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

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 04–106–3]

Oriental Fruit Fly; Removal of Quarantined Area

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: We are adopting as a final rule, without change, an interim rule that amended the Oriental fruit fly regulations by removing a portion of Los Angeles County, CA, from the list of quarantined areas and removing restrictions on the interstate movement of regulated articles from that area. The interim rule was necessary to relieve restrictions that were no longer needed to prevent the spread of the Oriental fruit fly into noninfested areas of the United States.

DATES: *Effective Date:* The interim rule became effective on March 1, 2005.

FOR FURTHER INFORMATION CONTACT: Mr. Wayne D. Burnett, National Fruit Fly Program Manager, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737–1236; (301) 734–4387.

SUPPLEMENTARY INFORMATION:

Background

In an interim rule effective on November 9, 2004, and published in the **Federal Register** on November 16, 2004 (69 FR 67041–67042, Docket No. 04–106–1), we amended the Oriental fruit fly regulations contained in 7 CFR 301.93 through 301.93–10 (referred to below as the regulations) by adding a portion of Los Angeles County, CA, to the list of quarantined areas in § 301.93–3(c) and restricting the interstate movement of regulated articles from that area. The November 2004 interim rule was necessary to prevent the spread of Oriental fruit fly into noninfested areas of the United States.

Comments on the interim rule were required to be received on or before January 18, 2005. We received one comment by that date, from a private citizen. The commenter questioned why an infestation of Oriental fruit fly had been allowed to occur, but did not offer any comments on the action taken in the interim rule; therefore, we are making no changes in response to this comment.

In a second interim rule effective March 1, 2005, and published in the **Federal Register** on March 7, 2005 (70 FR 10861–10862, Docket No. 04–106–2), we amended the Oriental fruit fly regulations by removing the portion of Los Angeles County, CA, from the list of quarantined areas and removing restrictions on the interstate movement of regulated articles from that area. We took this action based on trapping surveys conducted by inspectors of California State and County agencies that showed that the Oriental fruit fly had been eradicated from the quarantined portion of Los Angeles County, CA.

Comments on the interim rule were required to be received on or before May 6, 2005. We did not receive any comments. Therefore, for the reasons given in the interim rule, we are adopting the interim rule as a final rule.

This action also affirms the information contained in the interim rules concerning Executive Order 12866 and the Regulatory Flexibility Act, Executive Orders 12372 and 12988, and the Paperwork Reduction Act.

Further, for this action, the Office of Management and Budget has waived its review under Executive Order 12866.

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

■ Accordingly, we are amending 7 CFR part 301 as follows:

PART 301—DOMESTIC QUARANTINE NOTICES

■ Accordingly, we are adopting as a final rule, without change, the interim rule that amended 7 CFR part 301 and that was published at 70 FR 10861–10862 on March 7, 2005.

Done in Washington, DC, this 10th day of February 2006.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 06–1446 Filed 2–15–06; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 157

[Docket No. RM81–19–000]

Natural Gas Pipelines; Project Cost and Annual Limits

February 9, 2006.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: Pursuant to the authority delegated by 18 CFR 375.308(x)(1), the Director of the Office of Energy Projects (OEP) computes and publishes the project cost and annual limits for natural gas pipelines blanket construction certificates for each calendar year.

DATES: *Effective Date:* January 1, 2006.

FOR FURTHER INFORMATION CONTACT: Michael J. McGehee, Chief, Certificates Branch 1, Division of Pipeline Certificates, (202) 502–8962.

Publication of Project Cost Limits Under Blanket Certificates

Order of the Director, OEP

Section 157.208(d) of the Commission's Regulations provides for project cost limits applicable to construction, acquisition, operation and miscellaneous rearrangement of facilities (Table I) authorized under the blanket certificate procedure (Order No. 234, 19 FERC ¶ 61,216). Section 157.215(a) specifies the calendar year dollar limit which may be expended on underground storage testing and development (Table II) authorized under the blanket certificate. Section 157.208(d) requires that the ''limits specified in Tables I and II shall be adjusted each calendar year to reflect the 'GDP implicit price deflator'

published by the Department of Commerce for the previous calendar year.''

Pursuant to § 375.308(x)(1) of the Commission's Regulations, the authority for the publication of such cost limits, as adjusted for inflation, is delegated to the Director of the Office of Energy Projects. The cost limits for calendar year 2006, as published in Table I of § 157.208(d) and Table II of § 157.215(a), are hereby issued.

List of Subjects in 18 CFR Part 157

Administrative practice and procedure, Natural Gas, Reporting and recordkeeping requirements.

J. Mark Robinson,

Director, Office of Energy Projects.

■ Accordingly, 18 CFR part 157 is amended as follows:

PART 157—[AMENDED]

■ 1. The authority citation for part 157 continues to read as follows:

Authority: 15 U.S.C. 717–717w, 3301–3432; 42 U.S.C. 7101–7352.

■ 2. Table I in § 157.208(d) is revised to read as follows:

§ 157.208 Construction, acquisition, operation, replacement, and miscellaneous rearrangement of facilities.

* * * * *

(d) * * *

TABLE I

Year	Limit	
	Auto. proj. cost limit (Col. 1)	Prior notice proj. cost limit (Col. 2)
1982	$4,200,000	$12,000,000
1983	4,500,000	12,800,000
1984	4,700,000	13,300,000
1985	4,900,000	13,800,000
1986	5,100,000	14,300,000
1987	5,200,000	14,700,000
1988	5,400,000	15,100,000
1989	5,600,000	15,600,000
1990	5,800,000	16,000,000
1991	6,000,000	16,700,000
1992	6,200,000	17,300,000
1993	6,400,000	17,700,000
1994	6,600,000	18,100,000
1995	6,700,000	18,400,000
1996	6,900,000	18,800,000
1997	7,000,000	19,200,000
1998	7,100,000	19,600,000
1999	7,200,000	19,800,000
2000	7,300,000	20,200,000
2001	7,400,000	20,600,000
2002	7,500,000	21,000,000
2003	7,600,000	21,200,000
2004	7,800,000	21,600,000
2005	8,000,000	22,000,000
2006	8,200,000	22,700,000

* * * * *

■ 3. Table II in § 157.215(a)(5) is revised to read as follows:

§ 157.215 Underground storage testing and development.

(a) * * *

(5) * * *

TABLE II

Year	Limit
1982	$2,700,000
1983	2,900,000
1984	3,000,000
1985	3,100,000
1986	3,200,000
1987	3,300,000
1988	3,400,000
1989	3,500,000
1990	3,600,000
1991	3,800,000
1992	3,900,000
1993	4,000,000
1994	4,100,000
1995	4,200,000
1996	4,300,000
1997	4,400,000
1998	4,500,000
1999	4,550,000
2000	4,650,000
2001	4,750,000
2002	4,850,000
2003	4,900,000
2004	5,000,000
2005	5,100,000
2006	5,250,000

* * * * *

[FR Doc. 06–1435 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[T.D. TTB–42; Re: Notice No. 32]

RIN 1513–AA90

Establishment of the Covelo Viticultural Area (2003R–412P)

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Final rule; Treasury decision.

SUMMARY: This Treasury decision establishes the 38,000-acre ''Covelo'' viticultural area in northern Mendocino County, California, about 150 miles north of San Francisco. We designate viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase.

EFFECTIVE DATE: March 20, 2006.

FOR FURTHER INFORMATION CONTACT: Nancy Sutton, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 925 Lakeville St., No. 158, Petaluma, California 94952; telephone 415–271–1254.

SUPPLEMENTARY INFORMATION:

Background on Viticultural Areas

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (the FAA Act, 27 U.S.C. 201 *et seq.*) requires that alcohol beverage labels provide the consumer with adequate information regarding a product's identity and prohibits the use of misleading information on such labels. The FAA Act also authorizes the Secretary of the Treasury to issue regulations to carry out its provisions. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers these regulations.

Part 4 of the TTB regulations (27 CFR part 4) allows the establishment of definitive viticultural areas and the use of their names as appellations of origin on wine labels and in wine advertisements. Part 9 of the TTB regulations (27 CFR part 9) contains the list of approved viticultural areas.

Definition

Section 4.25(e)(1)(i) of the TTB regulations (27 CFR 4.25(e)(1)(i)) defines a viticultural area for American wine as a delimited grape-growing region distinguishable by geographical features, the boundaries of which have been recognized and defined in part 9 of the regulations. These designations allow vintners and consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in an area to its geographic origin. The establishment of viticultural areas allows vintners to describe more accurately the origin of their wines to consumers and helps consumers to identify wines they may purchase. Establishment of a viticultural area is neither an approval nor an endorsement by TTB of the wine produced in that area.

Requirements

Section 4.25(e)(2) of the TTB regulations outlines the procedure for proposing an American viticultural area and provides that any interested party may petition TTB to establish a grape-growing region as a viticultural area. Section 9.3(b) of the TTB regulations requires the petition to include—

- Evidence that the proposed viticultural area is locally and/or nationally known by the name specified in the petition;
- Historical or current evidence that supports setting the boundary of the

proposed viticultural area as the petition specifies;

- Evidence relating to the geographical features, such as climate, soils, elevation, and physical features, that distinguish the proposed viticultural area from surrounding areas;
- A description of the specific boundary of the proposed viticultural area, based on features found on United States Geological Survey (USGS) maps; and
- A copy of the appropriate USGS map(s) with the proposed viticultural area's boundary prominently marked.

Covelo Petition and Rulemaking

General Background

Mr. Ralph Carter of Sonoma, California, submitted a petition to establish the ''Covelo'' viticultural area in northern Mendocino County, California. The Covelo area is about 150 miles north of San Francisco and 45 miles north of Ukiah. The proposed Covelo viticultural area boundary line encompasses Round Valley, Williams Valley, and the surrounding foothills. The small, rural town of Covelo lies within Round Valley, and a portion of the Round Valley Indian Reservation overlaps with the northern end of the proposed Covelo viticultural area.

This 38,000-acre proposed viticultural area has 2 acres of planted grape vines, with the potential for more vineyard development in the valley and on the surrounding hillsides. The petition did not document a history of grape growing in the Covelo area.

The bowl-shaped basin of Round Valley, which lies within the proposed Covelo viticultural area, is distinctly different from the long, narrow valleys more commonly found in Mendocino County. In addition, the soils in the Covelo area are, for the most part, very deep, nearly level loam, which differ significantly from the soils in the surrounding areas. The proposed Covelo viticultural area has a shorter growing season when compared with other Mendocino County viticultural areas and comparatively high annual rain levels with some snow.

Below, we summarize the evidence presented in the petition and the comments received in response to the notice for public comment.

Name Evidence

Covelo is the name of a small, rural town within Round Valley in Mendocino County, California. The town appears on the USGS quadrangle maps of Covelo East and Covelo West, and on the 2002 Rand McNally California map. The California State Automobile Association Mendocino and Sonoma Coast map identifies Covelo as a rural township in northwest California. The 1988 DeLorme Northern California map displays the town of Covelo and ''Covelo Road'' (State Highway 162), which runs through the proposed viticultural area.

The National Oceanic and Atmospheric Administration California Climatological Data report of October 1999 includes temperature data for the Covelo weather station. The Covelo East USGS quadrangle map shows that the Covelo Ranger Station is situated about a mile north of the town.

Boundary Evidence

Distinctive elements of the proposed Covelo viticultural area include its geography, climate, and growing season. The Covelo area's geography, as noted on USGS maps, is largely a round, flat valley isolated from surrounding regions by a ring of foothills and mountains. The boundary line includes the foothills immediately adjacent to the valley floor because of the hillsides' viticultural potential, but excludes the higher and steeper mountainous terrain, which is less suitable for commercial viticulture.

