, or subject to, Federal milk order regulations on the basis of plant operating costs. In addition, the witness testified that a Federal milk order which had many producer-handlers supplying 10 percent of the Class I market would not represent a disruptive influence or create market disorder if the market share of the producer-handlers was stable (did not grow.) Also, the witness indicated that if the market share supplied by producer-handlers was stable but the number of producer-handlers supplying that market decreased, the impact of producer-handlers on the marketing conditions in the area would not be considered disorderly.

The NDA witness testified that a route disposition volume below 3 million pounds per month does not tend to lend a price or cost advantage to producer-handlers. The witness said that the impact of a producer-handler on a marketing area's blend price is directly related to the size of the marketing area. In this regard, the witness related that a 3 million pound milk bottling plant in the Upper Midwest Federal order, for example, would have a deminimus impact on that order's blend price but nevertheless maintained that a 3 million pound route disposition limit was a reasonable trigger to cause producer-handlers to become subject to the order's pooling and pricing provisions. The witness offered that an appropriate limit could be more than 3 million pounds, possibly as high as 4-million

pounds, while still reasonably meeting the overall objectives sought in Proposal 1. The witness cautioned that setting a limit that is too low—for example at 500,000 pounds per month—would essentially close the marketing and regulatory option of market entry as a producer-handler.

In agreeing with other testimony, a 3 million pound limit was consistent with what the NDA witness characterized as a political settlement reached with the Department in determining when handlers would become subject to a fluid milk promotion program assessment. According to the witness, important consideration was given to the threat of handlers with route disposition of less than 3 million pounds per month being able to band together and vote to terminate the fluid milk promotion program. The witness indicated that a 3 million pound level is also a coincidentally useful volume as it supports the DFA's consultant witness' plant size and cost study and analysis.

A witness appearing on behalf of NDA's WestFarm Foods testified in support of Proposals 1 and 2. The witness provided data comparing the variable costs of WestFarm's Medford, Oregon, bottling plant that processes 12 million pounds of milk per month with a hypothetical plant processing less than 3 million pounds per month. The witness testified that the results of this comparison were similar to the results of the DFA's study. The witness testified that WestFarm Food's study similarly concluded that as plant sizes increase, per unit processing costs tend to decrease.

The NDA witness testified that WestFarm Foods has lost significant sales of packaged fluid milk products to grocery stores and school milk contracts to producer-handler competitors. The witness reported that WestFarm Foods competed with one producer-handler in the Pacific Northwest for shelf space in 11 different retail outlets. According to the witness, the total volume of these sales was approximately 8 million pounds per year. The witness indicated that the producer-handler was able to offer longer term, fixed price contracts to retailers and thereby remove price volatility. The witness said that fully regulated handlers, like WestFarm Foods, do not have this ability because they must pay the Federal order Class I price which fluctuates every month.

The WestFarm Foods witness asserted that producer-handlers in Order 124 offer prices for fluid milk products that range from 15 to 45 cents per gallon cheaper than milk offered by fully regulated Class I handlers, depending on the monthly changes in the order's Class I price. The witness further asserted that producer-handlers are able to displace the Class I use of milk on the Order 124 pool by selling fluid milk products into Alaska, an area not subject to order regulation, at prices below the Class I price. According to the witness, when a producer-handler displaces potential fully regulated handler sales in Alaska, the fully regulated handler's milk is forced to a lower use value which lowers the blend price paid to pooled producers. The witness asserted that if producer-handler competition was absent in Alaska, WestFarm Foods would be the dominant supplier to customers in that market. While noting that producer-handlers continue to provide significant competition to WestFarm's bottling operations, the witness testified that none of the producer-handlers are selling fluid milk products below the Federal order minimum Class I price.

The WestFarm Foods witness testified that WestFarm Foods must meet a specified level of Class I sales to qualify all of its milk receipts for pooling on Order 124. According to the witness, producer-handlers in the marketing area have become very aggressive sellers of milk and have increased their sales volume to the point where fully regulated Class I handlers are having difficulty qualifying all of their producer milk receipts for pooling on the order. The witness attributed such pooling difficulties to the lack of growth in the Class I market combined with growing producer-handler route disposition. In addition, the witness testified that NDA charges its customers an over-order premium of between 30 and 45 cents per cwt.

A witness appearing on behalf of Dean Foods offered testimony in support of Proposals 1, 2, and 3. The witness asserted that exemptions to pooling and pricing provisions of Federal milk marketing orders should be few. According to the witness, the basic underlying objectives of an order are to efficiently assure an adequate supply of milk for fluid uses and to enhance returns to dairy farmers. The witness said that the Federal milk orders achieve these objectives by: using a classified pricing plan setting minimum class prices, utilizing the marketwide pooling of the classified values of milk to return a blend price to dairy farmers and verifying handler reporting through audits. The witness stressed that absent uniform and universal application of an order to market participants, some market participants will reap competitive advantages due solely to selective exemption from regulation rather than for business reasons.

According to the Dean witness, only a few types of firms have been historically exempted from the pooling and pricing provisions of Federal orders which include government and university facilities, small processors, and producer-handlers—characterizing the producer-handler exemption as one of administrative convenience. The witness was of the opinion that producer-handlers should only be exempt from the pooling and pricing provisions of Federal orders when the effect of providing a regulatory exemption has a negligible effect on market participants. In this regard, the witness was of the opinion that a penny or more impact on the order's blend price was significant. Relating this opinion to conditions in Order 131, the witness determined that the order's blend price would be affected by a penny when the route distribution of a producer-handler was at the 950,000 pound per month level.

The Dean witness testified that a dairy farmer operating as a producer-handler can receive a higher price than the alternative of an order's blend price, depending on the internal transfer price. The witness explained that a processor operating as a producer-handler essentially has the ability to ''acquire'' milk at a transfer price as the milk moves from the farm enterprise to the processing enterprise. In this regard, the witness related that such a transfer price can be represented by the difference between the order's blend price and the Class I price. However, the witness conceded that if the producer-handler is viewed as a single seamless entity, the application of transfer pricing may reveal less information than would an evaluation of all costs and revenues in determining the extent of the competitive advantage that a producer-handler may enjoy by regulatory exemption from the pricing and pooling provisions of an order.

The Dean witness also noted that using an internal transfer price may be of limited value as it does not involve price discovery achieved through arms-length transactions. However, the witness was of the strong opinion that regardless of a measure of operating performance or efficiency, a producer-handler would always have a competitive advantage over a fully regulated handler. The witness asserted that the competitive advantage which accrues to the producer-handler is the difference between the order's Class I price and the blend price. In this regard the witness was of the opinion that producer-handlers would always be able

to compete more effectively than fully regulated handlers because of their exemption from the pooling and pricing provisions of an order.

The witness offered an opinion as to why there has not been significant market entry of new producer-handlers if being exempt from the pricing and pooling provisions of an order confers significant competitive advantages over fully regulated handlers. In this regard, the witness offered that resources do not move easily between different enterprises within the dairy industry because of cost and regulatory risk. The witness also offered the opinion that if large companies, such as Kroger, attempted to become a producer-handler, legislative changes to prevent such outcomes would quickly result.

The Dean Foods witness was of the opinion that the notion of disorderly marketing should be seen to exist when the regulatory terms of trade between competitors are different. Along this theme, the witness testified that in Order 131, disorderly marketing conditions exist because the terms of trade between competitors are not the same, citing specifically the regulatory exemption from pooling and pricing for producer-handlers and no similar exemption for their fully regulated competitors. However, the witness contrasted the growing presence and market share in fluid milk distribution by producer-handlers in Order 131 with the stable market share of producer-handlers in Order 124.

A witness appearing on behalf of Alan Ritchey, Incorporated (ARI), a family-owned dairy farm business located in Texas and Oklahoma, testified in opposition to limiting route disposition of producer-handlers as advanced in Proposals 1 and 3. The witness testified that ARI marketed its milk through DFA because DFA was the only available buyer in the area. The witness testified that ARI opposed Proposals 1 and 3 because it would limit the option of becoming a producer-handler for those dairy farmers seeking alternative marketing options for their milk. The witness characterized the dairy industry as consolidating and forcing dairy farmers to consider abandoning their traditional relationships with cooperatives. The witness viewed becoming a producer-handler as a high-risk business venture but an important alternative that should continue to be available to dairy farmers.

The ARI witness also testified that cooperatives with membership and market presence which is national in scope have market power that may be reducing the revenue of individual dairy farmers who have no other milk marketing alternatives than through a cooperative. In the opinion of the witness, preserving the existing producer-handler definition provides dairy farmers with an alternative mechanism to market their milk directly and retain all of the revenue earned. In this regard, the witness indicated that ARI could see no reason why the route disposition of a producer-handler should be limited to 3 million pounds per month while regulated handlers have no limitations on route disposition.

A witness appearing on behalf of Braum's Dairy (Braum's), a producer-handler located in Tuttle, Oklahoma, testified in opposition to Proposals 1 and 3. The witness testified that Braum's milks approximately 10,000 cows and processes its milk production into fluid milk and cultured and ice cream products. The witness said that all of the milk and milk products produced by Braum's Dairy are marketed exclusively through its own retail outlets. The witness further testified that Braum's does not have sales to wholesale customers and maintained that they do not directly compete with fully regulated handlers.

The Braum's witness is of the opinion that Proposals 1 and 3 seek to eliminate competition by producer-handlers for the benefit of fully regulated handlers and will result in many producer-handlers becoming fully regulated. The witness also was of the opinion that Proposals 1 and 3 were advanced as a means to ultimately seek amending the producer-handler provision in all Federal milk orders even though the provision has worked well for the past 66 years.

The witness indicated that Braum's had not always been a producer-handler but due to Federal order pooling rules for out-of-area milk that were detrimental to Braum's interests, the decision was made to become a producer-handler. The witness said that in addition to the problems posed by pooling rules when the company was a fully regulated handler, Braum's also attributed difficulty acquiring a reliable and sufficient quantity of high-quality milk on a timely basis as a reason for becoming a producer-handler.

A witness appeared in opposition to Proposals 1 and 3, on behalf of Mallorie's Dairy, Edaleen Dairy, and Smith Brothers Dairy, all producers-handlers in the Order 124 marketing area. The witness was the owner of the Pure Milk and Ice Cream Company (Pure Milk), a large Texas producer-handler that is no longer in operation. This witness, hereinafter referred to as the SBEDMD witness, testified that Pure Milk was located in Waco, Texas, and had route disposition across a large part of Texas that is now part of the Southwest milk marketing area. According to the witness, Pure Milk was the combination of a profitable dairy farm whose milk was pooled on the Texas order and a profitable fluid distributing and manufacturing plant that produced an array of various fluid milk products, ice cream and ice cream mixes. The witness was of the opinion that limiting route disposition would render the option of becoming a producer-handler an unattractive business option under any circumstances. The witness stressed that without the ability to grow or otherwise attain economies of size and scale, the producer-handler business model could never be successful.