The proposed Covelo area's microclimate is distinct from surrounding areas due to its geographic self-containment and inland location. The area's climate has significant day and night temperature differences, and a short grape-growing season. This isolated valley microclimate differs from the marine-influenced climates found in most of the surrounding regions of Mendocino County.

The boundary line of the proposed Covelo viticultural area connects a series of peaks and benchmarks in the hills surrounding the Round and Williams Valleys. These elevation points vary from a low of 1,762 feet on the southern boundary to a high of 2,792 feet on its northern boundary.

Distinguishing Features

Geography

The proposed Covelo viticultural area boundary surrounds Round Valley, a bowl-shaped basin that includes the town of Covelo. This broad, round, and flat-floored valley differs from the long, narrow valleys commonly found in mountainous areas of Mendocino County. The proposed boundary area also includes the smaller Williams Valley, located to Round Valley's northeast, and the hillsides that surround the two valleys. The USGS maps note that Round Valley's floor varies from 1,310 feet in elevation in the southeast to 1,480 feet in elevation in the northwest, while the surrounding hillsides within the proposed boundaries are less than 2,800 feet high.

The elevations of the proposed area vary between 1,310 feet and approximately 2,800 feet, contrasting with the 4,000-foot to 7,000-foot mountain elevations around the Covelo area. These higher mountains geographically and climatically isolate the proposed Covelo viticultural area from surrounding regions.

Climate

The mountains surrounding Round Valley, together with the Coast Range to the valley's west, block the inland flow of climate-moderating Pacific marine air into the proposed Covelo viticultural area. Given this geographic isolation, the proposed Covelo viticultural area has a continental climate, which has greater temperature swings and a shorter growing season than the marine-influenced climate commonly found in the surrounding regions of Mendocino County.

The short growing season may be the most distinguishing characteristic of the proposed Covelo viticultural area. The frost-free growing season is commonly 125 days, or about 4 months long. Covelo's average growing season minimum temperature is also significantly lower than that of the Potter Valley viticultural area (27 CFR 9.82), which is about 33 miles south of Covelo.

The proposed Covelo viticultural area, with its annual 3,000 degree-days, marginally falls into Region 3, of Winkler's climate classification system. (Each degree of a day's mean temperature that is above 50 degrees F, which is the minimum temperature required for grapevine growth, is counted as one degree-day; see ''General Viticulture,'' Albert J. Winkler, University of California Press, 1975). The table below shows a comparison of degree-days for grape-growing regions near the proposed Covelo viticultural area.

Mendocino grape-growing regions	Summation of growing season degree-day units
Covelo	3,000
Hopland	3,313
Potter Valley viticultural area (27 CFR 9.82)	3,341
Redwood Valley viticultural area (27 CFR 9.153)	2,914
Ukiah	3,460
Willits	2,224

The proposed Covelo viticultural area summer temperatures have greater day-

to-night variations (between 40 and 66 degrees in the valley) than the areas surrounding it. Also, in October (the final month of the summer growing season) the valley has 90 fewer degree-day units of heat than other Region 3 viticultural areas in the Mendocino region.

The Covelo area receives an average of 40 inches of rain a year, which is the highest average of any valley in northern Mendocino County. Annual rainfall varies widely in the Covelo area. In 1998, the area received 65 inches of rain, while in 2000 it received 36 inches, according to the National Oceanic and Atmospheric Administration's Climatological Data Annual Summary reports of California for 1997 through 2001. In addition, the Covelo valley basin receives about 7 inches of snow annually, with higher amounts falling on the surrounding hillsides.

Geology and Soils

The proposed Covelo viticultural area is composed of alluvial plains, alluvial fans, and a valley basin, which are geologically younger than the surrounding higher elevations. While the alluvial deposits on the valley floor share the mineralogy of the Franciscan rocks of the surrounding hills, the soils differ distinctly from the foothill soils surrounding the valley.

Feliz-Russian-Cole soils cover about 50 percent of the proposed Covelo viticultural area. These soils, which are found in the Round Valley basin, have neutral-to-alkaline soil pH chemistry, in contrast with the acidity found in the hillside soils.

The Sanhedren-Speaker-Kekawaka association, which is a deep to very deep, well-drained loam and gravelly loam, predominates in the northern, eastern, and western foothills surrounding Round Valley. In the southern foothills, the Dingman-Beaughton-Henneke association (a well-drained, gravelly loam and cobbly clay loam) and the Hopland-Yorktree-Witherell association (a well-drained loam and sandy loam) predominate.

The soils of the Franciscan Formation, a blue schist and semi-schist of Franciscan Complex, cover the mountainous terrain above proposed Covelo viticultural area boundary line.

Notice of Proposed Rulemaking and Comments Received

TTB published a notice of proposed rulemaking regarding the establishment of the Covelo viticultural area in the **Federal Register** as Notice No. 32 on February 2, 2005 (70 FR 5393). In that notice, TTB requested comments by April 4, 2005, from all interested persons. TTB received six comments in response to the notice with three supporting and three opposing the Covelo petition.

The three supporting comments focused on Covelo's unique climate, grape-growing conditions, and the lack of summer fog. A commenting winery owner agrees that Covelo should be recognized as a unique grape-growing region and that consumers should have a choice between Mendocino County and Covelo wines. The opposing issues are discussed below.

One opposing commenter suggested a public hearing, stating concerns about the impact on farms and the introduction or encouragement of significant viticulture activity in the proposed area. A second commenter questioned the ability of the Covelo area to support commercial viticulture due to the area's early and late frost-prone climate, poor hillside soils, Round Valley's high water table, and its isolation from markets.

A third commenter opposed the establishment of the Covelo viticultural area due to his concern over the possible negative effects of viticulture on the Round Valley Indian Tribes. Noting Round Valley's name, this commenter also expressed opposition to the ''Covelo'' name, and, while acknowledging that grapes can grow in the area, expressed doubt that commercial viticulture in the area would be economically feasible. In addition, this commenter also requested a 90-day extension of the comment period, but did not explain why this extension was required.

Holding a hearing during the rulemaking rarely takes place unless specifically required by a statute. Hearings to establish a viticultural area are not required under the FAA Act. TTB has consistently used the informal rulemaking process, such as it is doing in this matter, when considering establishing a viticultural area. In addition, both supportive and contrary comments have been substantive and thoughtful, and holding a public hearing would provide little, if any, additional value in the petitioning process. Also, based on a lack of compelling justification, TTB did not grant the request for an extension of the comment period for Notice No. 32.

In response to the opposition comments, the petitioner provided additional information and comments in a rebuttal. In response to comments questioning the legitimacy of the proposed viticultural area's name, the petitioner notes that he did consider the ''Round Valley'' name, among others, but found that the name is used for many other places in the United States. Thus, the petitioner notes, ''Round Valley'' would not be an appropriate geographical name for this viticultural area. TTB agrees and notes that a search of the United States Geological Survey's Geographic Names Information System shows ''Round Valley'' is the name of 95 geographical places in 9 states, including places in 13 different California counties. On the other hand, according to the geographic names system, the name ''Covelo'' is associated only with the town of Covelo and the nearby ranger station. In light of the evidence presented, we believe the Covelo name is appropriate for the proposed viticultural area.

In response to commenters who question the ability of the proposed Covelo area to support commercial viticulture due to its climate, poor soil, high water table, and isolation, the petitioner notes that one commercial winery is currently using Covelo grapes in its production, and that several Covelo area vineyards produce wine and table grapes for non-commercial use. In addition, while the petitioner acknowledges that the proposed area has a short growing season climate, he quotes an Oregon wine industry member who notes, ''The pinnacle of wine quality always comes from grapes grown in marginal climates.'' The petitioner also notes that other Mendocino County viticultural areas, such as Anderson Valley (27 CFR 9.86), Potter Valley (27 CFR 9.82), and Redwood Valley (27 CFR 9.153), have short growing seasons similar to Covelo, and that select varietals, including pinot noir and chardonnay, do well in shorter growing seasons.

The petitioner notes some growers prefer the thinner soils and increased drainage of hillside locations, which naturally devigor the vine and improve the quality while decreasing labor intensity. As for the high water table found on the valley floor, the petitioner states that the water table is lower during the growing season, and states that successful vineyards result from the selection of proper varietals and rootstock, as well as proper irrigation management.

As for the proposed area's isolation from the market, the petitioner states that the distance from the proposed Covelo viticultural area to some of the grape-buying wineries of Mendocino County is not excessive. The Covelo area, the petitioner states, is within an hour's driving time of the wineries in Potter Valley, Redwood Valley, and Ukiah, and that the Vin De Tevis winery is only 12 miles from Covelo.

TTB agrees that while the proposed Covelo viticultural area has a number of potentially stressful growing conditions, many winemakers prefer grapes grown in more stressful conditions. The success of commercial viticulture with the proposed area will be determined by climatic and market conditions and by the efforts of vineyard proprietors, not by the designation or non-designation of Covelo as an American viticultural area.

In response to the concern over the impact of viticulture on Round Valley's Native American residents, the petitioner states that vineyard operations will offer employment opportunities to the area's residents, including Native Americans, who often must leave the region to find work. Although this information is noteworthy, it has no bearing on whether a viticultural area should be established. In addition, TTB notes that the viticultural area's designation does not impose any requirements on the Round Valley tribes, and the tribes are under no obligation to lease or sell any land for vineyard development. Retail alcohol sales within the Round Valley reservation and within the Covelo region remain under the control of their respective local officials and voters.

Boundary Description

See the narrative boundary description of the viticultural area in the regulatory text published at the end of this notice.

Maps

The petitioner provided the required maps, and we list them below in the regulatory text.

TTB Finding

After careful review of the petition, TTB finds that the evidence submitted supports the establishment of the proposed viticultural area. Therefore, under the authority of the Federal Alcohol Administration Act and part 4 of our regulations, we establish the ''Covelo'' viticultural area in Mendocino County, California, effective 30 days from this document's publication date.

Impact on Current Wine Labels

Part 4 of the TTB regulations prohibits any label reference on a wine that indicates or implies an origin other than the wine's true place of origin. With the establishment of this viticultural area and its inclusion in part 9 of the TTB regulations, its name, ''Covelo,'' is recognized as a name of viticultural significance. Consequently, wine bottlers using ''Covelo'' in a brand name, including a trademark, or in another label reference as to the origin of the wine, must ensure that the product is eligible to use the viticultural area's name as an appellation of origin.

For a wine to be eligible to use as an appellation of origin the name of a viticultural area specified in part 9 of the TTB regulations, at least 85 percent of the grapes used to make the wine must have been grown within the area represented by that name, and the wine must meet the other conditions listed in 27 CFR 4.25(e)(3). If the wine is not eligible to use the viticultural area name as an appellation of origin and that name appears in the brand name, then the label is not in compliance and the bottler must change the brand name and obtain approval of a new label. Similarly, if the viticultural area name appears in another reference on the label in a misleading manner, the bottler would have to obtain approval of a new label.

Different rules apply if a wine has a brand name containing a viticultural area name that was used as a brand name on a label approved before July 7, 1986. See 27 CFR 4.39(i)(2) for details.

Regulatory Flexibility Act

We certify that this regulation will not have a significant economic impact on a substantial number of small entities. This regulation imposes no new reporting, recordkeeping, or other administrative requirement. Any benefit derived from the use of a viticultural area name is the result of a proprietor's efforts and consumer acceptance of wines from that area. Therefore, no regulatory flexibility analysis is required.

Executive Order 12866

This rule is not a significant regulatory action as defined by Executive Order 12866 (58 FR 51735). Therefore, it requires no regulatory assessment.

Drafting Information

Nancy Sutton of the Regulations and Rulings Division drafted this document.

List of Subjects in 27 CFR Part 9

Wine.