The SBEDMD witness testified to participating in a Federal milk order hearing that similarly sought to limit the route disposition of producer-handlers under the Texas order in 1989. According to the witness, the argument advanced at that time was that the competitive advantage of being exempt from the order's pooling and pricing provisions enjoyed by large producer-handlers would undermine the economic viability of the Federal milk order program by causing harm to pooled producers and fully regulated handlers. The witness indicated that Pure Milk, operating as a producer-handler, failed not as a result of any competitive advantage arising from exemptions from pooling and pricing provisions but from the unique risks and costs associated with operating as a producer-handler.

The SBEDMD witness testified that, for a time, Pure Milk was convinced that there was an advantage to operating as a producer-handler instead of operating as a pooled producer or a fully regulated handler. The witness related that this view was held until Pure Milk lost a major customer that caused it to become consistently unprofitable. In this regard, the witness testified that Pure Milk had an account with a very large grocery chain in Texas and explained that when the large grocery chain customer learned of Pure Milk's involvement in the 1989 milk order hearing the account was lost. The witness characterized and described this business loss as an example of the regulatory risk of being a producer-handler.

The SBEDMD witness also testified that Pure Milk was unable to obtain and retain significant long-term contracts except for some school business and prison sales. The witness said that as a producer-handler, there was simply too much marketing risk and insufficient

long-term contract business to justify the additional required investment in plant and equipment to operate profitably. The witness testified that as a result of losing a large retail account after being its supplier for two years to a fully regulated handler, Pure Milk lost sufficient revenue and decided to end operations as a producer-handler.

The SBEDMD witness also related that in order to operate its plant profitably, Pure Milk would have had to achieve a volume of 1.2 million pounds per month, a level it never attained. In addition, the witness said, the company was never able to contain costs to a level at which it could compete effectively with large fully regulated handlers in the marketing area. The witness testified that Pure Milk's fully regulated competitors had larger plants and operated 24 hours a day, 7 days a week, while Pure Milk's plant, in contrast, operated about 17 hours a day, 5 days a week. The witness concluded that because their competitors operated at a higher capacity, they had plant efficiencies Pure Milk could not achieve. The witness attributed Pure Milk's inability to achieve the desired level of plant efficiency to the producer-handler definition which limited and constrained their ability to purchase additional milk supplies from others during their low production seasons. The witness also attributed Pure Milk's inability to achieve desired plant efficiencies to their inability to market surplus milk production at a profit during high milk production seasons. The witness described these as other examples of regulatory risk faced by a producer-handler.

At the closing of the Pure Milk plant, the witness indicated that he then managed Promised Land Dairy which operated as a small producer-handler from 1996–1999 supplying specialty packaged fluid milk products to health food and grocery stores. The witness said that Promised Land Dairy's specialty operation, selling Jersey cow milk in glass bottles, also failed to be profitable for the same reasons as the Pure Milk Company—the inability to balance supplies, the inability to achieve plant operating efficiencies, and the inability to obtain and retain a long-term customer base. The witness testified that Promised Land Dairy ended its operation as a producer-handler because it could not achieve profitability.

In additional testimony, the SBEDMD witness was of the opinion that relying on the concept of transfer pricing as a means for demonstrating that a pricing advantage accrues to producer-handlers by being exempt from the order's pooling and pricing provisions was misplaced. The witness maintained that as a producer-handler, the only measure of success is the profitability of the entire operation. However, the witness said that Pure Milk used the marketing order's blend price as a transfer price for the limited purpose of conducting internal evaluations of its production performance and to derive a measure of its plant's operating efficiency. The witness testified that the company did use Federal order minimum class prices as a basis for pricing milk to its customers and as a basis for making contract bids.

A second witness appearing on behalf of Smith Brothers Farms, Edaleen Dairy, and Mallorie's Dairy, testified in opposition to Proposals 1, 2, and 3. This witness, hereinafter referred to as the SBEDMD second witness, was of the opinion that these proposals would adversely restrain competition in the dairy industry in both the Order 124 and 131 marketing areas. The witness testified that the producer-handler exemption from pooling and pricing in Orders 124 and 131 serve a needed and useful purpose by providing market niches and marketing alternatives for operators with dairy production and processing expertise as a means to remain competitive in an era of otherwise increasing industry consolidation. The witness was of the opinion that the best measure of orderliness in dairy markets should be on results rather than on the mechanics and operations of a milk marketing order. According to the witness, orderly marketing implies protecting the rights of producers to choose their market outlet freely without coercion or unreasonable barriers to market entry.

The SBEDMD second witness criticized the proponent's use of the Cornell University processing plant study, also relied upon by the NMPF witness, as a basis to support the proposed 3 million pound per month route disposition limit for producer-handlers. The witness was critical of the Cornell study, in part, because the minimum plant sizes considered in the study were 4 times or 12 million pounds larger than the 3 million pound limit contained as part of Proposals 1 and 3. The witness also was of the opinion that the Cornell plant study yielded results that were statistically insignificant because the number of plants used in the study was too small to reveal useful information. The witness explained that the sample of plants used in the study was not applicable to considerations regarding marketing conditions in Orders 124 and 131 because: (1) The data were improperly grouped into regions using the Consumer Price Index rather than the Producer Price Index, (2) the sample of plants did not include any plants located in the two marketing order areas, and (3) the sample of plants could not demonstrate any similarity to producer-handlers in either of the two marketing order areas.

The SBEDMD second witness also testified that DFA's plant cost study results were similarly based on faulty data. According to the witness, the statistical analyses used in the DFA plant cost study should have been based on observations of individual plant costs rather than by averaging plant cost across the various classes of plant sizes selected for inclusion in the study. In addition, the witness testified that the analyses should have considered all plant costs by region, labor type, and type of regulated handler rather than relying only on selected costs.

The SBEDMD second witness was of the opinion that the interest in advancing Proposals 1 and 3 stems from what the witness characterized as the arbitrary setting of higher than needed Class I differentials in all Federal milk orders. According to the witness, higher than needed Class I differential levels were set because of proponent lobbying efforts during Federal milk order reform. According to the witness, lowering Class I differential levels would effectively reduce the incentive for further business expansion of producer-handlers.

In addition, the SBEDMD second witness was of the opinion that producer-handlers add much needed competition in the Order 124 and 131 marketing areas. According to the witness, the high concentration ratio of handlers-to-dairy farmers in both orders has created a near monopsony of milk buyers that has negative implications for prices received by dairy farmers. The witness also characterized the high concentration ratio of handlers-to-dairy farmers as contrary to the public interest because it may result in higher prices to consumers.

The SBEDMD second witness pointed to other changes in marketing conditions that warrant not changing the current regulatory exemptions of producer-handlers. The witness testified that the consolidation of cooperatives through mergers into fewer and larger cooperatives, together with full-supply marketing contracts, has reduced dairy farmer income because cooperatives can re-blend and re-distribute revenue to their members at a value below the order's blend price. The witness also testified that cooperatives that are national in scope may not be meeting the local needs of their dairy farmer

members in markets where such cooperatives are the dominant buyer of milk because it leaves producers without alternative marketing options except to sell their milk through the dominant cooperative. With such changes to marketing conditions, the witness concluded that becoming a producer-handler provides dairy farmers a useful and needed alternative to limited marketing options resulting from dairy industry consolidations.

The SBEDMD second witness characterized the application of the pooling and pricing provisions of Orders 124 and 131 as essentially an imposition of a tax on producer-handlers. The witness said that the pooling and pricing provisions of the orders should apply only to those handlers that purchase milk from producers. Along this theme, while acknowledging that producer-handlers are also handlers, the witness did not view an intra-firm transfer of milk from the farm production enterprise to the processing plant enterprise as equivalent to a purchase of milk by a handler from a dairy farmer. The witness testified to awareness of a court ruling equating intra-firm transfers of milk as identical to purchases of milk but considered such rulings not being relevant to the context of this proceeding for limiting the route disposition volume of a producer-handler.

A third witness appearing on behalf of Smith Brothers Farms, Edaleen Dairy, and Mallorie's Dairy, also testified in opposition to Proposals 1 and 2. The witness provided financial information regarding efficient dairy processing plant size and costs. The witness indicated that successful long-term operators in the fluid processing business must operate their plants efficiently and process sufficient volumes to achieve a competitive cost structure. The witness said that establishing a maximum monthly processing limit of 3 million pounds for producer-handlers limits them to operating plants that would be unable to capitalize on the economies of scale required to further reduce per unit costs to more competitive levels.

A former Market Administrator of the pre-reform Central Arizona milk marketing order testified in opposition to Proposal 1, 2, and 3. The witness explained that if regulated, producer-handlers would be subject to the pooling and pricing provisions of an order by being required to pay into the producer-settlement fund of the order on the basis of their Class I sales in the marketing area.

A witness appearing on behalf of Smith Brothers Dairy (Smith Brothers), a producer-handler located in the Order 124 marketing area, testified in opposition to Proposals 1 and 2. According to the witness, Smith Brothers has been operating as a producer-handler for some 43 years. The witness testified that Smith Brothers is a family owned and operated enterprise that survives by serving niche markets not well served by other market participants, including fully regulated handlers. The witness testified that the largest single market niche served by Smith Brothers is home delivery, representing approximately 70 percent of its fluid milk sales. According to the witness, Smith Brothers purposely pursued this market niche beginning in 1980 when home delivery represented only a third of their fluid milk sales. The witness was of the opinion that the goal of the proponents advancing the adoption of Proposal 1 is to eliminate producer-handlers as competitors in the Order 124 marketing area.

The witness maintained that Smith Brothers has not been a disruptive factor in the Order 124 marketing area. The witness testified that Smith Brothers does not directly compete for customers with large fully regulated handlers as it does not have sales to grocery chains, convenience stores, or large commercial retailers in the marketing area. Relying on Market Administrator statistics for Order 124, the witness related the decline in the number of producer-handlers from 73 in 1997 to 11 in 2000 and a decline in route disposition by all producer-handlers of nearly 6 percent between 2000 and mid-2003 as evidence that clearly demonstrates producer-handlers are not a source of market disorder. The witness also discounted the notion that producer-handlers enjoy a competitive advantage by noting the lack of entry of new producer-handlers in the Order 124 marketing area.

The Smith Brothers witness testified that the majority of regulated handlers in Order 124 are much larger, more diversified, and not interested in the niche market of home delivery that Smith Brothers serves. The witness testified that limiting a producer-handler's route disposition to less than 3 million pounds per month would cause them to not only lose their status as a producer-handler but may even result in Smith Brothers terminating operations altogether.

The Smith Brothers witness explained that producer-handlers face different costs and risks than do pooled producers and fully regulated handlers. According to the witness, producer-handlers have balancing risks, farm production risks, and processing risks that, when combined into a single business enterprise, are greater than those borne by either pooled producers or fully regulated handlers. The witness asserted that any pricing advantage the producer-handler may have is offset by the combination of these costs and by the loss of opportunity to produce, acquire and market other dairy products.

The witness testified that Smith Brothers, in part, balances its own milk production by selling surplus milk into Alaska, an area not regulated by a Federal milk order, and characterized Alaska as an under-served market.

A second witness, an independent milk distributor appearing on behalf of Smith Brothers, also testified in opposition to Proposals 1 and 2. The witness testified to operating a milk distribution business for more than 26 years and was one of approximately 60 other independent distributors selling Smith Brothers dairy products to market niches including coffee shops, independent convenience stores, the home delivery market, and daycare operations that larger market participants do not serve. The witness attributed long-term business success as a distributor to personal service, nostalgia, and product quality. The witness also attributed sales success by advertising that the milk distributed is produced without growth hormones and that the milk is produced and processed by a family farm business.

A third witness for Smith Brothers Dairy also testified in opposition to Proposals 1 and 2. The witness was of the opinion that these proposals are designed to eliminate producer-handlers as competitors of fully regulated handlers. The witness was also of the opinion that both proposals are intended to serve as an intentional market entry barrier for other large producers who may seek to become producer-handlers as a means to regain control of their milk marketings.

The witness related that Smith Brothers evaluates itself as a single integrated enterprise. The witness testified that as the person responsible for measuring the efficiency of the operation, Smith Brothers does not rely on the concept of transfer pricing as a means to measure the efficiency or market value of their milk production. The witness testified that Smith Brothers does not compare its cost of production to the Federal order Class I price or the blend price in measuring the efficiency of its operations. According to the witness, Smith Brothers compares their total costs to

the prices the company receives for its products (total receipts).

A witness appearing on behalf of Edaleen Dairy, a producer-handler located in the Order 124 marketing area, testified in opposition to Proposals 1 and 2. The witness stated that as the milk production manager and co-owner of Edaleen Dairy, their cost of milk production is higher than that estimated by those proposing a limit on the route dispositions of producer-handlers. The witness testified that Edaleen Dairy's milk production costs exceeded a recent Order 124 blend price of $10.50 per cwt.

The witness testified that Edaleen Dairy once held a milk supply contract with Starbucks by replacing Sunshine Dairy, a fully regulated handler. According to the witness, the contract provided more than a year's lead time for Edaleen Dairy to develop additional milk production and processing capacities. The witness said that the Starbucks account was offered to Edaleen Dairy on the basis of its customer service, product quality and price.

The witness testified that Edaleen Dairy eventually lost its Starbucks' contract to Safeway, a fully regulated handler, noting that Starbucks phased out Edaleen Dairy as a supplier over a 6-month period. The witness said that reasons given for the loss of the account was that Safeway offered to supply milk at a lower price and Starbucks' rapid growth gave rise to geographical supply needs that Edaleen Dairy could not meet. The witness explained that the 6-month phase-out of Edaleen Dairy as a milk supplier to Starbucks was unusual in the dairy business. The witness said that more typically account terminations are given with a month's notice or less.

The witness testified that Edaleen Dairy's balancing costs are greater than that of the pooled producers of Order 124. The witness also testified that during periods of low market prices for milk, balancing costs are particularly difficult to manage. The witness related that Edaleen Dairy's surplus milk production is sold to fully regulated handlers but they are paid $1.50 per cwt less than the Class III price.

The Edaleen Dairy witness testified that there are several factors that tend to restrain the growth of producer-handlers. According to the witness, environmental regulations, marketing and production risks, and management risks all act to limit the ability for business expansion. The witness said that the size of potential customers also can constrain a producer-handler's operational flexibility and ability to expand the business. The witness said, for example, that a very large customer, such as a warehouse customer, may be such a large part of a producer-handler's capacity that losing such a customer can risk continued economic viability of the entire operation because it is so difficult to absorb the loss of revenue and to find new customers.

The Edaleen Dairy witness testified that producer-handlers also serve market niches that fully regulated handlers do not service. The witness said that if a limit on producer-handler route disposition had been in place when the Starbucks account became available, for example, the opportunity to service that account would not have been possible. The witness asserted that limiting the sales volume of producer-handlers also would effectively eliminate servicing new market niches that might arise in the future. In this regard, the witness cited the example of coffee-kiosk shops that were not of interest to fully regulated handlers until the mid-1990's.

The Edaleen Dairy witness testified that an important element of why their producer-handler operation is valued by their customers is because they have complete and total control of the production and processing of their milk. The witness testified that without the producer-handler exemption from the pooling and pricing provisions of Order 124, Edaleen Dairy would not be able to offer such a differentiated fluid milk product to its customers.

A second witness, also appearing on behalf of Edaleen Dairy, testified in opposition to Proposals 1, 2, and 3. The witness testified that Edaleen Dairy operates an efficient dairy farm operation and processing plant as a producer-handler. The witness was of the opinion that a producer-handler operates a farm and a plant with risks that differ from the risks faced by dairy farmers and processing plant operators. According to the witness, a producer-handler differs from pooled dairy farmers in three different ways: (1) Pooled producers are guaranteed the minimum Federal order blend price, (2) pooled producers do not bear the marketing risk and additional costs involved in selling their milk, and (3) pooled producers do not bear the risks and costs of operating a processing plant. With regard to how a producer-handler differs from fully regulated handlers, the witness cited three important differences: (1) Fully regulated handlers purchase their milk supply and therefore do not incur the risk of production, (2) fully regulated handlers know the cost of raw milk before buying it from dairy farmers, and (3) a producer-handler bears the risk and cost of balancing its milk supply and operates at its sole risk and enterprise, a regulatory constraint not applicable to fully regulated handlers.

The Edaleen Dairy witness amplified the above differences between producers-handlers, dairy farmers, and fully regulated handlers. With respect to dairy farmer and producer-handler differences, the witness noted that a pooled producer can deliver milk to alternative buyers if its primary buyer is not available but that a producer-handler can only deliver milk to its own plant and a dairy farmer has no legal requirement or economic responsibility for the viability of any particular processing plant or handler. With respect to the fully regulated handler and producer-handler differences, the witness noted that a fully regulated handler can acquire any quantity of milk from any number of dairy farmers and the business failure of any individual dairy farmer does not have an overwhelming impact on the economic viability of a fully regulated handler's operation.

The Edaleen Dairy witness testified that combined risks—as a producer and as a handler—are not incurred by either a pooled producer or a fully regulated handler. The witness testified, for example, that if a producer-handler loses a sale it continues to have milk production that must be disposed of and the costs of that milk production must be paid regardless of whether a market exists for that milk. According to the witness, the risks and costs of production, processing, and marketing accrue to the entire operation because producer-handlers are a single operating enterprise.

Additionally, the Edaleen Dairy witness said, there are inseparable links between the production and processing portions of the producer-handler because if either the milk production process fails or the processing process fails, both processes affect the single operating entity. The witness testified that the regulation of the processing and marketing operations of a producer-handler coincidentally regulates the dairy farm portion of the producer-handler enterprise. According to the witness, the most important benchmark for a producer-handler is whether in the long-run the total revenue received for its milk exceeds the total costs of its operation.

The Edaleen Dairy witness testified that the Federal order blend price is irrelevant to a successful producer-handler and bears no relation to the prices received from its milk sales. The witness expressed the irony of testimony concerning the importance of

the blend price to producer-handlers by parties who do not operate as producer-handlers. The witness said that Edaleen Dairy ignores what the Federal order blend price may be for the month and seeks to sell milk at the highest possible price but never intentionally below the Federal order Class I price. The witness noted that during the past several years there have been times when the Class I price fell below the cost of production. During such times, the witness was of the opinion that fully regulated handlers have a distinct advantage over producer-handlers.

The Edaleen Dairy witness testified that cooperatives have certain regulatory advantages by being able to re-blend pool proceeds and actually pay their members less than the order blend price. The witness claimed that re-blending allows cooperatives to use their bottling operations to essentially subsidize their processing operations. The witness testified that if a producer-handler's route disposition was more than 3 million pounds per month, the required payment into the producer-settlement fund would return no benefit to the producer-handler. According to the witness, the proceeds paid to the producer-settlement fund would simply be distributed to other pooled producers. This would, according to the witness, have an adverse impact on small businesses such as Edaleen Dairy, a business with fewer than 500 employees.

In addition, the Edaleen Dairy witness saw no justification for limiting the route disposition of producer-handlers in Order 124 because Market Administrator statistics indicate a declining market share of the Class I market by producer-handlers. The witness also asserted that limiting the route distribution of producer-handlers would essentially close the marketing option that becoming a producer-handler offers to large producers. The witness viewed such restrictions as acting to reduce competition among handlers rather than enhancing it.

A third witness, the founder of Edaleen Dairy, also testified in opposition to Proposals 1, 2, and 3. The witness related that when acquiring financing, bank loan officers will only consider Edaleen Dairy's cows as appropriate collateral for financing. The witness testified that bankers place no asset value for loan collateralization on Edaleen Dairy's processing plant facilities.

A witness appearing on behalf of Mallorie's Dairy, a producer-handler located in the Order 124 marketing area, testified in opposition to Proposals 1 and 2. The witness said that Mallorie's Dairy markets its milk on a wholesale basis directly and through independent distributors and small independent retailing establishments ranging from grocery stores to coffee shops. According to the witness, the milk production enterprise of their producer-handler operation is very efficient, producing an average of 80 pounds of milk per day per cow. The witness testified that Mallorie's Dairy's largest customer is an independent distributor who has developed a niche market by supplying small companies that other fully regulated handlers do not serve.

According to the witness, Mallorie's Dairy lost a grocery store chain account which had been one of its large long-term customers to a fully regulated handler. The witness stressed that any price advantage that Mallorie's Dairy derives from the existing producer-handler exemption from the pooling and pricing provisions of Order 124 is offset by the cost of balancing its milk supply, about 20 percent of its production. The witness said that Mallorie's Dairy performs its balancing requirements by selling its surplus milk to a local cooperative at the lower of the Class III or Class IV price minus a substantial discount. According to the witness, balancing sales represents about 10 percent of Mallorie's' total sales while specialty milk sales to commercial food processors represent the remainder.

The Mallorie's Dairy witness was unsure of the full impact that adoption of Proposals 1 and 2 would have on Mallorie's Dairy. However, the witness said that Mallorie's Dairy would lose its producer-handler status and thus be forced to expand its plant size in order to continue operating, to remain competitive and to exploit their current marketing strengths while seeking new business from warehouse stores such as Costco and Walmart.