The Regulatory Amendment

■ For the reasons discussed in the preamble, we amend 27 CFR, chapter 1, part 9 as follows:

PART 9—AMERICAN VITICULTURAL AREAS

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

■ 2. Amend subpart C by adding § 9.187 to read as follows:

§ 9.187 Covelo.

(a) *Name.* The name of the viticultural area described in this section is ''Covelo''. For purposes of part 4 of this chapter, ''Covelo'' is a term of viticultural significance.

(b) *Approved Maps.* The appropriate maps for determining the boundaries of the Covelo viticultural area are four United States Geological Survey 1:24,000 scale topographic maps. They are titled:

(1) Dos Rios, California Quadrangle,—Mendocino Co., 7.5 Minute Series, edition of 1967, revised 1994;

(2) Covelo West, California Quadrangle,—Mendocino Co., 7.5 Minute Series, edition of 1967, photoinspected 1973;

(3) Covelo East, California Quadrangle,—Mendocino Co., 7.5 Minute Series, edition of 1967, revised 1994; and

(4) Jamison Ridge, California Quadrangle,—Mendocino Co., 7.5 Minute Series, edition of 1967, revised 1994.

(c) *Boundary.* The Covelo viticultural area surrounds the town of Covelo in northern Mendocino County, California. The area's boundaries are defined as follows—

(1) Beginning on the Dos Rios map at the intersection of State Highway 162 and the southern boundary of section 25, T22N, R13W (labeled Inspiration Point on the map), proceed west 0.3 miles on Highway 162 to BM 2006 in section 36, T22N, R13W; then

(2) Proceed straight west-northwest 1.5 miles to the 2,537-foot elevation point in the northwest quadrant of section 26, T22N, R13W, Dos Rios map; then

(3) Proceed straight northwest 1.6 miles to the 2,488-foot peak in the northwest quadrant of section 22, T22N, R13W, Covelo West map; then

(4) Proceed straight north-northwest 0.75 miles to the 2,262-foot peak on the section 15 and 16 boundary line, T22N, R13W, and continue straight north 1.6 miles to the 2,247-foot peak on the section 3 and 4 boundary line, T22N, R13W, Covelo West map; then

(5) Proceed straight northerly 1 mile to the 1,974-foot peak on the T22N/T23N boundary line, and continue straight north 1.6 miles to the 2,290-foot peak in the northwest quadrant of section 27, T23N, R13W, Covelo West map; then

(6) Proceed straight northeast 1.2 miles to the 2,397-foot peak in the

northeast quadrant of section 22, and continue straight northeast 1.5 miles to BM 2210 in the northeast quadrant of section 14, T23N, R13W, Covelo West map; then

(7) Proceed straight east-southeast 1.75 miles to the 2,792-foot peak in the southwest quadrant of section 18, T23, R12W, Covelo East map; then

(8) Proceed straight north-northeasterly 0.9 mile to the 2,430-foot elevation point in the southeast quadrant of section 7, T23N, R12W, Covelo East map; then

(9) Proceed straight east-northeast 1.6 miles to the peak of Coyote Rock in section 9, T23N, R12W, Covelo East map; then

(10) Proceed straight east-southeast 1.55 miles to the 2,435-foot elevation point in the northern half of section 15, and continue straight southeast 2.3 miles to the 2,066-foot peak in the southwest quadrant of section 24, T23N, R12W, Covelo East map; then

(11) Proceed straight south-southwest 0.6 mile to the 2,024-foot peak near the section 26 eastern boundary line, T23N, R12W, Covelo East map; then

(12) Proceed straight west-southwest 1.9 miles to the 2,183-foot peak in the northwest quadrant of section 34, T23N, R12W, Covelo East map; then

(13) Proceed straight south-southeast 1.2 miles to the 1,953-foot peak in the northeast quadrant of section 3, T22N, R12W, Covelo East map; then

(14) Proceed straight southerly 0.9 mile to the 2,012-foot peak in the northeast quadrant of section 10, T22N, R12W, Covelo East map; then

(15) Proceed straight south-southeast 1.4 miles along Dingman Ridge to the 2,228-foot peak along the section 14 and 15 boundary line, T22N, R12W, Covelo East map; then

(16) Proceed straight southeast 0.95 mile to the 2,398-foot peak in the northeast quadrant of section 23, T22N, R12W, Covelo East map; then

(17) Proceed straight south-southeast 1.75 miles to the 2,474-foot elevation point along the section 25 and 26 boundary line, T22N, R12W, Jamison Ridge map; then

(18) Proceed straight west-southwest 0.9 mile to BM 2217 in the southwest quadrant of section 26, and continue straight westerly 1.5 miles to the 2,230-foot peak northwest of Iron Spring, in the southeast quadrant of section 28, T22N, R12W, Jamison Ridge map; then

(19) Proceed straight southwest 0.65 mile to the 2,022-foot peak very near an unimproved road in section 33, T22N, R12W, Jamison Ridge map; then

(20) Proceed straight west-northwest 1.5 miles to the 1,762-foot peak in the northeast quadrant of section 31, T22N, R12W, Jamison Ridge map, and continue in the same line of direction 1.1 miles to the beginning point at the intersection of State Highway 162 and the southern boundary of section 25, T22N, R13W (labeled Inspiration Point), on the Dos Rios map.

Signed: December 15, 2005.

John J. Manfreda,

Administrator.

Approved: January 19, 2006.

Timothy E. Skud,

Deputy Assistant Secretary, (Tax, Trade, and Tariff Policy).

[FR Doc. 06–1457 Filed 2–15–06; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[T.D. TTB–43; Re: Notice No. 47]

RIN: 1513–AA77

Establishment of the Rattlesnake Hills Viticultural Area (2004R–678P)

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Final rule; Treasury decision.

SUMMARY: This Treasury decision establishes the Rattlesnake Hills viticultural area in Yakima County in south-central Washington State. The 68,500-acre area is entirely within the established Yakima Valley and Columbia Valley viticultural areas. We designate viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase.

EFFECTIVE DATE: March 20, 2006.

FOR FURTHER INFORMATION CONTACT: N. A. Sutton, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 925 Lakeville St., No. 158, Petaluma, California 94952; telephone 415–271–1254.

SUPPLEMENTARY INFORMATION:

Background on Viticultural Areas

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (the FAA Act, 27 U.S.C. 201 *et seq.*) requires that alcohol beverage labels provide the consumer with adequate information regarding a product's identity and prohibits the use of misleading information on such labels. The FAA Act also authorizes the Secretary of the Treasury to issue regulations to carry out its provisions. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers these regulations.

Part 4 of the TTB regulations (27 CFR part 4) allows the establishment of definitive viticultural areas and the use of their names as appellations of origin on wine labels and in wine advertisements. Part 9 of the TTB regulations (27 CFR part 9) contains the list of approved viticultural areas.

Definition

Section 4.25(e)(1)(i) of the TTB regulations (27 CFR 4.25(e)(1)(i)) defines a viticultural area for American wine as a delimited grape-growing region distinguishable by geographical features, the boundaries of which have been recognized and defined in part 9 of the regulations. These designations allow vintners and consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in an area to its geographical origin. The establishment of viticultural areas allows vintners to describe more accurately the origin of their wines to consumers and helps consumers to identify wines they may purchase. Establishment of a viticultural area is neither an approval nor an endorsement by TTB of the wine produced in that area.

Requirements

Section 4.25(e)(2) of the TTB regulations outlines the procedure for proposing an American viticultural area and provides that any interested party may petition TTB to establish a grape-growing region as a viticultural area. Section 9.3(b) of the TTB regulations requires the petition to include—

- Evidence that the proposed viticultural area is locally and/or nationally known by the name specified in the petition;
- Historical or current evidence that supports setting the boundary of the proposed viticultural area as the petition specifies;
- Evidence relating to the geographical features, such as climate, elevation, physical features, and soils that distinguish the proposed viticultural area from surrounding areas;
- A description of the specific boundary of the proposed viticultural area, based on features found on United States Geological Survey (USGS) maps; and
- A copy of the appropriate USGS map(s) with the proposed viticultural area's boundary prominently marked.

Rattlesnake Hills Petition and Rulemaking

General Background

Mr. Gail Puryear, a vineyard owner, along with 10 other vineyard and winery owners in the Rattlesnake Hills region, submitted a petition to TTB proposing the establishment of the 68,500-acre Rattlesnake Hills viticultural area in eastern Yakima County in south-central Washington State. The proposed viticultural area is within the Yakima Valley viticultural area (27 CFR 9.69), which, in turn, is within the larger Columbia Valley viticultural area (27 CFR 9.74). As of 2005, the proposed Rattlesnake Hills viticultural area has 1,227 acres of vines in commercial production.

The proposed viticultural area encompasses a portion of the Rattlesnake Hills, an east-west chain of hills located north of the Yakima River and south of the Moxee Valley between the Hanford Reservation in the east and Union Gap in the west. The distinguishing features of the proposed viticultural area include its topography, climate, and soils. The evidence submitted in support of the petition is summarized below.

Name Evidence

The Rattlesnake Hills are well documented on government and commercial maps. The current USGS, 1:24,000 scale, topographic maps for Elephant Mountain, Granger NE, Granger NW, Toppenish, Wapato, and Yakima East all identify the Rattlesnake Hills in Yakima County, Washington. The American Automobile Association (AAA) map of Oregon and Washington State of February 2003 places the Rattlesnake Hills in south-central Washington, between the towns of Yakima and Kennewick. The 1996–1997 Washington State Highways map, published by the Washington State Department of Transportation, shows the Rattlesnake Hills to the east and west of State Highway 241 and south of State Highway 24.

The 1910 USGS Zillah map, reprinted in 1935, identifies the Rattlesnake Hills along the T12N/T11N township line in ranges R21E and R22E. While this historical map shows no settlements within the Rattlesnake Hills, it places the towns of Zillah, Granger, and Sunnyside to the south along or near the Yakima River.

The Rattlesnake Hills are also mentioned in various publications. For example, an article published in the August 1997 edition of Sunset magazine, ''Bringing Home the Harvest—Pacific Northwest,'' by Jim McCausland, describes a tour of the Yakima, Washington region, and includes a description of the Roza Canal at the base of the orchard- and vineyard-covered Rattlesnake Hills.

Boundary Evidence

The proposed Rattlesnake Hills viticultural area is an isolated grape-growing region with boundaries defined by the area's distinctive topography, climate, and soils. The Rattlesnake Hills name applies to the entire area within the proposed boundaries, as shown on the USGS maps.

Nancy B. Hultquist, Ph.D., professor of Geography and Land Studies at Central Washington University in Ellensburg, and John F. Hultquist, Ph.D., former Adjunct Assistant Professor of Geography, Central Washington University, prepared the boundary documentation and geographical evidence for the Rattlesnake Hills viticultural area petition. This information is described below.

The proposed Rattlesnake Hills viticultural area, within the larger Yakima Fold Belt, includes a series of asymmetrical anticlines separated by basins. The north boundary line of the proposed Rattlesnake Hills viticultural area approximates the range's east-to-west ridgeline, which separates the range's gentler-sloping south side from its steeper north side. The proposed area's east boundary line follows the 120° west longitude line and power lines from the Bonneville Dam. The south boundary line meanders along the Sunnyside Canal, which flows southeast from the Yakima River. The terrain to the north of the Sunnyside Canal, within the proposed viticultural area, is hilly and characterized by ridge spurs. The west boundary line uses a combination of the Sunnyside Canal and Interstate Highway 82, which, in this region, lie just east of the Yakima River.

Rising higher than the surrounding portions of the Yakima Valley region, elevation is a primary distinguishing feature of the proposed Rattlesnake Hills viticultural area. The proposed boundary line is set at a minimum of 850 feet in elevation, which generally corresponds to the upslope of the foothills. With irrigation, viticulture is considered possible at elevations between 850 feet and 2,000 feet.

Regional elevations below the 850-foot contour line are not conducive to successful viticulture based on damaging spring and fall frosts, heavy winterkill conditions, alkali soils, and high water tables. Vineyards planted in the region at elevations below 850 feet generally have failed after years of struggle. For example, the Thalheimer vineyard project, 2 miles south of Sunnyside Canal and close to the city of Granger, is below 850 feet in elevation and lies outside the proposed boundary. The project lasted 10 years, experiencing consistent vine damage from winterkill conditions. Also, William Pettit planted chardonnay grapes west of Toppenish on the valley floor, seven miles south of the proposed Rattlesnake Hills viticultural area. The vineyard suffered annual winterkill caused by vines reaching down to perennial water. With only three successful vintages in six years, Mr. Pettit removed the vineyard in 1987.

Distinguishing Features

The proposed Rattlesnake Hills viticultural area's distinguishing features include its topography, moderate microclimate, and soil characteristics.

Topography

The Rattlesnake Hills rise to 3,000 in elevation, placing the hills' ridgeline up to 2,000 feet above the north flank of the Yakima River Valley. Running east to west, the Hills' ridgeline creates north- and south-facing slopes. While the northern slope falls steeply away from the ridgeline, the more gently sloping south side of the Rattlesnake Hills has dissected canyons, ridges, and terraces running south to the Yakima River.

The proposed Rattlesnake Hills viticultural area, with elevations between 850 feet and 3,085 feet, lies on the south slope of the Rattlesnake Hills in Yakima County, and includes a multitude of landscapes with differing aspects and hill slope positions. Low glacial terraces comprise the balance of the terrain found within the proposed viticultural area. Vineyards are usually located on the southern ridges and terraces in areas with good air drainage, which lessens the potential for frost damage and winterkill conditions. As compared to the proposed Rattlesnake Hills viticultural area, the rest of the established Yakima Valley viticultural area is lower in elevation, with a flatter, more open and consistent landscape.

Climate

The proposed Rattlesnake Hills viticultural area has a more temperate climate than surrounding regions and is more protected by its topography from damaging winter weather. The Rattlesnake Hills viticultural area petition includes data collected from 11 weather stations in south-central Washington State, operated by Washington State University (WSU) as part of the Public Agricultural Weather

System (PAWS). The Buena station at 900 feet in elevation and the Outlook station at 1,300 feet in elevation are both within the proposed viticultural area boundary. While still in south-central Washington State, the other nine stations are beyond the proposed area's boundary.

The PAWS weather data provides an annual total and a 10-year average of the heat accumulation, as measured in degree days, for each station. (Each degree that a day's mean temperature is above 50 degrees Fahrenheit, which is the minimum temperature required for grapevine growth, is counted as one degree day. See ''General Viticulture,'' by Albert J. Winkler, University of California Press, 1974.) The chart below shows the 10-year average for the annual growing degree day total for each of the PAWS stations.

Weather station	Degree days, 10-year annual average	Location in relation to Rattlesnake Hills area
Parker	3133	1 mile west.
Wapato	2540	7 miles west.
Moxee	2096	2 miles north.
Sunnyside	2498	2.5 miles east.
Port of Sunnyside	2554	6 miles southeast.
WSU Roza	2552	11 miles southeast.
WSU HQ	2588	14 miles southeast.
Benton City	3036	30 miles southeast.
Badger Canyon	3297	40 miles southeast.
Buena	2683	In Rattlesnake Hills.
Outlook	2870	In Rattlesnake Hills.

The degree day temperatures within the proposed Rattlesnake Hills viticultural area vary significantly from the surrounding regions, according to PAWS data. Growing season temperatures are especially warmer in the Red Mountain viticultural area (27 CFR 9.167) to the east of the proposed viticultural area around Badger Canyon and Benton City. Also, the portion of the Yakima River Valley located between the Rattlesnake Hills region and Red Mountain generally has a cooler growing season, as documented by the Port of Sunnyside and WSU Roza weather stations.

Topography also affects the proposed area's climate. To the west, the high altitude Cascade Range shields eastern Washington, including the Rattlesnake Hills region, from much of the Pacific Ocean's climatic influence and rainfall. In addition, while polar air from Canada, funneled by strong winds into eastern Washington, can damage or kill grape vines, the proposed Rattlesnake Hills viticultural area is protected from these freezing winds by the Umptanum and Yakima Ridges, which lie to the northeast, and by the main ridgeline of the Hills themselves. These ridges and hills divert the damaging winds eastward toward the Red Mountain and Walla Walla Valley (27 CFR 9.91) viticultural areas.

Soil

The soils of the proposed Rattlesnake Hills viticultural area differ from soils in other Washington State viticultural areas and regions. In the rooting zone, or the depth of soil penetrated by plant roots, silt-loam or loam is the predominant soil type found within the proposed Rattlesnake Hills viticultural area. These finer soils textures contrast to the sandy soils of the nearby Prosser Flats, Red Mountain, and Horse Heaven Hills regions, as well as with the silty soils found in the surrounding Yakima Valley region.

The formation of the soils in the Rattlesnake Hills area was influenced by glacial fluvial (water transported) and eolian (wind transported) soils. The topsoil layer is generally formed by loess and lesser amounts of volcanic ash. When Mount St. Helens erupted in 1980, the Rattlesnake Hills region received between one half-inch and one inch of volcanic ash. Formation influences on deeper soil layers include volcanic cobbles and tuffaceous sands from the Ellensburg Formation. The Rattlesnake Hills, at or above 1,100 feet in elevation, perch beyond the influence of the Missoula Floods. Soils above the flood line developed on older volcanic sediments of the Ellensburg Formation. These soil parent materials weathered in a climate with dry summers and 6 to 12 inches of annual rainfall.

Common soil characteristics within the proposed Rattlesnake Hills viticultural area include a mesic soil regime. The annual soil temperature is between 8 degrees and 15 degrees Celsius (46.4–59 °F). Mean summer soil temperatures vary between 15 degrees and 22 degrees Celsius (59–71.6 °F). Also, the soil pH is consistent, ranging from neutral at pH 6.6 to mildly alkaline at pH 8.4.

The primary soils suitable for viticulture within the proposed Rattlesnake Hills viticultural area include the Warden Series silt loams and a composite of Harwood-Burke-Wiehl series silt loams. The Warden Series soils, which are very deep and well drained, occupy terraces underlain by glacial fluvial sediments. The Harwood-Burke-Wiehl series, a complex composition of three distinctively different soils, covers the ridge tops and side slopes of the range's steep hills. This three-soil composition forms from loess (wind-blown, silt-sized material) that overlies remnants of the Ellensburg Formation. The composition is common within the proposed Rattlesnake Hills viticultural area but is seldom found elsewhere in the Yakima Valley viticultural area. Also, the soil is shallow, which is in contrast to the uniformly deep, silt-loamy and sandy soils found in the balance of the Yakima Valley viticultural area.

Other soils in the proposed Rattlesnake Hills viticultural area include the Kiona silt loam series in the northwest corner. Also, along the top of the Rattlesnake Ridge, the Lickskillet series of stony silt loam and the Starbuck series provide a suitable viticultural environment when irrigation is available.

The steeper north-facing slopes of the Rattlesnake Hills, immediately beyond the proposed viticultural area's northern boundary line, are covered with Lickskillet, a very stony silt loam. The very stony soils, steep slopes, and lack of irrigation make this terrain unsuitable for viticulture. The topography east of the proposed boundary line is a large basin with Warden Series silt loams and some Esquatzel silty loam on two to five percent slopes.

Along the southern boundary line of the proposed Rattlesnake Hills viticultural area, and south beyond

Sunnyside Canal, is the Yakima River Valley. The Esquatzel Series of silt loams dominate this large, flat-bottomed valley, according to the ''Soil Survey of Yakima County Area, Washington'' (Lenfesty and Reedy, 1985). The valley also has Warden Series soils that are more geologically eroded and at a lower elevation than the Warden Series of the Rattlesnake Hills region to the north.

Past the western border of the proposed Rattlesnake Hills viticultural area the hills drop down to the Yakima River. Immediately west of the river, and beyond the proposed boundaries, lies a valley floor with Weirman Association soils. Continuing westward from the boundary line, the Ashue-Naches Association occupies the bottomland of an older Yakima River floodplain. Also, as the Yakima River Valley rises westward to Ahtanum Ridge, the prevalent Warden Series soil creates a common link to the Rattlesnake Hills area. However, the Warden Series soil in the Rattlesnake Hills terrain includes the exposure of the Ellensburg Formation, unlike the Ahtanum Ridge soil.

Notice of Proposed Rulemaking and Comments Received

On June 1, 2005, TTB published a notice of proposed rulemaking regarding the establishment of the Rattlesnake Hills viticultural area in the **Federal Register** (70 FR 31396) as Notice No. 47. In that notice, TTB requested comments by August 1, 2005, from all interested persons. TTB received 28 comments in response, including 14 in support, 11 in opposition, and 3 from the petitioner responding to the concerns of the opposing comments.

Comments

Name: Public comments confirm the appropriateness of the ''Rattlesnake Hills'' name for the proposed viticultural area, with 9 vineyard and winery owners with 15 to 24 years of viticulture experience in the region agreeing with the chosen name. Also, a winery owner holding the Federal trademark for ''Rattlesnake Ridge'' wholly supports the proposed Rattlesnake Hills name and establishment of the viticultural area.

Boundary: Some comments support the proposed viticultural area's boundaries as appropriate, meaningful, and discernible. The Hultquists, who supplied geographic information in the original petition, comment that while USGS topographic maps do not show the boundaries of the region's climates, cold damage, or soil types, they do show nearby roads, power lines, elevation points, and other labeled landmarks that can be used in defining the boundary lines of a proposed viticultural area.

The two geographers also note that while the ''Rattlesnake Hills'' name also refers to the hills beyond the proposed viticulture area to the east, that region is devoid of vineyards or wineries. The Hultquists state that the proposed boundary lines were drawn to surround only the region's vineyards and wineries, which start about 10 miles south of the range's north-facing slope at Sagebrush Ridge, a feature shown on the USGS Grandview and Sagebrush Ridge topographical quadrangle maps.

Several vineyard and winery owners with up to 28 years of viticulture experience in the region oppose the proposed Rattlesnake Hills viticultural area boundaries as arbitrary. These commenters state that because the Rattlesnake Hills range stretches beyond the proposed viticultural area boundary, the boundary lines should be extended to include more of the range. One commenter points to the proposed eastern boundary line (along the 120° west longitude line) as particularly random, and describes the distinguishing features of the Rattlesnake Hills range as continuing east for 27 miles to the Red Mountain viticultural area. TTB notes, however, that the commenters do not provide documentation to support their claims of arbitrary boundary lines, and fail to include proposed expanded boundaries and substantive justification.

In response, the petitioner explains that the proposed boundary lines were developed by studying the viticultural feasibility of the Rattlesnake Hills region, including its topography, climate, and soils. The petitioner concludes that the entire Rattlesnake Hills landform would make a poor viticultural area, with three-fourths of its geographical area unsuitable for viticulture. The petitioner states that the northwestern region of the Rattlesnake Hills range suffers from a lack of water, a north-facing mountain slope, and a colder climate. The range's northeastern region is on the Hanford Reservation, a sealed nuclear site that is not conducive to any type of agricultural use.

Topography: Supporting commenters confirm that the geographical isolation and higher elevations of the proposed viticultural area set the region apart, even from the topography of other portions of the Rattlesnake Hills range. An opposing commenter notes that the topography of the proposed Rattlesnake Hills viticultural area is not as consistent as described in the petition. However, this commenter does not include documentation to support this claim.