The founder of Sarah Farms, a producer-handler located in the Order 131 marketing area, testified in opposition to Proposals 1, 2, and 3. The witness was of the opinion that the purpose of the public hearing was to eliminate Sarah Farms as a competitor in the Order 131 marketing area. The witness said that imposing a 3-million pound per month route disposition limit on producer-handlers would restrict the growth of Sarah Farms while leaving competing cooperatives and proprietary handlers free to compete without additional restraints. The witness was of the opinion that imposing a route disposition limit on producer-handlers as advanced in Proposal 3, was based on projected future conditions and was therefore both unjustified and speculative. According to the witness, a restriction on sales volume would force a dramatic change to Sarah Farms' business structure and practices when there was no evidence of an unfair regulatory advantage by being exempt from the Order 131 pooling and pricing provisions.

The witness testified that Sarah Farms' sales exceed 3 million pounds per month, noting that the majority of its current sales, and sales since becoming a producer-handler in 1995, are in Arizona. The witness said that some major customers include Sam's Club, Basha's (a grocery store chain), Costco, and other smaller independent retailers. The witness said that Sarah Farms' growth was directly related to its ability to fill a market void left by competitors who exited the dairy business leaving an opportunity that others could not completely fill.

The witness asserted that Sarah Farms produces a differentiated product from that of its competitors by marketing its fluid milk products with tamper resistant caps and by delivering their fluid milk products to customers within 24 hours of milking which, according to the witness, adds up to 7 days to the shelf life of its products. The witness also said that Sarah Farms' gallon-sized fluid milk products are shipped in cardboard containers, which further differentiates these products from their competitors.

The Sarah Farms witness testified that being a producer-handler is a high-risk undertaking. Relying on Market Administrator data, the witness noted that the number of producer-handlers in Order 131 has declined from six in 1980 to only two in 2003, an important indicator of the high-risk nature of being a producer-handler.

The witness testified that Sarah Farms pays its own balancing costs and does not transfer these costs to other fully regulated handlers or pooled producers of Order 131. In addition, the witness testified that as a producer-handler, Sarah Farms simultaneously bears all of its own production, marketing, and processing costs and risks unlike pooled producers and fully regulated handlers. The witness also was of the opinion that a fluid milk processing plant under construction in Clark County, Nevada, an area exempt from Federal milk regulation, poses a greater competitive threat to producers and fully regulated handlers than any other entity. The witness also testified that Sarah Farms does not sell its milk below the Order 131 Class I price plus the cost of transportation, packaging, and processing.

A witness representing Food City, a retail grocery chain, testified on behalf

of Sarah Farms. The witness testified that Food City, and its parent company, the Basha's operate some 144 stores in Arizona, New Mexico, and California. The witness said that Food City buys milk from Sarah Farms and from a fully regulated handler. The witness indicated that Food City's opposition to Proposal 3 was to help assure that Food City continues to have more than a single supplier for its fluid milk needs. The witness indicated that in the longer term, the availability of multiple suppliers tends to assure competitive pricing, reliable service, and product quality. The witness said that Food City's interest in multiple suppliers transcended the issue of whether the supplier is a fully regulated handler or a producer-handler.

Post Hearing Briefs and Motions

Post hearing briefs filed on behalf of proponents and opponents made extensive arguments as they relate to case law, arguing legal contexts for why large producer-handlers should or should not become subject to the pooling and pricing provisions of the Pacific Northwest and the Arizona-Las Vegas marketing orders. Presented herein are discussions of the briefs as they relate to the economic and marketing conditions of the two orders.

A brief filed on behalf of NDA reiterated its support for the adoption of Proposals 1, 2, and 3. They noted that both Orders 124 and 131 have fully regulated handlers operating plants whose route disposition of Class I milk are smaller than the largest producer-handlers in the two orders. NDA stressed that the Department cannot ignore a situation where the smallest regulated handlers in the market are not provided equitable minimum prices as intended by Congress when the AMAA established the requirement that classified pricing be uniform to all handlers.

In brief, NDA took issue with the notion by opponents that producer-handler balancing costs are greater than that of fully regulated handlers. NDA argued that the milk order program does not attempt to consider all costs or address issues of profitability. They noted that balancing costs are typically borne by regulated handlers over and above the minimum cost structure reflected in the orders. In this regard, NDA noted that opponents expanded on the burden of their own balancing costs but did not consider balancing costs incurred by fully regulated handlers. They further explained that balancing costs may also be absorbed by marketwide pooling through the mechanism of Class III and Class IV pricing, which stressed NDA, is not applicable to producer-handlers.

The rapid and extensive growth of Sarah Farms was also noted by NDA who claimed that Sarah Farms now has captured 15 to 20 percent of all the Class I sales in Order 131. This equates, the NDA brief said, to a reduction in Class I premium dollars by at least $2.5 million per year. In the Order 124 area, added NDA, producer-handlers account for about 10 percent of total in-area Class I sales and similarly reduce Class I premium dollars.

A brief filed on behalf of DFA reiterated their support for the adoption of proposals 1, 2, and 3 stressing that small dairies which do not impact total pool value should be the only exempted producer-handlers. DFA noted that in Order 124 the three largest producer-handlers, which average nearly 5.0 million pounds of Class I sales each per month, are larger in size than one-third of the order's fully regulated distributing plants. According to the DFA brief, in Order 131, Sarah Farms has captured more than 15 million pounds of Class I sales per month. DFA was of the opinion that orderly marketing conditions can only be maintained if any exceptions to classified pricing are limited and justified. DFA emphasized that large producer-handlers in the two orders have captured a significant share of the Class I sales which thereby reduces returns to all producers while retaining substantial Class I proceeds for each producer-handler on an individual handler pool basis.

The DFA brief also reiterated reasons why 3 million pounds of Class I route distribution should be established as the cap for producer-handler exemption from full regulation. They stated that there is a similar benchmark applicable in the Fluid Milk Promotion Act of 1990. They also indicated that volumes of milk sales from stores in the marketing areas indicate that at the 3 million pound level, a handler could supply a number of small stores. They noted that at this threshold size, producer-handlers' economies of scale are sufficient enough that as handlers, producer-handlers can be competitive with fully regulated handlers. Lastly, DFA maintained that, as producers, producer-handlers have substantial economies of scale in on-farm milk production that if exempt from pooling, gives producer-handlers a significant advantage in the marketplace for fluid milk sales.

A brief filed on behalf of UDA continued to iterate its support for the adoption of Proposal 3. They indicated that they did not support limiting producer-handlers sales to 3 million pounds per month on the basis that it was the same benchmark as in the Fluid Milk Promotion Act of 1990. Rather, UDA finds merit in regulating large producer-handlers above 3 million pounds per month in route sales because at such a size they are able to achieve economies of scale that enable them to be competitive factors in the market and able to compete with fully regulated handlers.

A brief was filed on behalf of Shamrock Foods Company, Shamrock Farms Company and the Dean Foods Company in continued support of the adoption of Proposal 3. They emphasized that Sarah Farms' doubling of Class I sales between 1998 and 2003 was not known and could not have been known during the time of adopting the consolidated orders as a part of Federal milk order reform. In this regard, they also noted that at the time of Federal milk order reform, the Department could not have known of the growing importance to integrated operations such as Kroger and Safeway of price competition from large warehouse box stores such as Costco caused by large producer-handler sales. Lastly, they indicated that no limit had been placed on producer-handlers during Federal milk order reform because it could not have been known that losses to pooled participants would increase by a multiple of nearly four from before to after implementation of order reform.

A brief filed on behalf of NMPF continued to iterate its support for adoption of proposals that would limit the size of producer-handlers. NMPF was of the opinion that the exemption for producer-handlers violates the principles of producer equity upon which the milk order program relies. In addition, they were of the opinion that producer-handler exemption threatens orderly marketing. They explained that farms with over 3 million pounds of monthly production account for about 15 percent of the total U.S. milk supply which equates to about 40 percent of fluid milk sales. Continued exemption of producer-handlers from pooling and pricing, the NMPF maintained, threatens both producer and handlers.

A Statement of Interest was filed on behalf of two cooperatives, Select Milk Producers and Continental Dairy Products, indicating support for adoption of Proposal 3 as submitted by UDA. Select Milk Producers is a New Mexico milk marketing cooperative and Continental Dairy Products is an Ohio milk marketing cooperative.

A consolidated brief filed on behalf of Edaleen Dairy, Mallorie's Dairy, Smith Brothers Farms, and Sarah Farms

stressed that as producer-handlers who have sales in excess of three million pounds per month, adoption of any proposal that would subject them to the pooling and pricing provisions of the orders would cause their organizations to be severely affected. They stressed that if they become required to make equalization payments to the producer-settlement funds, this would take millions of dollars per year away from their operations and redistribute it to other producers with no return benefit to their operations.

In brief, Edaleen Dairy, Mallorie's Dairy, Smith Brothers Farms, and Sarah Farms indicated that the advantages producer-handlers have as alleged by proponents, vanish when the financial benefits of not having to pay minimum prices and avoiding equalization payments to the producer-settlement fund are offset by their balancing costs. Any remaining advantage should be viewed as acceptable given the increased risks producer-handlers incur in the marketplace. They indicated that rational persons would not take on additional risk without the prospect of additional rewards.

In brief, Edaleen Dairy, Mallorie's Dairy, Smith Brothers Farms, and Sarah Farms stressed that, in their opinion, neither milk supply or prices for milk in the two marketing areas had fluctuated unreasonably, noting that milk was in such sufficient supply that with or without producer-handlers supplies are plentiful. They did not view their fluid milk sales in the marketing area as contributing to the erosion of classified prices or blend prices. They cited hearing record statistics to assert that they are not a cause of market disorder or cause the inefficient movement of milk. They cited the reduction in the number of producer-handlers, emphasizing that between 1975 and 2000, the Pacific Northwest order producer-handler numbers fell from 73 to 11 with average daily pounds of production increasing only 4.7 percent between 1985 and 2000. For the Arizona-Las Vegas order, they noted that since 1982, the number of producer-handlers fell from seven to two. According to the brief, on the basis of such statistics, there can be no finding that producer-handlers have unabated growth or that they are a source of market disruption.

A motion to strike the testimony and related exhibits concerning plant operating costs offered by DFA's consultant witness was filed on behalf of Edaleen Dairy, Mallorie's Dairy, Smith Brothers Farms and Sarah Farms. The presiding Administrative Law Judge received this motion after the certification of the hearing record on June 1, 2004. Given that the objection goes to the weight to be given to the testimony and exhibits and not to their admissibility, the motion is denied.

A Motion to Strike the exceptions and comments of the large producer-handlers—Sarah Farms, Edaleen Dairy, Mallorie's Dairy, and Smith Brothers Farms—was filed on behalf of DFA. This motion was received on July 11, 2005, and sought to prevent the introduction of new material into the record by opponent producer-handlers. The Department has concluded that the testimony, briefs, and the relevance of comments and exceptions filed by all parties are clearly delineated in the context of the official record. Accordingly, the motion by DFA, and a subsequent motion filed jointly on behalf of DFA, Dean, UDA, Shamrock Farms and Shamrock Foods, are denied.