TTB notes that the topography of the proposed Rattlesnake Hills viticultural area, as explained in Notice No. 47 and summarized above, describes numerous geographical variations. The topographical description of the proposed viticultural area includes references to the proposed area's ridges, canyons and terraces, and the petition states that the area has a ''multitude of landscapes with differing aspect and hill slope positions.''

Climate: Offering anecdotal evidence, some supporting commenters emphasize the distinctive milder climate within the proposed Rattlesnake Hills viticultural area, which has more annual degree days of heat accumulation and a more frost-free environment when compared to other portions of the Yakima Valley viticultural area.

Several opposing commenters, however, state that the proposed viticultural area is not distinctive, including the amount of heat accumulated during the growing season as measured in degree days. One commenter notes that the petition's climatic information lacks specific vineyard data and relies solely on PAWS data, while other commenters note that the winter cold damage comparison is based on elevation rather than the proposed boundary lines.

In response, the petitioner states that the PAWS data collected at various stations in the region over a 10-year period is reliable evidence of the climatic differences between the proposed viticultural area and the surrounding regions. Citing PAWS information, the petitioner states that east of the Bonneville power lines cold air flows downward into a large basin at the bottom of Washout Canyon, and notes that the Sunnyside weather station, located within the basin, records the coldest temperatures of the 11 stations in the region.

The petitioner also explains that frost occurs two to three weeks earlier in the large basin area than within the proposed Rattlesnake Hills viticultural area. The colder climate steers agriculture in the basin toward dairy, corn, alfalfa, and grapes for juice rather than wine. For example, the southeast portion of the basin, near Benton City, is used for dry-land agriculture and is characterized by wheat fields and rangelands. The petitioner notes that this region dips toward the Yakima River and is exposed to more frost damage, winterkill, and a higher water table, which makes the region below

850 feet in elevation incompatible with grape growing.

Originally the petitioner considered extending the proposed viticultural area to include the Black Canyon region, located about six miles east of the proposed boundary line toward Red Mountain. However, the petitioner cites a May 2003 freeze at the 1,300-foot elevation of Vineyard del Sol that froze vines to the ground. On the same night, the petitioner states there was no known frost damage within the proposed viticultural area boundary, even in vineyards at 900-foot elevations with no frost protection. Therefore, the petitioner contends that although Black Canyon is part of the Rattlesnake Hills geographical landform, the area's climate is significantly different.

The petitioner claims that the cold air drainage effect is less harsh within the proposed Rattlesnake Hills viticultural area east of the proposed boundary line at the 120° longitude line. Stating that more cold air will drain down higher mountains than lower ones, the petitioner notes that inside the proposed eastern boundary the Rattlesnake Hills average 2,000 feet in elevation while elevations to the east average 3,000 feet. The petitioner also states that the cold air effect causes cold air to accumulate in a narrow valley and disperse in a wide valley, and, therefore, the narrowing of the central Yakima Valley east of the 120th meridian influences the movement of cold air in the region.

Soil: Supporting commenters state that the proposed viticultural area is distinguished by superior soils with good drainage compared to surrounding regions. Other commenters claim, however, that the soils of the proposed Rattlesnake Hills viticultural area are common in the surrounding Yakima Valley viticultural area.

The petitioner relies on the expertise of soil scientist Alan Busacca, PhD, to provide geological and soil information for the proposed viticultural area and the areas outside its proposed boundaries. After careful review, TTB believes that the soil facts and data narrative prepared by Dr. Busacca and presented in the petition constitute adequate evidence and documentation to support the conclusions reached in the petition.

Economic Impact: Some commenters favor establishing a distinct viticultural area to separate the proposed Rattlesnake Hills viticultural area from the larger, surrounding Yakima Valley area, as well as from the much larger Columbia Valley viticultural areas. A commenter states that Washington State vintners will be able to market wine products with more accuracy, efficiency, and profitability with establishment of new viticultural areas. In addition, a member of the Yakima County Planning Department believes that establishment of the Rattlesnake Hills viticultural area will assist Yakima County in planning for its economic development.

Several opposing commenters voice concerns about the detrimental effect of establishing the Rattlesnake Hills viticultural area within the larger Yakima Valley viticultural area. One commenter states that the establishment of the Rattlesnake Hills viticultural area will confuse consumers and undermine the success of the Yakima Valley viticultural area, and a second commenter stated that there are no significant differences between the two viticultural areas. TTB notes that neither commenter included evidence or documentation to support these claims.

In response, the petitioner states that the proposed Rattlesnake Hills viticultural area grape-growing industry is characterized by small ''artisan estate wineries,'' while the Yakima Valley viticultural area has some larger commercial vineyard estates.

Overall, TTB notes that, with the proposed Rattlesnake Hills viticultural area entirely inside the larger Yakima Valley viticultural area, the two areas do share some general characteristics. However, the proposed Rattlesnake Hills viticultural area also has separate and significant distinguishing features, as noted above in the summary of the petition evidence. Furthermore, the possible impact of one viticultural area on another one is not, standing alone, a sufficient basis on which to deny a petition for a new viticultural area.

TTB also notes that the issue of consumer confusion normally stems from similarities in the names of viticultural areas or from the similarity of a proposed viticultural area name to a brand name on a wine label. The names ''Yakima Valley'' and ''Rattlesnake Hills'' have no apparent similarity that would confuse wine consumers.

TTB Finding

After careful review of the petition and the comments received, TTB finds that the evidence submitted supports the establishment of the proposed viticultural area. Therefore, under the authority of the Federal Alcohol Administration Act and part 4 of our regulations, we establish the ''Rattlesnake Hills'' viticultural area in Yakima County in south-central Washington State, effective 30-days from this document's publication date.

Boundary Description

See the narrative boundary description of the viticultural area in the regulatory text published at the end of this document.

Maps

The maps for determining the boundary of the viticultural area are listed below in the regulatory text.

Impact on Current Wine Labels

Part 4 of the TTB regulations prohibits any label reference on a wine that indicates or implies an origin other than the wine's true place of origin. With the establishment of this viticultural area and its inclusion in part 9 of the TTB regulations, its name, ''Rattlesnake Hills,'' is recognized as a name of viticultural significance. Consequently, wine bottlers using ''Rattlesnake Hills'' in a brand name, including a trademark, or in another label reference as to the origin of the wine, must ensure that the product is eligible to use the viticultural area's name as an appellation of origin.

For a wine to be eligible to use as an appellation of origin the name of a viticultural area specified in part 9 of the TTB regulations, at least 85 percent of the grapes used to make the wine must have been grown within the area represented by that name, and the wine must meet the other conditions listed in 27 CFR 4.25(e)(3). If the wine is not eligible to use the viticultural area name as an appellation of origin and that name appears in the brand name, then the label is not in compliance and the bottler must change the brand name and obtain approval of a new label. Similarly, if the viticultural area name appears in another reference on the label in a misleading manner, the bottler would have to obtain approval of a new label.

Different rules apply if a wine has a brand name containing a viticultural area name that was used as a brand name on a label approved before July 7, 1986. See 27 CFR 4.39(i)(2) for details.

Regulatory Flexibility Act

We certify that this regulation will not have a significant economic impact on a substantial number of small entities. This regulation imposes no new reporting, recordkeeping, or other administrative requirement. Any benefit derived from the use of a viticultural area name is the result of a proprietor's efforts and consumer acceptance of wines from that area. Therefore, no regulatory flexibility analysis is required.

Executive Order 12866

This rule is not a significant regulatory action as defined by Executive Order 12866 (58 FR 51735). Therefore, it requires no regulatory assessment.

Drafting Information

Nancy Sutton of the Regulations and Rulings Division drafted this document.

List of Subjects in 27 CFR Part 9

Wine.

The Regulatory Amendment

■ For the reasons discussed in the preamble, we amend 27 CFR, chapter 1, part 9, as follows:

PART 9—AMERICAN VITICULTURAL AREAS

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

■ 2. Subpart C is amended by adding § 9.193 to read as follows:

§ 9.193 Rattlesnake Hills.

(a) *Name.* The name of the viticultural area described in this section is ''Rattlesnake Hills''. For purposes of part 4 of this chapter, ''Rattlesnake Hills'' is a term of viticultural significance.

(b) *Approved Maps.* The appropriate maps for determining the boundaries of the Rattlesnake Hills viticultural area are eight United States Geological Survey 1:24,000 scale topographic maps. They are titled:

(1) Yakima East Quadrangle, Washington—Yakima Co., 1953, photorevised 1985;

(2) Elephant Mountain Quadrangle, Washington—Yakima Co., 1953, photorevised 1985;

(3) Granger NW Quadrangle, Washington—Yakima Co., 1965;

(4) Granger NE Quadrangle, Washington—Yakima Co., 1964;

(5) Sunnyside Quadrangle, Washington—Yakima Co., 1965, photorevised 1978;

(6) Granger Quadrangle, Washington—Yakima Co., 1965;

(7) Toppenish Quadrangle, Washington—Yakima Co., 1958, photorevised 1985; and

(8) Wapato Quadrangle, Washington—Yakima Co., 1958, photorevised 1985.

(c) *Boundary.* The Rattlesnake Hills viticultural area is located in Yakima County, Washington. The area's boundary is defined as follows:

(1) The beginning point is on the Yakima East map at the point where a line drawn straight east from the west end of the Wapato Dam on the Yakima River intersects Interstate Highway 82, section 17, T12N/R19E. This line coincides with the boundary of the Yakima Valley viticultural area (27 CFR 9.69). From the beginning point, the Rattlesnake Hills viticultural area boundary line—

(2) Proceeds straight eastward, crossing onto the Elephant Mountain map, to the 2,192-foot peak of Elephant Mountain, section 16, T12N/R20E; then

(3) Continues straight east-southeast, crossing over the northeast corner of the Toppenish map, and continuing onto the Granger NW map, to the 2,186-foot pinnacle of Zillah Peak, section 32, T12N/R21E; then

(4) Continues straight eastward, crossing onto the Granger NE map, to the 3,021-foot peak of High Top Mountain, section 32, T12N/R22E; then

(5) Continues straight east-southeast to the 2,879-foot peak in the northeast quadrant of section 3, T11N/R22E, and continues in the same direction in a straight line until the line intersects with the 120°00′ west longitude line in section 1 of T11N/R22E along the east margin of the Granger NE map; then

(6) Proceeds straight south along the 120°00′ west longitude line to its intersection with a set of power lines in section 24, T11N/R22E, on the east margin of the Granger NE map; then

(7) Follows the power lines southwest, crossing onto the Sunnyside map, to their intersection with the Sunnyside Canal, section 8, T10N/R22E; then

(8) Follows the meandering Sunnyside Canal generally northwest, crossing over the northeast corner of the Granger map, and continuing over the Granger NW map, the Toppenish map, and onto the Wapato map to the canal's intersection with Interstate Highway 82, section 27 west boundary line, T12N/R19E; then

(9) Follows Interstate Highway 82 northwest for 2.75 miles, crosses onto the Yakima East map, and returns to the beginning point.

Signed: December 19, 2005.

John J. Manfreda,

Administrator.

Approved: January 19, 2006.

Timothy E. Skud,

Deputy Assistant Secretary (Tax, Trade, and Tariff Policy).

[FR Doc. 06–1459 Filed 2–15–06; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 100, 117 and 165

[USCG–2006–23919]

Quarterly Listings; Safety Zones, Security Zones, Special Local Regulations and Drawbridge Operation Regulations

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary rules issued.

SUMMARY: This document provides required notice of substantive rules issued by the Coast Guard and temporarily effective between April 1, 2005 and September 30, 2005 that were not published in the **Federal Register**. This quarterly notice lists temporary local regulations, temporary drawbridge operation regulations, security zones, and safety zones, all of limited duration and for which timely publication in the **Federal Register** was not possible.