A Motion to Supplement the Public Record due to ex parte communications was filed on behalf of Sarah Farms on April 7, 2005. This motion sought additional information to amplify the public record of this proceeding based on the attendance of the AMS Dairy Programs Deputy Administrator at the annual meeting of Dairylea Cooperative where a speaker publicly addressed issues germane to this proceeding and producer-handlers in the Federal milk order program in a speech. A Memorandum to the Record Regarding Ex Parte Communications was issued on May 23, 2005, by the Deputy Administrator, Dairy Programs explaining that no Dairy Programs officials engaged in ex parte discussions of the material issues of this proceeding at the Dairylea Cooperative meeting on October 12–13, 2004, nor at the DFA annual meeting on March 23–24, 2005, nor at any other forum. This memorandum is available for public inspection at the Office of the USDA Hearing Clerk and at the Dairy Programs Web site, *www.ams.usda.gov/dairy/*.

Comments and Exceptions

A number of proponents for regulating large producer-handlers, including Shamrock Foods Company, Dean Foods Company, United Dairymen of Arizona, and Shamrock Farms (hereinafter Shamrock, et al.) submitted joint comments and exceptions to the Recommended Decision. The proponents were joined by the Alliance of Western Milk Producers representing California cooperatives (1100 dairy farmer members) in support of the Recommended Decision's findings.

The Shamrock, et al., comments agreed with the Recommended Decision's finding that the criteria for determining whether a producer-handler is a small or large business rest on the producer-handler's capacity as a producer. Proponents noted that most handlers, regardless of their regulatory status, would be considered small businesses because of the 500 employee threshold established by the Small Business Administration's definition of a large business for milk processing plants.

The Shamrock, et al., comment reiterated the position of the proponents that an impact of more than a penny per cwt per month on an order's blend price is sufficient to indicate a significant impact on the blend price that dairy farmers receive by pooling milk on these orders. In addition, they agreed with the Recommended Decision's finding that producer-handlers with route disposition of fluid milk products in excess of 3 million pounds per month had a significant and disruptive impact in these marketing areas. According to the comment, these impacts are large enough to warrant a new review of the producer-handler exemption from the pooling and pricing provisions of the orders.

Shamrock, et al., took exception to the recommended 3 million pound per month in-area Class I route disposition as the threshold beyond which producer-handlers would become subject to the pooling and pricing provisions of the orders. They explained that this threshold was too generous and should have been set at some level less than 3 million pounds per month. Shamrock, et al., was joined in this exception by the National Milk Producers Federation. Shamrock et al., also took exception to the charge of ex parte communications between USDA officials and certain leaders of DFA alleged by large producer-handlers who would likely become regulated if the orders were amended. According to the comment, such allegations were unwarranted.

Comments and exceptions by DFA similarly supported the findings of the Recommended Decision. The comments by DFA called for immediate implementation of the proposed full regulation of producer-handlers with in-area route disposition of fluid milk products in excess of 3 million pounds per month. They noted that each month's delay in implementing the proposed rule significantly reduces the blend price for pooled producers. They agreed with the Recommended Decision and the Shamrock, et al; conclusion that a producer-handler's characterization of being a small or large business should be based on the producer-handler's capacity as a producer.

DFA's comments also noted that the record of the proceeding supported the conclusions of the Recommended Decision on the disorder caused by exempting large producer-handlers from the pooling and pricing provisions of the orders. In this regard, their comments reiterated from their post-hearing brief that large producer-handler balancing costs are much lower in these marketing areas than historical balancing costs of small producer-handlers. As with Shamrock, et al., the comment noted that allegations of ex parte communications between DFA and USDA officials were unfounded.

As with Shamrock, et al., DFA took exception to adopting a threshold of 3 million pounds per month of in-area route disposition. They maintained that the threshold should include all route disposition not just in-area route disposition. DFA was joined in this exception by National Milk Producers Federation.

Six hundred ten e-mail comments received expressed support for the Recommended Decision's findings. These comments were from dairy farmer members of cooperatives, employees of cooperatives, representatives of producer and processor organizations from California, as well as producer and processor organizations in the Pacific Northwest and Arizona-Las Vegas marketing areas. Comments indicating support received via the U.S. Postal Service and fax also were largely from dairy farmers, cooperatives, associations of cooperatives, and their employees.

Supporting comments for the Recommended Decision's findings by dairy farmer and dairy farmer organizations focused on the pricing and sales advantages that producer-handlers have by being exempt from classified pricing and marketwide pooling. Specifically, these comments stressed that the impact on fully regulated handlers and pooled producers is directly related to the size of producer-handlers. In general, these comments contain the common theme that the pricing advantage enjoyed by producer-handlers has been the difference between an order's Class I price and blend price. The comments generally support the conclusion that small producer-handlers, having route disposition below 3 million pounds per month, have not been a significant factor in the Pacific Northwest or Arizona-Las Vegas marketing areas.

The large producer-handlers from the Arizona-Las Vegas and Pacific Northwest marketing areas submitted joint comments and exceptions in opposition to the findings of the Recommended Decision. These entities included Sarah Farms, Mallorie's Dairy, Edaleen Dairy, and Smith Brothers Farms, Inc. Their exceptions specifically reiterated opposition to adopting any measure that would cause them to be subject to the order's pooling and pricing provisions. They also took exception to the finding that impacts on an order's blend price are significant and disruptive to orderly marketing. This finding, they stressed, is arbitrary and capricious because, in their opinion, record evidence is not sufficient to reach this conclusion.

The large producer-handlers' joint exception disagreed with the Recommended Decision's finding that large producer-handlers should be viewed as large businesses in their capacity as dairy farmers rather than in their capacity as handlers. In this regard, they concluded that if producer-handlers are considered for regulation on the basis that they are large in their capacity as dairy farmers, they cannot have their exemption from pooling and pricing provisions removed because the AMAA provides the authority to only regulate handlers and not dairy farmers. They continued to assert that they are seamless integrated entities that cannot be viewed in separate capacities as producers and handlers. Thus, the exception concluded that large producer-handlers should be viewed as small businesses because they have fewer than 500 employees.

The large producer-handlers' took exception to the Recommended Decision's findings concerning the impact on order blend prices noting that milk market prices vary over time as marketing conditions change. They concluded that such variations in prices are unrelated to the level of route disposition of producer-handlers individually or in the aggregate. In addition, they stressed that even if large producer-handlers enjoyed advantages as claimed by proponents, their aggregate share of the market in the Pacific Northwest during the period 2000–2003 had decreased.

The large producer-handlers' joint exception asserted that the record demonstrates that fully regulated handlers are able to compete effectively with large producer-handlers. They took exception to the Recommended Decision's finding that large producer-handlers are the cause of market disruption and characterized the finding as arbitrary and capricious. In their view, such a finding is not established or supported in the record. The exception maintains that normal variability in milk prices and gains or losses of commercial accounts are contained in the record as examples and explanations of activities that the Recommended Decision incorrectly characterizes as market disruption and disorderly marketing.

In separate exceptions, Sarah Farms reiterated their opposition to the findings of the Recommended Decision maintaining that market disorder resulting from the alleged advantages enjoyed by producer-handlers is not demonstrated in the record. They noted that producer-handler market share in the Pacific Northwest order had declined in the year preceding the hearing—from 10 percent to 9 percent. They asserted that producer-handler market share in the Arizona-Las Vegas order was 10 percent during the same period, concluding that no finding of either competitive advantage or market disorder can be made. Mallorie's Dairy, Edaleen Dairy, and Smith Brothers Farms, presented separate and similar exceptions.

Each large producer-handler noted in their separate exception that at current route disposition levels, their monthly revenue would decline significantly if they become required to make equalization payments to the order's producer-settlement fund. Edaleen Dairy, for example, stated that their monthly revenue would decline by $125,000. The other large producer-handlers noted in their separate exceptions that owners, employees and customers would experience similar losses in revenue from reduced sales volume in their efforts to maintain producer-handler status.

In separate exceptions Edaleen Dairy noted that lowered revenues may in turn reduce employment at their dairy farm and processing plant and may even affect employment in supporting service businesses as a result of down-sizing their operations. They were joined in similar exceptions by Smith Brothers Farms, Mallorie's Dairy, and Sarah Farms. All large producer-handlers also asserted that their full regulation would decrease competition and that their customers would likely experience increased prices and reduced product choices.

Within the April 13–June 13, 2005, comment period, 12,223 e-mail comments and more than 5,600 hard-copy comments were received through the U.S. Postal Service or by fax that opposed fully regulating large producer-handlers. In addition, 1969 pages of petitions containing a total of 26,267 signatures opposing the findings of the Recommended Decision were received. The signed petitions were submitted by Edaleen Dairy, Mallorie's Dairy, and Sarah Farms. Of the 12,223 e-mail comments received, approximately

11,590, or about 95 percent, opposed the Recommended Decision's findings. These comments were generated as part of a write-in campaign by what appeared to be customers located in the United States, Canada, and Mexico of the large producer-handlers opposing their full regulation.

Other comments received in opposition to the Recommended Decision included letters from the United States Senators from Alaska and some members of the U.S. House of Representatives from the States of Oregon, Washington, and Arizona. Several Oregon and Washington elected State, county and municipal officials and regional economic development organizations provided exceptions expressing opposition to the Recommended Decision's findings. The exceptions speculated that fully regulating producer-handlers might result in job losses at locations where these producer-handlers produce and bottle milk and market their dairy products. Some of these comments speculated that independent residential milk route operators in Oregon might be forced out of business if large producer-handlers became fully regulated.

Exceptions opposing implementation of the Recommended Decision were submitted on behalf of consumer and processor interests from unregulated areas who currently purchase milk from some of the large producer-handlers. These parties expressed concern that milk prices in unregulated areas, such as Alaska, would rise significantly if large producer-handlers became fully regulated.

Findings

Although producer-handlers have not been fully regulated as a general practice, the AMAA provides the authority to regulate handlers of milk to carry out the purposes of the AMAA. With respect to producer-handlers, the legislative history indicates that there is authority to regulate such operations if they are so large as to disrupt the market for producers. In the past during other rulemaking proceedings, producer-handlers have been found not to disrupt the marketing of milk and milk products.

Nevertheless, restrictions were placed on producer-handlers. Both the Pacific Northwest and the Arizona-Las Vegas orders currently permit producer-handlers to purchase up to 150,000 pounds per month of supplemental milk only from pool sources. In addition, the Arizona-Las Vegas order, prohibits the disposition of Class I products by a producer-handler to a wholesale customer who is also serviced by a pool distributing plant that supplies the same product in a same-sized package with a similar label in the same month. While each order has its own unique definition, it is accurate to say that in general, producer-handlers are required to operate their businesses at their own enterprise and risk, meaning that the care and management of the dairy animals and other resources necessary for the production, processing, and distribution of their Class I products are the sole responsibility of the producer-handlers.

Producer-handler exclusion from pooling and pricing provisions also has been historically based on the premise that the objectives of the AMAA (orderly marketing) could be achieved without extending regulation to this category of handler. In previous rulemaking decisions, the Department has articulated its authority to subject producer-handlers to further regulation, including being subject to marketwide pooling and minimum pricing provisions, if they singularly or collectively have an impact on the market. For example, in a Final Decision (31 FR 7062–7064; May 13, 1966) for the Puget Sound order, a predecessor to the Pacific Northwest order, the Department found that producer-handlers should continue to be exempt from pooling and pricing provisions of the order with the caveat that the producer-handlers could be subject to further regulation if justified by prevailing market conditions. This position was amplified in a subsequent Puget Sound Final Decision (32 FR 1073–1074; July 21, 1967) where the Department found that a hearing should be held to consider the regulation of producer-handlers if the marketing area is susceptible to being affected by producer-handlers or if producer-handler sales could disrupt or operate to the detriment of other producers in the market. Such policy was also articulated in another decision concerning producer-handlers (Texas and Southwest Plains, Recommended Decision, 54 FR 27179, June 28, 1989). That decision concluded that subjecting producer-handlers to the pooling and pricing provisions of the order would be appropriate if it could be shown that producer-handlers cause market disruption to the market's dairy farmers or regulated handlers.

The proposals for fully regulating producer-handlers in this proceeding, specifically making them subject to the order's pooling and pricing provisions, are based primarily on issues relating to producer-handler size, specifically the volume of Class I route disposition. The producer-handler exemption from pooling and pricing provisions is proposed to end when the volume of Class I route disposition in the marketing area exceeds 3 million pounds per month.

In considering issues relating to size, producer-handlers are dairy farmers that process and sell only their own milk production. These entities are dairy farmers as a pre-condition to operating a processing plant as producer-handlers. Consequently, the size of the dairy farm determines the production level of the operation and is the controlling factor in the capacity of the processing plant and possible sales volume. Accordingly, the major consideration in determining whether a producer-handler is a large or small business focuses on its capacity as a dairy farm. Under SBA criteria, a dairy farm is considered large if its gross revenue exceeds $750,000 per year with a production guideline of 500,000 pounds of milk per month. Accordingly, a dairy farm with sales of its own milk that exceeds 3 million pounds per month is considered a large business.

Another factor to consider regarding the size of producer-handlers is their ability to have an impact on the market's pooled participants. Indicators of market disruption affecting dairy farmers who pool their milk on the orders and by the orders' fully regulated handlers should be determined on the basis of prices that are uniform to producers and equitable among handlers. When these price conditions are present, milk marketing order areas are considered to be exhibiting orderly marketing—a key objective of the AMAA that relies on the tools of classified pricing and marketwide pooling. In the absence of equity among producers and handlers such conditions are and should be deemed to be disorderly.

As already discussed above, producer-handler exemptions from the pooling and pricing provisions of the orders are based upon the premise that the burden of surplus disposal of their milk production is borne by them alone. Consequently, they have not shared the additional value of their production that arose from Class I sales with pooled dairy farmers. In this regard, to the extent that producer-handlers are no longer bearing the burden of surplus disposal, specifically disposal of milk production in some form other than Class I, gives rise to considering regulatory measures that would tend to provide price equity among producers and handlers that is eroded when producer-handlers are permitted to retain the entire additional value of milk accruing from Class I sales.

The record supports finding that producer-handlers with more than 3

million pounds of route disposition per month in both the Pacific Northwest and the Arizona-Las Vegas marketing areas are the primary source of disruption to the orderly marketing of milk. This disorder is evidenced by significantly inequitable minimum prices that handlers pay and reduced blend prices that dairy farmers receive under the terms of each area's marketing order. Accordingly, producer-handler status under the Pacific Northwest and the Arizona-Las Vegas orders should end when a producer-handler exceeds 3 million pounds per month of in-area Class I route disposition.

Review of the intent of the producer-handler provision and the marketing conditions arising from this provision in these orders could warrant finding that the original producer-handler exemption is no longer valid or should be limited to 150,000 pounds per month Class I route disposition limit. However, the hearing notice for this proceeding constrains such a finding to a level of not less than 3 million pounds per month of Class I route dispositions.

Adopting a 3 million pound Class I route disposition limit on producer-handlers is supported in direct testimony by proponent witnesses and other marketing data, most notably the volume of Class I route disposition relative to the total volume of Class I sales, and structural changes in the markets. Producer-handlers with more than 3 million pounds of Class I route disposition significantly affect the blend price received by producers. This decision finds merit in DFA's and Dean's testimony that a blend price impact of 1-cent per cwt is significant. The reduction in the blend prices received by producers in the Pacific Northwest and Arizona-Las Vegas orders, attributable to producer-handler route disposition are significant and greater than 1-cent per cwt. The record evidence supports a conclusion that the exemption of producer-handlers from pooling and pricing has reduced the blend price between $0.04 to $0.06 per cwt per month in the Arizona-Las Vegas marketing area and between $0.02 to $0.04 per cwt per month for the Pacific Northwest marketing area since January 2000. The causes of the blend price reduction arise from a producer-handler's ability to price fluid milk at an amount between the blend price and the order's Class I price combined with the producer-handler's size relative to the total volume of Class I milk disposition in the respective marketing areas.

In general, the difference between the Class I price and the blend price not paid into the producer-settlement fund is the pricing advantage enjoyed by producer-handlers over fully regulated handlers. While this has always been the case, those producer-handlers with route disposition of more than 3 million pounds of milk per month in these two orders are large enough to have a negative impact on the prices received by pooled dairy farmers. Since fully regulated handlers do not have the ability to escape payment into the producer-settlement fund of the difference in their use-value of milk and the order's blend price like producer-handlers, regulated handlers competing against large producer-handlers are at a competitive price disadvantage.

Even though producer-handlers argue otherwise, this decision agrees with proponent arguments, most notably by the NMPF witness, that the difference between the Class I price and the blend price is a reasonable estimate of the pricing advantage producer-handlers enjoy even if it is not possible to determine the precise pricing advantage of any individual producer-handler. This pricing advantage is compounded as producer-handler size, and the accompanying increase in the volume of Class I sales in the marketing area, begins to increasingly affect the blend price received by pooled producers.

The record contains specific examples demonstrating that producer-handlers with route disposition of more than 3 million pounds per month have and are placing their fully regulated competitors at a comparative sales disadvantage. For example, Shamrock Foods, a regulated handler with substantial sales in the Arizona-Las Vegas marketing area, is constrained in competing on a price basis for customers by the order's minimum prices that must be paid for milk procurement. Meanwhile, the large producer-handler is able to compete for commercial customers at prices that a regulated handler is unable to match. The competitive pricing advantage of producer-handlers is clearly attributable to their exemption from paying the difference between the Class I and blend price into the producer-settlement fund. This competitive pricing advantage has been recognized previously by the Department (Milk in the Texas Southwest Plains Marketing Area, 54 FR 27182) and determined not to cause disorderly marketing conditions. However, marketing conditions and the overall dairy industry's marketing structure have changed significantly in these orders resulting in disorderly marketing conditions as evidenced by lower blend prices received by pooled producers. The producer-handlers are significantly larger in these two orders and while they are solely responsible for their production and processing facilities, they are not assuming the entire burden of balancing their production with their fluid milk requirements as discussed later in this decision.

The record evidence supports concluding that the one large producer-handler represents between 12–18 percent of the total Class I sales volume in the Arizona-Las Vegas marketing area. The record evidence supports a conclusion that the exemption of this producer-handler has reduced the blend price received by pooled producers between $0.04 and $0.06 per cwt per month in the Arizona-Las Vegas marketing area. Similarly, record evidence reveals that producer-handler exemption from pooling and pricing in the Pacific Northwest reduces the blend price to all other dairy farmers by $0.02–$0.04 per cwt. The Pacific Northwest marketing area has eight producer-handlers, with four having Class I route disposition exceeding 3 million pounds per month. In the aggregate, all producer-handlers in the Pacific Northwest account for nearly 10 percent of the total Class I sales in the marketing area. Importantly, the impact on the marketing area's blend price by the exemption from the pooling and pricing provision by any of the individual producer-handlers whose sales exceed 3 million pounds per month on average exceeds $0.01, a level found to be significant and disruptive to orderly marketing. While the marketing conditions of the Pacific Northwest area differ from the Arizona-Las Vegas marketing area in the number of producer-handlers and the relative market share of producer-handlers, evidence of market disruption by producer-handlers resulting in lower blend prices is a common factor of both orders.

The record, based on Market Administrator data, supports concluding that the annualized reduction in revenue received by the average pooled producer in the Pacific Northwest marketing area would range from $1,500–$3,000 from the $0.02–$0.04 cents per cwt per month reduction on the order's blend price during 2003. For the Arizona-Las Vegas marketing area the record supports concluding that the annualized reduction in revenue received by the average pooled producer would range between $11,000–$17,000 from the $0.04–$0.06 per cwt impact of large producer-handlers on that order's blend price per month for 2003.

As in the Arizona-Las Vegas marketing area, producer-handlers in the Pacific Northwest similarly enjoy a competitive sales advantage because they do not procure milk at the order's

Class I price as required of fully regulated handlers. This has resulted in fully regulated handlers not being able to compete with producer-handlers for Class I route sales. For example, Vitamilk testified that as regional grocery chains were acquired by national handlers in the Pacific Northwest marketing area, independent regulated handlers such as Vitamilk found themselves unable to compete for sales with large producer-handlers in the changed marketing environment of fewer wholesale customers on a price basis. Vitamilk demonstrated that the pricing advantage that accrues to producer-handlers from their exemption from pooling and pricing provisions created an insurmountable marketing obstacles that eliminated Vitamilk's ability to compete for available customers in the marketing area on the basis of minimum Class I prices established by the order.

For both the Pacific Northwest and the Arizona-Las Vegas marketing areas, record evidence demonstrates that large producer-handlers have a comparative pricing advantage over fully regulated handlers. Without full regulation of large producer-handlers, the order is not able to ensure equitable minimum prices to similarly situated handlers. Such an advantage has resulted in fully regulated handlers losing sales to producer-handlers on the basis of minimum prices. Producer-handlers have similarly lost accounts to fully regulated handlers but for reasons other than minimum prices established by the orders.