DATES: This document lists temporary Coast Guard rules that became effective and were terminated between April 1, 2005 and September 30, 2005.

ADDRESSES: The Docket Management Facility maintains the public docket for this notice. Documents indicated in this notice will be available for inspection or copying at the Docket Management Facility, U.S. Department of Transportation, Room PL–401, 400 Seventh Street SW., Washington, DC 20593–0001 between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays. You may electronically access the public docket for this notice on the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: For questions on this notice contact Ms. Lesley Mose, Office of Regulations and Administrative Law, telephone (202) 267–1477. For questions on viewing, or on submitting material to the docket, contact Ms. Angie Ames, Docket Operations, telephone 202–366–5115.

SUPPLEMENTARY INFORMATION: Coast Guard District Commanders and Captains of the Port (COTP) must be immediately responsive to the safety and security needs within their jurisdiction; therefore, District Commanders and COTPs have been delegated the authority to issue certain local regulations. Safety zones may be established for safety or environmental purposes. A safety zone may be stationary and described by fixed limits or it may be described as a zone around a vessel in motion. Security zones limit

access to prevent injury or damage to vessels, ports, or waterfront facilities and may also describe a zone around a vessel in motion. Special local regulations are issued to enhance the safety of participants and spectators at regattas and other marine events. Drawbridge operation regulations authorize changes to drawbridge schedules to accommodate bridge repairs, seasonal vessel traffic, and local public events. Timely publication of these rules in the **Federal Register** is often precluded when a rule responds to an emergency, or when an event occurs without sufficient advance notice. The affected public is, however, informed of these rules through Local Notices to Mariners, press releases, and other means. Moreover, actual notification is provided by Coast Guard patrol vessels enforcing the restrictions imposed by the rule. Because **Federal Register** publication was not possible before the beginning of the effective period, mariners were personally notified of the contents of these special local regulations, drawbridge operation regulations, security zones, and safety zones by Coast Guard officials on-scene prior to any enforcement action. However, the Coast Guard, by law, must publish in the **Federal Register** notice of substantive rules adopted. To meet this obligation without imposing undue expense on the public, the Coast Guard periodically publishes a list of these temporary special local regulations, security zones, safety zones and drawbridge operation regulations. Permanent rules are not included in this list because they are published in their entirety in the **Federal Register**. Temporary rules are also published in their entirety if sufficient time is available to do so before they are placed in effect or terminated.

The safety zones, special local regulations, security zones and drawbridge operation regulations listed in this notice have been exempted from review under Executive Order 12866, Regulatory Planning and Review, because of their emergency nature, or limited scope and temporary effectiveness. The following rules were placed in effect temporarily during the period from April 1, 2005 through September 30, 2005 unless otherwise indicated.

Docket No.	Location	Type	Effective date
CGD01–05–051	Boston, MA	Safety Zones (Parts 147 and 165)	05/25/2005
CGD01–05–083	Revere, MA	Safety Zones (Parts 147 and 165)	08/20/2005
CGD01–05–086	Gloucester, MA	Safety Zones (Parts 147 and 165)	09/03/2005
CGD01–05–089	Boston, MA	Safety Zones (Parts 147 and 165)	09/25/2005
CGD01–05–090	Boston, MA	Security Zones (Part 165)	09/21/2005
CGD05–05–086	Norfolk, VA	Safety Zones (Parts 147 and 165)	07/15/2005
CGD05–05–092	Reedville, VA	Security Zones (Part 165)	07/23/2005
CGD05–05–095	Suffolk, VA	Safety Zones (Parts 147 and 165)	08/13/2005
CGD05–05–109	Havre de Grace, MD	Safety Zones (Parts 147 and 165)	08/27/2005
CGD05–05–111	Chesapeake Bay, MD	Safety Zones (Parts 147 and 165)	08/26/2005
CGD05–05–115	Patuxent River, MD	Safety Zones (Parts 147 and 165)	09/02/2005
CGD05–05–116	Washington, DC	Safety Zones (Parts 147 and 165)	09/02/2005
CGD05–05–118	Washington, DC	Security Zones (Part 165)	09/06/2005
CGD05–05–119	Cape Charles, VA	Safety Zones (Parts 147 and 165)	09/23/2005
CGD07–05–104	Miami, FL	Special Local Regulations (Part 100)	08/28/2005
CGD09–05–084	Detroit, MI	Safety Zones (Parts 147 and 165)	07/15/2005
CGD09–05–085	Harbor Beach, MI	Safety Zones (Parts 147 and 165)	07/16/2005
CGD09–05–086	Grosse Isle, MI	Safety Zones (Parts 147 and 165)	07/16/2005
CGD09–05–087	Muskegon, MI	Safety Zones (Parts 147 and 165)	07/21/2005
CGD09–05–092	Chicago, IL	Security Zones (Part 165)	07/23/2005
CGD09–05–096	Chicago, IL	Safety Zones (Parts 147 and 165)	07/29/2005
CGD09–05–097	St. Clair, MI	Safety Zones (Parts 147 and 165)	07/29/2005
CGD09–05–098	Muskegon, MI	Safety Zones (Parts 147 and 165)	07/30/2005
CGD09–05–099	Oswego, NY	Safety Zones (Parts 147 and 165)	07/30/2005
CGD09–05–103	Clayton, NY	Safety Zones (Parts 147 and 165)	08/07/2005
CGD09–05–104	Tawas, MI	Safety Zones (Parts 147 and 165)	08/13/2005
CGD09–05–105	Mentor, OH	Safety Zones (Parts 147 and 165)	08/14/2005
CGD09–05–106	Toledo, OH	Safety Zones (Parts 147 and 165)	09/05/2005
CGD09–05–107	Erie, PA	Safety Zones (Parts 147 and 165)	08/02/2005
CGD09–05–109	Erie, PA	Safety Zones (Parts 147 and 165)	08/20/2005
CGD09–05–110	Buffalo, NY	Safety Zones (Parts 147 and 165)	08/20/2005
CGD09–05–111	Menominee, MI	Safety Zones (Parts 147 and 165)	08/06/2005
CGD09–05–116	Chicago, IL	Safety Zones (Parts 147 and 165)	08/13/2005
CGD09–05–121	Fairport, OH	Safety Zones (Parts 147 and 165)	09/10/2005
CGD09–05–124	Maumee River, OH	Safety Zones (Parts 147 and 165)	09/18/2005
CGD11–05–016	San Francisco, CA	Special Local Regulations (Part 100)	07/28/2005
CGD11–05–020	San Francisco, CA	Drawbridges (Part 117)	07/31/2005
CGD11–05–021	Richmond Inner Harbor, CA	Special Local Regulations (Part 100)	08/06/2005
CGD11–05–024	San Francisco Bay, CA	Special Local (Part 100)	08/31/2005
CGD11–05–025	San Francisco Bay, CA	Special Local (Part 100)	09/19/2005
CGD11–05–026	San Francisco Bay, CA	Special Local (Part 100)	09/24/2005
CGD13–05–032	Snake River, WA	Safety Zones (Parts 147 and 165)	08/08/2005
CGD13–05–035	Puget Sound, WA	Safety Zones (Parts 147 and 165)	08/13/2005
COTP JACKSONVILLE–05–110	St. Johns River	Security Zones (Part 165	07/28/2005
COTP JACKSONVILLE–05–111	Brevard County, FL	Safety Zones (Parts 147 and 165)	07/27/2005
COTP JACKSONVILLE–05–122	St. Marys River, GA	Security Zones (Part 165)	09/22/2005
COTP JACKSONVILLE–05–123	Port Canaveral, FL	Security Zones (Part 165)	09/23/2005
COTP JACKSONVILLE–05–124	Port Canaveral, FL	Safety Zones (Parts 147 and 165)	09/25/2005
COTP JACKSONVILLE–05–125	Port Canaveral, FL	Security Zones (Part 165)	09/28/2005
COTP JACKSONVILLE–05–126	Port Canaveral, FL	Security Zones (Part 165)	09/30/2005

Docket No.	Location	Type	Effective date
COTP JACKSONVILLE–05–130	Port Canaveral, FL	Security Zones (Part 165)	09/26/2005
COTP KEY WEST–05–004	Plantation Key, FL	Safety Zones (Parts 147 and 165)	08/28/2005
COTP MOBILE–05–010	Pensacola, FL	Safety Zones (Parts 147 and 165)	06/17/2005
COTP MOBILE–05–016	Dauphin Island Bridge, AL	Safety Zones (Parts 147 and 165)	07/05/2005
COTP MOBILE–05–017	Bayou La Batre, AL	Safety Zones (Parts 147 and 165)	07/05/2005
COTP MOBILE–05–018	Gulf Shores, AL	Safety Zones (Parts 147 and 165)	07/05/2005
COTP MOBILE–05–019	Choctawhatchee Bay Bridge, FL	Safety Zones (Parts 147 and 165)	07/05/2005
COTP MOBILE–05–020	Biloxi, MS	Safety Zones (Parts 147 and 165)	07/09/2005
COTP MOBILE–05–021	Dauphin Island Bridge	Safety Zones (Parts 147 and 165)	07/09/2005
COTP MOBILE–05–022	Gulf Shores, AL	Safety Zones (Parts 147 and 165)	07/09/2005
COTP MOBILE–05–023	Santa Rosa Island, FL	Safety Zones (Parts 147 and 165)	07/09/2005
COTP MOBILE–05–024	Aucilla River, FL	Safety Zones (Parts 147 and 165)	07/09/2005
COTP NEW ORLEANS–05–029	Southwest Pass Safety Fairway, LA	Safety Zones (Parts 147 and 165)	05/26/2005
COTP OHIO VALLEY–05–010	Louisville, KY	Safety Zones (Parts 147 and 165)	07/31/2005
COTP OHIO VALLEY–05–012	Paducah, KY	Safety Zones (Parts 147 and 165)	07/13/2005
COTP PITTSBURGH–05–012	Pittsburgh, PA	Safety Zones (Parts 147 and 165)	07/01/2005
COTP PITTSBURGH–05–013	Chester, WV	Safety Zones (Parts 147 and 165)	07/04/2005
COTP PITTSBURGH–05–014	Weirton, WV	Safety Zones (Parts 147 and 165)	07/04/2005
COTP PITTSBURGH–05–015	Pittsburgh, PA	Safety Zones (Parts 147 and 165)	07/17/2005
COTP PORT ARTHUR–05–012	Orange, TX	Safety Zones (Parts 147 and 165)	07/04/2005
COTP SAVANNAH–05–110	Savannah, GA	Security Zones (Part 165)	08/07/2005
COTP ST LOUIS–05–010	Louisiana, MO	Safety Zones (Parts 147 and 165)	06/16/2005
COTP ST LOUIS–05–012	St. Louis, MO	Safety Zones (Parts 147 and 165)	07/02/2005
COTP ST LOUIS–05–013	Guttenburg, IA	Safety Zones (Parts 147 and 165)	07/02/2005
COTP ST LOUIS–05–014	St. Charles, MO	Safety Zones (Parts 147 and 165)	07/03/2005
COTP ST LOUIS–05–015	Davenport, IA	Safety Zones (Parts 147 and 165)	07/03/2005
COTP ST LOUIS–05–016	Chillicothe, IL	Safety Zones (Parts 147 and 165)	07/04/2005
COTP ST LOUIS–05–017	Peoria, IL	Safety Zones (Parts 147 and 165)	07/04/2005
COTP ST LOUIS–05–019	St. Louis, MO	Safety Zones (Parts 147 and 165)	07/16/2005
COTP ST LOUIS–05–020	Atchison, KS	Safety Zones (Parts 147 and 165)	07/16/2005
COTP ST LOUIS–05–021	St. Paul, MN	Safety Zones (Parts 147 and 165)	07/18/2005
COTP ST LOUIS–05–022	Sioux City, IA	Safety Zones (Parts 147 and 165)	07/23/2005
COTP ST LOUIS–05–023	La Grange, MO	Safety Zones (Parts 147 and 165)	07/30/2005
COTP ST LOUIS–05–024	Red Wing, MN	Safety Zones (Parts 147 and 165)	07/30/2005
COTP ST LOUIS–05–025	Red Wing, MN	Safety Zones (Parts 147 and 165)	08/06/2005
COTP TAMPA–05–099	Tampa Bay, FL	Safety Zones (Parts 147 and 165)	07/02/2005
COTP TAMPA–05–100	Tampa Bay, FL	Safety Zones (Parts 147 and 165)	07/05/2005

Dated: February 10, 2006.

S.G. Venckus,

Chief, Office of Regulations and Administrative Law.

[FR Doc. 06–1439 Filed 2–15–06; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[COTP Western Alaska–06–002]

RIN 1625–AA00

Safety Zone; Gulf of Alaska, Narrow Cape, Kodiak Island, AK

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone in the Gulf of Alaska, encompassing the navigable waters in the vicinity of Narrow Cape and Ugak Island. The zone is needed to protect persons and vessels operating in the vicinity of the safety zone during a rocket launch from the Alaska Aerospace Development Corporation, Narrow Cape, Kodiak Island facility. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Commander, Seventeenth Coast Guard District, the Coast Guard Captain of the Port, Western Alaska, or their on-scene representative. The intended effect of the safety zone is to ensure the safety of human life and property during the rocket launch.

DATES: This temporary final rule is effective from 2 a.m. on February 20, 2006 through 10:30 a.m. on February 23, 2006.

ADDRESSES: Documents indicated in this preamble as being available in the docket are available for inspection and copying at Coast Guard Marine Safety Detachment Kodiak, Kodiak, AK 99619. Normal Office hours are 7:30 a.m. to 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: LT Patrick Lee, Marine Safety Detachment, at (907) 486–5918.

SUPPLEMENTARY INFORMATION:

Regulatory History

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(8), the Coast Guard finds that good cause exists for not publishing an NPRM. The dates for rocket launches often change at the last moment or the rocket launch is cancelled. In the past, the Coast Guard has received several changes to rocket launch dates before the rocket launch actually occurs. As a result, it is impracticable to publish and NPRM because the date for the rocket launch is likely to change at the last minute.

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**. The process of scheduling a rocket launch is uncertain due to unforeseen delays such as weather that can cause cancellation of the launch. Any delay encountered in this

regulation's effective date would be unnecessary and contrary to public interest since immediate action is needed to protect human life and property from possible fallout from the rocket launch. The parameters of the zone will not unduly impair business and transits of vessels. The Coast Guard will announce via Broadcast Notice to Mariners the anticipated date and time of each launch and will grant general permission to enter the safety zone during those times in which the launch does not pose a hazard to mariners.

Background and Purpose

The Alaska Aerospace Development Corporation will launch an unmanned rocket from their facility at Narrow Cape, Kodiak Island, Alaska sometime between 6 a.m. and 10 a.m. during a four-day period between February 20, 2006 and February 23, 2006. The safety zone is necessary to protect spectators and transiting vessels from the potential hazards associated with the launch.

The Coast Guard will announce via Broadcast Notice to Mariners the anticipated date and time of the launch and will grant general permission to enter the safety zone during those times in which a launch schedule does not pose a hazard to mariners. Because the hazardous situation is expected to last for approximately eight and a half (8.5) hours each day during the four-day launch window period, and because general permission to enter the safety zone will be given during non-hazardous times, the impact of this rule on commercial and recreational traffic is expected to be minimal.

Discussion of Rule

From the latest information received from the Alaska Aerospace Development Corporation, the launch window is scheduled for four (4) hours during a four-day period between February 20 and February 23, 2006. The safety zone will be enforced from 2 a.m. to 10:30 a.m. on each of these days. The Captain of the Port, Western Alaska will terminate the safety zone after rocket launch operations are complete.

The size of the safety zone has been set to protect the public from potential hazards associated with the launch. The duration of the safety zone period will allow time for proper surveillance to be conducted to ensure the public is clear of the hazard area prior to and immediately following the rocket launch. The Pacific Range Support Team has identified a launch area exclusion zone from the area north of Narrow Cape to a point south of Ugak Island along the launch trajectory. The COTP will enforce a single safety zone in support of their exclusion zone. The established safety zone includes the navigable waters in the vicinity of Narrow Cape and Ugak Island, within the boundaries defined by a line drawn from a point located at 57°29.8′ North, 152°17.0′ West, then southeast to a point located at 57°21.1′ North, 152°11.2′ West, then southwest to a point located at 57°19.9′ North, 152°14.2′ West, and then northwest to a point located at 57°25.4′ North, 152°28.2′ West, and then northeast to the point located at 57°29.8′ North, 152°17.0′ West. All coordinates reference Datum: NAD 1983.

This safety zone is necessary to protect transiting vessels from the potential hazards associated with the Rocket launch. The Coast Guard will announce via Broadcast Notice to Mariners the anticipated date and time of the launch and will grant general permission to enter the safety zone during those times in which the launch does not pose a hazard to mariners.

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 cost and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not significant under the regulatory policies and procedures of the Department of Homeland Security (DHS) (44 FR 11040; February 26, 1979). The Coast Guard expects the economic impact of this rule to be so minimal that a full Regulatory Evaluation under paragraph 10(e) of the regulatory policies and procedures of DHS is unnecessary. Because the hazardous situation is expected to last for approximately eight and a half (8.5) hours each day during the four-day launch window period, and because general permission to enter the safety zone will be given during non-hazardous times, the impact of this rule on commercial traffic should be minimal. Before the effective period, we will issue maritime advisories widely available to users of the affected portion of the Gulf of Alaska. We believe there will be minimal economic impact on commercial traffic.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have significant economic impacts 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 less than 50,000.

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

This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit, anchor, or fish in a portion of the Gulf of Alaska from north of Narrow Cape to South of Ugak Island from 2:30 a.m. to 10:30 a.m. each day from February 20 until February 23, 2006 until rocket launch operations are complete. Because the hazardous situation is expected to last for approximately eight and a half (8.5) hours of each day during the four-day launch window period, and because general permission to enter the safety zone will be given during non-hazardous times, the impact of this rule on commercial and recreational traffic should be minimal. Before the effective period, we will issue maritime advisories widely available to users of the affected portion of the Gulf of Alaska. We believe there will be minimal impact to small entities.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

This rule will not effect a taking of private property or otherwise have

taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct affect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. We invite your comments on how this proposed rule might impact tribal governments, even if that impact may not constitute a ''tribal implication'' under the Order.

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, we believe that this rule should be categorically excluded, under figure 2–1, paragraph (34)(g) of the Instruction, from further environmental documentation because this rule establishes a safety zone. A final ''Environmental Analysis Check List'' and a final ''Categorical Exclusion Determination'' will be available in the docket where indicated under **ADDRESSES.**

List of Subjects in 33 CFR Part 165

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

■ For the reasons set out in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. From February 20, 2006 to February 23, 2006 add temporary § 165.T17–124 to read as follows:

§ 165.T17–124 Alaska Aerospace Development Corporation, Safety Zone; Gulf of Alaska, Narrow Cape, Kodiak Island, AK.

(a) *Description.* The established safety zone includes the navigable waters in the vicinity of Narrow Cape and Ugak Island, within the boundaries defined by a line drawn from a point located at 57°29.8′ North, 152°17.0′ West, then southeast to a point located at 57°21.1′ North, 152°11.2′ West, then southwest to a point located at 57°19.9′ North, 152°14.2′ West, and then northwest to a point located at 57°25.4′ North, 152°28.2′ West, and then northeast to the point located at 57°29.8′ North, 152°17.0′ West. All coordinates reference Datum: NAD 1983.

(b) *Enforcement periods.* The safety zone in this section will be enforced from 2 a.m. to 10:30 a.m. during each day of a four-day launch window period from February 20, 2006 to February 23, 2006.

(c) *Regulations.* (1) The Duty Officer at Marine Safety Detachment, Kodiak, Alaska can be contacted at telephone number (907) 486–5918.

(2) The Captain of the Port may authorize and designate any Coast Guard commissioned, warrant, or petty officer to act on his behalf in enforcing the safety zone.

(3) The general regulations governing safety zones contained in § 165.23 apply. No person or vessel may enter or remain in this safety zone without first obtaining permission from the Captain of the Port or his on-scene representative. The Captain of the Port, Western Alaska, on-scene representative may be contacted at Marine Safety Detachment Kodiak.

Dated: January 31, 2006.

M.R. DeVries,

Captain, U.S. Coast Guard, Captain of the Port, Western Alaska.

[FR Doc. 06–1438 Filed 2–15–06; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AK65

Filipino Veterans' Benefits Improvements

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) adjudication regulations to reflect changes made by three Public Laws. First, Public Law 106–377, the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2001, changed the rate of compensation payments to certain veterans of the Philippine Commonwealth Army and recognized guerrilla forces, who reside in the

United States. Second, Public Law 106–419, the Veterans Benefits and Health Care Improvement Act of 2000, changed the amount of monetary burial benefits that VA will pay to survivors of certain veterans of the Philippine Commonwealth Army and recognized guerrilla forces who lawfully reside in the United States at death. This document adopts with changes the interim final rule published in the **Federal Register** on December 27, 2001 at 66 FR 66763.

This document additionally implements Public Law 108–183, the Veterans Benefits Act of 2003, and solicits comments on this regulatory amendment only. This public law added service in the Philippine Scouts as qualifying service for payment of compensation, dependency and indemnity compensation (DIC) and monetary burial benefits at the full-dollar rate, and provided for payment of DIC at the full-dollar rate to survivors of certain veterans of the Philippine Commonwealth Army and recognized guerrilla forces who lawfully reside in the United States.

DATES: *Effective Date:* February 16, 2006.

Comment Date: Comments on the regulatory amendments in this rulemaking which implement Public Law 108–183 only must be received on or before March 20, 2006.

ADDRESSES: Written comments may be submitted by: mail or hand-delivery to Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; fax to (202) 273–9026; or e-mail through *http://www.Regulations.gov.* Comments should indicate that they are submitted in response to ''RIN 2900-AK65.'' All comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 273–9515 for an appointment.

FOR FURTHER INFORMATION CONTACT: Bill Russo, Chief, Regulations Staff, Compensation and Pension Service (211D), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, telephone (202) 273–7211.

SUPPLEMENTARY INFORMATION: To implement Public Law 106–377 and Public Law 106–419, VA published an interim final rule in the **Federal Register** for notice and comment (see 66 FR 66763). We received written comments from the American Coalition for Filipino Veterans, Inc.; the Disabled American Veterans; and two congressmen. Based on the rationale set forth in the interim final rule and in this document, we are adopting the provisions of the interim final rule as a final rule with the changes discussed below. We are also including in this final rule amendments to 38 CFR 3.40, 3.42, 3.43, 3.405, 3.505, and 3.1600 to implement provisions from Public Law 108–183 that relate to Filipino veterans. Public Law 108–183, the Veterans Benefits Act of 2003 was enacted subsequent to publication of the interim final rule. The provisions in the Public Law relate to Filipino veterans, therefore, we find it appropriate to include the amendments in this final rule. As well, the amendments are restatements of statutes and, as such, do not require publication for public notice and comment.

Street Address Requirement

The interim final rule required that Filipino veterans and their survivors have a valid street address where they receive mail to prove that they are residing in the United States. Two commenters noted that some veterans and survivors do not have a street address because they are either homeless or live in a home that is mobile, such as a motor home or boat. One commenter stated that some veterans and survivors choose not to receive mail at their home address because ''mail security'' at that address is questionable.