Consideration was given to the themes of the more than 12,000 e-mail comments, petition subjects and arguments advanced by large producer-handlers that were received during the briefing and comment periods of the Recommended Decision. One of these themes is that large producer-handlers are family-owned business enterprises in both orders that should receive support through their special status. This concern does not acknowledge that the producers who are the competitors of large producer-handlers are nearly all family-owned dairy farms who are members of cooperatives. Another highly commented theme given consideration in this decision and raised by large producer-handlers was that certain market niches that they serve in the public interest such as providing home delivery and hormone free milk will not be provided by fully regulated handlers and may not occur if they become fully regulated. There is no record evidence to support concluding that home-delivery or availability of hormone free milk would be disrupted by having the pooling and pricing provisions of the orders apply to large producer-handlers. Accordingly, this decision does not agree with the arguments of either the large producer-handlers or in those exceptions of other interested parties arguments that full regulation would eliminate their ability to provide home-delivery or hormone-free milk to their customers. No provision of any Federal milk marketing order prevents or promotes the marketing practices that handlers use to service their customer demands for home-delivery or in providing hormone-free milk products.

The record supports concluding that producer-handlers with more than 3 million pounds of route disposition per month have gained the ability to no longer bear the burden of the surplus disposal of their milk production. This represents a significant development that warrants the need for regulatory action because producer-handler exemption from the pooling and pricing provisions of the orders has been rationalized on the basis that producer-handlers bear the entire burden of balancing their own production. A producer-handler not bearing the burden of balancing their milk production essentially shifts such burden to the market's pooled producers while simultaneously retaining the full value of Class I sales for themselves.

Record evidence, reinforced by subsequent exceptions, demonstrates that large producer-handlers are able to use their pricing advantage to transfer their burden of surplus disposal to regulated handlers. Evidence provided by an affiliate of NDA demonstrates that producer-handlers were able to use their pricing advantage to displace sales of regulated handlers into Alaska. According to the witness testimony, producer-handlers were able, at will, to displace the established accounts of fully regulated handlers on the basis of minimum prices. The testimony supports concluding that such sales by large producer-handlers displace fluid milk sales of fully regulated handlers that would otherwise have been producer-handler surplus.

A changing retail environment gives rise to the potential of producer-handlers entering into sales agreements to furnish the retailers with as much milk as the producer-handler can deliver. Marketing milk to national grocery discounters creates an environment in which the producer-handlers can sell nearly their entire production to such a retailer, bypassing the need to balance their production. In such a marketing environment, the regulated market's pooled producers essentially become the residual suppliers of Class I milk to the market when a producer-handler's production is not able to satisfy the fluid milk demands of their customer. The retailer need only purchase milk from fully regulated handlers to offset what a producer-handler is not able to supply. This is of growing concern to both producer and regulated handler interests in the Pacific Northwest and the Arizona-Las Vegas marketing areas because consumers are buying an increasing share of their grocery needs from discount outlets.

The record evidence, reinforced with subsequent comments, also reveals that producer-handlers in both the Pacific Northwest and the Arizona-Las Vegas marketing areas with route disposition of more than 3 million pounds per month enjoy sales of fluid milk products into unregulated areas such as Alaska and California. These examples contribute to demonstrating a shifting of the burden of balancing their milk production onto the order's pooled producers. This outcome has the compounded disadvantage for regulated handlers and their producer-suppliers because fully regulated handlers must account to the marketwide pool for Class I sales outside of the marketing area at the order's Class I price. This yields a two-fold advantage to producer-handlers—the ability to eliminate balancing their milk production through Class I sales at the expense of the regulated market and the ability to compete on a consistent basis at prices that fully regulated handlers are unable to meet.

This evidence contradicts the notion that the balancing of their milk production is a burden borne exclusively by the producer-handler. Thus it is reasonable to find that producer-handlers with Class I route distribution in excess of 3 million pounds per month in the Pacific Northwest and the Arizona-Las Vegas marketing areas are not truly balancing their production. Accordingly, this decision finds that the burden of balancing has been essentially shifted to the market's pooled participants. This decision also finds that large producer-handlers have and use a pricing advantage that cannot be overcome by fully regulated handlers. This advantage increases only as producer-handler size increases. Therefore, it is reasonable that large producer-handler status should be limited.

This decision considered the relevance of a 3 million pound route disposition threshold on producer-handler route disposition. The relative impact on the market's pooled

participants by producer-handlers having more than 3-million pounds of route disposition in the market is measurable and significant in both the Pacific Northwest and Arizona-Las Vegas marketing areas. When considered in the aggregate, producer-handlers in the Pacific Northwest with over 3 million pounds of route disposition collectively have more significant share of the Class I market which further lowers the blend price received by dairy farmers.

All handlers have different production and processing costs. These differences may be due to differing levels of plant operating efficiencies related to their size or to that portion of their milk supply that may be produced and supplied from their own farms. Whatever the cost differences, all fully regulated handlers must pay the same minimum Class I price and equalize their use-value of milk (generally, the difference between the Class I price and the blend price) into the order's producer-settlement fund. Similarly, all producers have differing milk production costs. Producer cost differences, for example, may be the result of farm size or differing milk production levels attributable to management ability. Nevertheless, producers, regardless of their costs, receive the same minimum blend price.

This decision finds that disorderly marketing conditions exist in the Pacific Northwest and Arizona-Las Vegas marketing areas. The source of the disorder is directly attributable to the operations of large producer-handlers and their exemption from the pooling and pricing provisions of the orders. The record evidence for full regulation of large producer-handlers with route disposition in excess of 3 million pounds per month support finding that market disruption is present because the blend prices paid to producers in both orders are measurably and significantly lowered.

This decision finds that producer-handlers with route disposition in excess of 3 million pounds per month enjoy significant competitive sales advantages because they do not account to the marketwide pool at the same minimum Class I price for raw milk procurement. This clearly gives large producer-handlers a pricing advantage over fully regulated handlers when competing for sales. This pricing advantage becomes amplified as producer-handler size increases further affecting the minimum price producers receive. Adoption of a 3 million pound per month threshold for producer-handlers should tend to significantly reduce disorderly marketing conditions that arise from inequitable Class I prices to handlers. A 3 million pound per month limitation on route disposition would likely result in the full regulation of a current producer-handler in the Arizona-Las Vegas marketing area. Of the producer-handlers operating in the Pacific Northwest marketing area, four producer-handlers would likely become regulated by adopting the 3 million pound per month limitation on route disposition. Adoption of this limitation will not completely eliminate the impact of the other producer-handlers in the Pacific Northwest marketing area but should nevertheless result in a significant and immediate reduction in market disorder and disruption by assuring that similarly situated handlers face the same minimum Class I prices and producers receive the same blend prices.

The hearing notice contained a proposal that would make the producer-handler definition of the Pacific Northwest order the same as that for the Arizona-Las Vegas order, most notably the proposed requirement would not permit a producer-handler to market to the same client the same product in a similar package with a similar label in the same month as a regulated handler. The record does not contain sufficient evidence of disorderly marketing conditions that would support recommending a prohibition on producer-handlers in marketing to the same client the same product in a similar package with a similar label in the same month as a regulated handler.

Additionally, the proposals contained in the hearing notice seeking the full regulation of producer-handlers when they surpass a 3-million pound per month threshold in Class I route dispositions in the marketing area were substantially modified during the hearing. The modifications redescribe producer-handlers and harmonize the producer-handler definitions between the two orders with changed terminology. The record evidence does not support finding that a compelling need exists to make the Pacific Northwest producer-handler definition the same as that for the Arizona-Las Vegas order. The current producer-handler definitions of both orders adequately describe those entities that qualify as producer-handlers.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the Pacific Northwest and the Arizona-Las Vegas orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) The tentative marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to Section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area(s), and the minimum prices specified in the tentative marketing agreements and the orders, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;

(c) The tentative marketing agreements and the orders, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in marketing agreements upon which a hearing has been held; and

(d) All milk and milk products handled by handlers, as defined in the tentative marketing agreement and the order as hereby proposed to be amended, are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products.

Rulings and Exceptions

In arriving at the findings and conclusions, and the regulatory provisions of this decision, each of the exceptions received was carefully and fully considered in conjunction with the record evidence. To the extent that the findings and conclusions and the regulatory provisions of this decision are at variance with any of the exceptions, such exceptions are thereby overruled for the reasons previously stated in this decision.

Marketing Agreement and Order

Annexed hereto and made a part hereof is one document—A Marketing Agreement regulating the handling of milk.

It is hereby ordered that this entire final decision and the Marketing Agreement annexed hereto be published in the **Federal Register**.

Referendum Order To Determine Producer Approval; Determination of Representative Period; and Designation of Referendum Agent

It is hereby directed that a referendum be conducted and completed on or

before the 30th day from the date this decision is published in the **Federal Register**, in accordance with the procedure for the conduct of referenda (7 CFR 900.300–311), to determine whether the issuance of the order as amended and hereby proposed to be amended, regulating the handling of milk in the Pacific Northwest and Arizona-Las Vegas marketing areas are approved or favored by producers, as defined under the terms of the order, as amended and as hereby proposed to be amended, who during such representative period were engaged in the production of milk for sale within the aforesaid marketing area.

The representative period for the conduct of such referendum is hereby determined to be June 2003.

The agent of the Secretary to conduct such referendum is hereby designated to be James R. Daugherty, the Pacific Northwest and Arizona-Las Vegas Market Administrator.

List of Subjects in 7 CFR Parts 1124 and 1131

Milk marketing orders.

Dated: December 9, 2005.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

Order Amending the Order Regulating the Handling of Milk in the Pacific Northwest and Arizona-Las Vegas Marketing Areas

(This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met).

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) *Finding.* A public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Pacific Northwest and Arizona-Las Vegas marketing areas. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure (7 CFR Part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said order as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the act;

(2) The parity prices of milk, as determined pursuant to Section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the aforesaid marketing area. The minimum prices specified in the order as hereby amended are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said order as hereby amended regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held.

(4) All milk and milk products handled by handlers, as defined in the tentative marketing agreement and the order as hereby proposed to be amended, are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products.

Order Related to Handling

It is therefore ordered, that on and after the effective date hereof, the handling of milk in the Pacific Northwest and Arizona-Las Vegas marketing areas shall be in conformity to and in compliance with the terms and conditions of the order, as amended, and as hereby amended as follows:

The provisions of the order amending the order contained in the Recommended Decision issued by the Administrator, Agricultural Marketing Service, on April 7, 2005, and published in the **Federal Register** on April 13, 2005 (70 FR 19636), are adopted and shall be the terms and provisions of these orders. The revised orders read as follows:

1. The authority citation for 7 CFR Parts 1124 and 1131 continues to read as follows:

Authority: 7 U.S.C. 601–674.

PART 1124—MILK IN THE PACIFIC NORTHWEST MARKETING AREA

2. Amend the *Producer-handler* definition of the Pacific Northwest milk marketing order by revising § 1124.10 to read as follows:

§ 1124.10 Producer-handler.

Producer-handler means a person who operates a dairy farm and a distributing plant from which there is route distribution within the marketing area during the month not to exceed 3 million pounds and who the market administrator has designated a producer-handler after determining that all of the requirements of this section have been met.

(a) *Requirements for designation.* Designation of any person as a producer-handler by the market administrator shall be contingent upon meeting the conditions set forth in paragraphs (a)(1) through (5) of this section. Following the cancellation of a previous producer-handler designation, a person seeking to have their producer-handler designation reinstated must demonstrate that these conditions have been met for the preceding month.

(1) The care and management of the dairy animals and the other resources and facilities designated in paragraph (b)(1) of this section necessary to produce all Class I milk handled (excluding receipts from handlers fully regulated under any Federal order) are under the complete and exclusive control, ownership and management of the producer-handler and are operated as the producer-handler's own enterprise and its own risk.

(2) The plant operation designated in paragraph (b)(2) of this section at which the producer-handler processes and packages, and from which it distributes, its own milk production is under the complete and exclusive control, ownership and management of the producer-handler and is operated as the producer-handler's own enterprise and at its sole risk.

(3) The producer-handler neither receives at its designated milk production resources and facilities nor receives, handles, processes, or distributes at or through any of its designated milk handling, processing, or distributing resources and facilities other source milk products for reconstitution into fluid milk products or fluid milk products derived from any source other than:

(i) Its designated milk production resources and facilities (own farm production);

(ii) Pool handlers and plants regulated under any Federal order within the limitation specified in paragraph (c)(2) of this section; or

(iii) Nonfat milk solids which are used to fortify fluid milk products.

(4) The producer-handler is neither directly nor indirectly associated with the business control or management of, nor has a financial interest in, another handler's operation; nor is any other handler so associated with the producer-handler's operation.

(5) No milk produced by the herd(s) or on the farm(s) that supply milk to the producer-handler's plant operation is:

(i) Subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program under the authority of a State government maintaining marketwide pooling of returns, or

(ii) Marketed in any part as Class I milk to the non-pool distributing plant of any other handler.

(b) *Designation of resources and facilities.* Designation of a person as a producer-handler shall include the determination of what shall constitute milk production, handling, processing, and distribution resources and facilities, all of which shall be considered an integrated operation, under the sole and exclusive ownership of the producer-handler.

(1) Milk production resources and facilities shall include all resources and facilities (milking herd(s), buildings housing such herd(s), and the land on which such buildings are located) used for the production of milk which are solely owned, operated, and which the producer-handler has designated as a source of milk supply for the producer-handler's plant operation. However, for purposes of this paragraph, any such milk production resources and facilities which do not constitute an actual or potential source of milk supply for the producer-handler's operation shall not be considered a part of the producer-handler's milk production resources and facilities.

(2) Milk handling, processing, and distribution resources and facilities shall include all resources and facilities (including store outlets) used for handling, processing, and distributing fluid milk products which are solely owned by, and directly operated or controlled by the producer-handler or in which the producer-handler in any way has an interest, including any contractual arrangement, or over which the producer-handler directly or indirectly exercises any degree of management control.

(3) All designations shall remain in effect until canceled, pursuant to paragraph (c) of this section.

(c) *Cancellation.* The designation as a producer-handler shall be canceled upon determination by the market administrator that any of the requirements of paragraph (a)(1) through (5) of this section are not continuing to be met, or under any of the conditions described in paragraphs (c)(1), (2) or (3) of this section. Cancellation of a producer-handler's status pursuant to this paragraph shall be effective on the first day of the month following the month in which the requirements were not met or the conditions for cancellation occurred.

(1) Milk from the milk production resources and facilities of the producer-handler, designated in paragraph (b)(1) of this section, is delivered in the name of another person as producer milk to another handler.

(2) The producer-handler handles fluid milk products derived from sources other than the milk production facilities and resources designated in paragraph (b)(1) of this section, except that it may receive at its plant, or acquire for route disposition, fluid milk products from fully regulated plants and handlers under any Federal order if such receipts do not exceed 150,000 pounds monthly. This limitation shall not apply if the producer-handler's own-farm production is less than 150,000 pounds during the month.

(3) Milk from the milk production resources and facilities of the producer-handler is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing plan operating under the authority of a State government.

(d) *Public announcement.* The market administrator shall publicly announce:

(1) The name, plant location(s), and farm location(s) of persons designated as producer-handlers;

(2) The names of those persons whose designations have been cancelled; and

(3) The effective dates of producer-handler status or loss of producer-handler status for each. Such announcements shall be controlling with respect to the accounting at plants of other handlers for fluid milk products received from any producer-handler.

(e) *Burden of establishing and maintaining producer-handler status.* The burden rests upon the handler who is designated as a producer-handler to establish through records required pursuant to § 1000.27 that the requirements set forth in paragraph (a) of this section have been and are continuing to be met, and that the conditions set forth in paragraph (c) of this section for cancellation of the designation do not exist.

PART 1131—MILK IN THE ARIZONA-LAS VEGAS MARKETING AREA

3. Amend the *Producer-handler* definition of the Arizona-Las Vegas milk marketing order by revising § 1131.10 to read as follows:

§ 1131.10 Producer-handler.

Producer-handler means a person who operates a dairy farm and a distributing plant from which there is route distribution within the marketing area during the month not to exceed 3 million pounds and who the market administrator has designated a producer-handler after determining that all of the requirements of this section have been met.

(a) *Requirements for designation.* Designation of any person as a producer-handler by the market administrator shall be contingent upon meeting the conditions set forth in paragraphs (a)(1) through (5) of this section. Following the cancellation of a previous producer-handler designation, a person seeking to have their producer-handler designation reinstated must demonstrate that these conditions have been met for the preceding month.

(1) The care and management of the dairy animals and the other resources and facilities designated in paragraph (b)(1) of this section necessary to produce all Class I milk handled (excluding receipts from handlers fully regulated under any Federal order) are under the complete and exclusive control, ownership and management of the producer-handler and are operated as the producer-handler's own enterprise and its own risk.

(2) The plant operation designated in paragraph (b)(2) of this section at which the producer-handler processes and packages, and from which it distributes, its own milk production is under the complete and exclusive control, ownership and management of the producer-handler and is operated as the producer-handler's own enterprise and at its sole risk.

(3) The producer-handler neither receives at its designated milk production resources and facilities nor receives, handles, processes, or distributes at or through any of its designated milk handling, processing, or distributing resources and facilities other source milk products for reconstitution into fluid milk products or fluid milk products derived from any source other than:

(i) Its designated milk production resources and facilities (own farm production);

(ii) Pool handlers and plants regulated under any Federal order within the limitation specified in paragraph (c)(2) of this section; or

(iii) Nonfat milk solids which are used to fortify fluid milk products.

(4) The producer-handler is neither directly nor indirectly associated with the business control or management of, nor has a financial interest in, another handler's operation; nor is any other handler so associated with the producer-handler's operation.

(5) No milk produced by the herd(s) or on the farm(s) that supply milk to the producer-handler's plant operation is:

(i) Subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program under the authority of a State government maintaining marketwide pooling of returns, or

(ii) Marketed in any part as Class I milk to the non-pool distributing plant of any other handler.

(6) The producer-handler does not distribute fluid milk products to a wholesale customer who is served by a plant described in § 1131.7(a), (b), or (e), or a handler described in § 1000.8(c) that supplied the same product in the same-sized package with a similar label to a wholesale customer during the month.

(b) *Designation of resources and facilities.* Designation of a person as a producer-handler shall include the determination of what shall constitute milk production, handling, processing, and distribution resources and facilities, all of which shall be considered an integrated operation, under the sole and exclusive ownership of the producer-handler.

(1) Milk production resources and facilities shall include all resources and facilities (milking herd(s), buildings housing such herd(s), and the land on which such buildings are located) used for the production of milk which are solely owned, operated, and which the producer-handler has designated as a source of milk supply for the producer-handler's plant operation. However, for purposes of this paragraph, any such milk production resources and facilities which do not constitute an actual or potential source of milk supply for the producer-handler's operation shall not be considered a part of the producer-handler's milk production resources and facilities.

(2) Milk handling, processing, and distribution resources and facilities shall include all resources and facilities (including store outlets) used for handling, processing, and distributing fluid milk products which are solely owned by, and directly operated or controlled by the producer-handler or in which the producer-handler in any way has an interest, including any contractual arrangement, or over which the producer-handler directly or indirectly exercises any degree of management control.

(3) All designations shall remain in effect until canceled pursuant to paragraph (c) of this section.

(c) *Cancellation.* The designation as a producer-handler shall be canceled upon determination by the market administrator that any of the requirements of paragraph (a)(1) through (5) of this section are not continuing to be met, or under any of the conditions described in paragraphs (c)(1), (2) or (3) of this section. Cancellation of a producer-handler's status pursuant to this paragraph shall be effective on the first day of the month following the month in which the requirements were not met or the conditions for cancellation occurred.

(1) Milk from the milk production resources and facilities of the producer-handler, designated in paragraph (b)(1) of this section, is delivered in the name of another person as producer milk to another handler.

(2) The producer-handler handles fluid milk products derived from sources other than the milk production facilities and resources designated in paragraph (b)(1) of this section, except that it may receive at its plant, or acquire for route disposition, fluid milk products from fully regulated plants and handlers under any Federal order if such receipts do not exceed 150,000 pounds monthly. This limitation shall not apply if the producer-handler's own-farm production is less than 150,000 pounds during the month.

(3) Milk from the milk production resources and facilities of the producer-handler is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing plan operating under the authority of a State government.

(d) *Public announcement.* The market administrator shall publicly announce:

(1) The name, plant location(s), and farm location(s) of persons designated as producer-handlers;

(2) The names of those persons whose designations have been cancelled; and

(3) The effective dates of producer-handler status or loss of producer-handler status for each. Such announcements shall be controlling with respect to the accounting at plants of other handlers for fluid milk products received from any producer-handler.

(e) *Burden of establishing and maintaining producer-handler status.* The burden rests upon the handler who is designated as a producer-handler to establish through records required pursuant to § 1000.27 that the requirements set forth in paragraph (a) of this section have been and are continuing to be met, and that the conditions set forth in paragraph (c) of this section for cancellation of the designation do not exist.

[FR Doc. 05–24024 Filed 12–9–05; 2:16 pm]

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H.R. 584/P.L. 109–125

Department of the Interior Volunteer Recruitment Act of 2005 (Dec. 7, 2005; 119 Stat. 2544)

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To direct the Secretary of Interior to convey certain land held in trust for the Paiute Indian Tribe of Utah to the City of Richfield, Utah, and for other purposes. (Dec. 7, 2005; 119 Stat. 2546)

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To revoke a Public Land Order with respect to certain lands erroneously included in the Cibola National Wildlife Refuge, California. (Dec. 7, 2005; 119 Stat. 2548)

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