VA has established procedures for ensuring that homeless claimants and claimants without mailing addresses receive benefit payments. As stated in 38 CFR 1.710(d), if a claimant is homeless or does not have a mailing address, benefit payments and correspondence will be sent to the VA Agent Cashier of the Regional Office that adjudicated or is adjudicating the veteran's or survivor's claim, or to any other VA Agent Cashier that VA deems appropriate. Additionally, a homeless veteran or survivor may elect to receive correspondence from VA at General Delivery in a United States Postal Service (USPS) facility. As VA has acknowledged that having a valid street address is not a requirement for receipt of benefit payments, we agree that the requirement in the interim final rule of having a valid street address at which mail is received is overly restrictive. Accordingly, we have revised §§ 3.42 and 3.43 to remove the requirement that a Filipino veteran or survivor must reside at a valid street address and receive mail at that address to be eligible for VA benefits at the full-dollar rate.

Three commenters objected to the provision in § 3.42(c)(4) that stated that VA would not pay benefits at the full-dollar rate if a veteran's or survivor's mailing address was a Post Office box, unless the USPS did not deliver mail to the veteran's or survivor's street address. They asserted that the provision was arbitrary and capricious, and contrary to 38 U.S.C. 5126, which provides that VA may not deny benefits on the basis that a claimant does not have a mailing address. One commenter stated that § 3.42(c)(4) would also bar payment of benefits at the full-dollar rate if the veteran or survivor had a General Delivery mailing address.

As stated above, we agree that the requirement in the interim final rule of having a valid street address at which mail is received is overly restrictive and we have removed that provision from the final rule. We believe this change addresses the commenters' concerns regarding 38 U.S.C. 5126. The issue addressed by § 3.42(c)(4) is whether a Post Office box mailing address constitutes evidence that a Filipino veteran, or his or her survivor, is ''residing in the United States.'' We believe that it does not constitute such evidence. A Post Office box is essentially rented space. The box can be rented in any Post Office that has space available, and the box does not have to be in the Post Office that provides delivery service to the renter's residential address. A person who resides outside the United States can rent a Post Office box inside the United States. Although a valid mailing address in the United States is initially required to rent a Post Office box, there is no requirement that the renter remain in the United States or maintain a residence at that address. Access to a Post Office box does not require the physical presence of the renter. Physical possession of the key to the box or knowing the combination to the lock on the box is all that is required for access. Therefore, having a Post Office box as a mailing address does not establish that a person resides in the United States. Nevertheless, for reasons previously discussed, we have removed the requirement that a Filipino veteran or survivor must receive mail at a valid street address to be eligible for VA benefits at the full-dollar rate.

Section 3.42(d)(4) provides that if mail from VA is returned by the USPS, VA will reduce payments to $0.50 for each dollar authorized. Two commenters objected to this provision. One commenter suggested that VA should take steps to verify that the

address of record is the most current address before reducing benefits. The other commenter simply called the provision arbitrary and unlawful. We disagree with the commenter's assertion that the provision is in any way arbitrary or unlawful, but we agree that VA should ensure that the mail was sent to the correct address before reducing benefits. Therefore, we have added language to § 3.42(d)(4) and § 3.505(d) that requires VA to make reasonable efforts to determine the correct mailing address. If VA is unable to determine the correct mailing address after reasonable efforts, VA may reduce benefit payments to $0.50 for each dollar authorized.

VA requires proof of lawful U.S. residency to establish eligibility for VA benefits at the full-dollar rate. One commenter urged VA to use the Social Security Administration's regulation, 20 CFR 416.1603, How to prove you are a resident of the United States, as guidance for alternative ways to prove residency if the Department has ''reason to question'' that a claimant or beneficiary is residing in the United States.

We agree that the examples listed in that Social Security Administration regulation and similar examples listed in Department of Homeland Security regulations at 8 CFR 244.9, may be relevant evidence of residency. We have decided to use several of the examples from these two regulations, selecting those which are most commonly available to Filipino veterans and their survivors. We have not used the exact wording contained in those regulations; instead we have summarized them in both §§ 3.42(c)(4) and 3.43(c)(4).

Requiring U.S. Citizenship and Immigration Services Verification of Naturalization or Permanent Residence Status

After VA published the interim final rule, the Immigration and Naturalization Service (INS) was transferred to the Department of Homeland Security and renamed the U.S. Citizenship and Immigration Services (USCIS). We will refer to the USCIS when responding to comments concerning the INS. We also made non-substantive clarifying amendments to the rule to reflect this change.

One commenter described ''data integrity'' problems at USCIS, quoting a portion of a 2001 Government Accountability Office (GAO) report regarding USCIS's data on immigration applications. This same commenter stated that there is no evidence that the USCIS will be able to provide verification directly to VA in a timely manner and there is a GAO audit finding that it will likely not be able to do so accurately.

The referenced material from the GAO report concerns USCIS processing of immigration applications. It does not concern USCIS's ability to identify individuals to whom it has granted citizenship or resident alien status. Upon VA's request, USCIS verifies the citizenship or alien status of a Filipino veteran or survivor. We have not experienced any problems in receiving timely and accurate verification of citizenship or alien status from USCIS. USCIS generally responds to VA's requests for verification data within one work day of the request. Therefore, no changes are warranted based on this comment.

One commenter suggests that some Filipino veterans and survivors may meet the USCIS criteria for a presumption of permanent residence as persons who ''have been lawfully admitted for permanent residence even though a record of his admission cannot be found,'' under 8 CFR 101.1, Aliens and Nationality, Presumption of lawful admission. This commenter stated that VA should require USCIS confirmation of naturalized citizenship or permanent resident alien status only if the Filipino veteran or survivor is unable to produce adequate alternative documentation of status.

USCIS is the Federal agency with responsibility for granting citizenship or resident alien status, and for maintaining records on alien residents and naturalized citizens. VA has no authority to determine that a veteran has adequate alternative documentation of citizenship or permanent resident alien status under 8 CFR 101.1 and thus relies exclusively upon USCIS's verification, even if that verification is based upon USCIS's presumption of residency. Since USCIS timely responds to VA's requests for verification of citizenship or resident alien status, there is no need to seek alternative documentation of that status. No changes in the interim final rule are warranted based on this comment.

Two commenters noted that USCIS does not require that employers request USCIS verification of citizenship or permanent resident alien status. Instead, USCIS allows employers to accept documentation such as a United States passport or Permanent Residence card.

We agree that since the United States Department of State requires proof of U.S. citizenship before issuing a passport, VA may accept a valid passport as proof that a veteran or survivor is a citizen of the United States. Accordingly, we have amended §§ 3.42(c)(2) and 3.43(c)(2) to reflect that either USCIS verification or a valid United States passport is sufficient proof that a veteran or survivor is a citizen of the United States.

We do not agree that a Permanent Residence card is sufficient proof of lawful residence in the United States. VA's responsibility under Public Laws 106–377, 106–419, and 108–183 to pay full-dollar rate benefits to Filipino veterans and survivors who are either citizens or permanent resident aliens is inherently different than the responsibility of employers to verify resident alien status for employment purposes. In addition, Permanent Residence cards may be forged. Because such cards may not be the most reliable evidence, we decline to accept them as sufficient proof of residency.

Length-of-Residency Requirements

Three commenters felt that the length-of-residency requirements in the interim final rule were too stringent. Two of these commenters disagreed with the provisions in §§ 3.42 and 3.43 that require the discontinuance of full-dollar rate benefits if a Filipino veteran is absent from the U.S. for more than 60 consecutive days. They noted that, under 20 CFR 404.460, Nonpayment of monthly benefits of aliens outside the United States, the Social Security Administration allows beneficiaries to continue receiving benefits as United States residents until they are absent from the country for more than 6 consecutive months. The commenters urged VA to adopt similar residency requirements.

Section 402(t)(1) of title 42, United States Code, mandated the 6-month absence rule that the Social Security Administration implemented in 20 CFR 404.460. Because Congress did not establish a specific residency period in the Public Laws authorizing full-dollar rate benefits for Filipino veterans, VA must establish reasonable residency requirements within its general rule-making authority.

In our view, the requirement that a Filipino veteran or survivor not be absent from the United States for more than 60 consecutive days to continue to receive benefits at the full-dollar rate is fair, reasonable, and consistent with the applicable Public Laws. The 60-day requirement reasonably allows a Filipino veteran or survivor sufficient freedom to travel, while allowing payment of compensation or DIC at the full-dollar rate only while he or she is residing in the United States. An extended period spent outside of the United States is not consistent with the intent of Congress that the Filipino

veteran or survivor reside in the United States for receipt of benefits at the full-dollar rate. We therefore make no changes based on these comments.

Another commenter also disagreed with the 60-day provision, asserting that it is arbitrary and ''has no apparent connection or correlation to the indicators or determinants of residency.'' This commenter stated that a beneficiary may need to be temporarily outside the United States for more than the 60-day limit imposed by the interim final rule. The key factor, the commenter urged, should be whether the beneficiary intends to give up his or her United States residency.

We disagree that a beneficiary's intent should be the key factor in determining whether benefits may be paid at the full-dollar rate. Congress, by the language in the applicable Public Laws, limited entitlement to the full-dollar rate to Filipino veterans and survivors while they are actually residing in the United States, as citizens or aliens lawfully admitted for permanent residence. The statute makes no mention of the beneficiary's intent to establish a permanent residence as a factor. Therefore, no changes have been made based on this comment.

This commenter also asserted that an important factor in Congress' decision to pay these beneficiaries at the full-dollar rate must have been Congress' recognition that these Filipino veterans' past military service and allegiance to the United States was and is on a par with that of other veterans. The commenter concluded that ''[t]o require of these Filipino [beneficiaries] a greater physical presence in the United States than is required of United States veterans [and survivors] is without any rational basis except to prevent Filipino [beneficiaries] from obtaining full [benefits] while actually living in the Philippines.''

There is no general statutory residency requirement for receipt of VA benefits. However, Congress has determined that Filipino veterans and survivors must actually reside in the United States to receive VA benefits at the full-dollar rate. Thus, under current law, veterans of the United States Armed Forces and their survivors are entitled to the full range of VA benefits without regard to residency, while certain Filipino veterans and their survivors are entitled to VA benefits payable at the rate of $0.50 for each dollar authorized under the law, unless they reside in the United States. VA therefore cannot interpret these plain statutory provisions as the commenter suggests. Accordingly, no changes are being made based on this comment.

Three commenters stated that Filipino beneficiaries traveling outside of the United States may be unavoidably detained because of physical illness or other infirmities which prevent them from timely returning to the United States. One commenter also noted that such beneficiaries may be absent from the U.S. to care for a terminally ill relative or to assist with the disposition of a relative's estate. Another commenter felt that VA should take into account each Filipino beneficiary's peculiar circumstances and reasons for foreign travel. This commenter agreed that physical presence outside the U.S. for extended periods on a regular basis might provide a basis to question the Filipino beneficiary's residency.

We agree that Filipino beneficiaries who are traveling outside of the United States may not return within 60 days for legitimate reasons that are out of their control, such as physical illness or other infirmities that occur at any point during the 60-day or 183-day periods. The residency requirements in the interim final rule are based upon Congress' express intent to require that Filipino beneficiaries reside within the United States to receive benefits at the full-dollar rate. However, we recognize that circumstances may arise that prevent Filipino beneficiaries from returning to the United States as planned. Accordingly, we are amending § 3.42(d)(1) to provide exceptions to the 60-day and 183-day rules for good cause. Exceptions will be granted on a case-by-case basis and must be thoroughly documented.

We have deleted the last sentence of § 3.42(e) as it is redundant with § 3.405(e), and we have clarified that § 3.405 refers to a calendar year as opposed to a 12-month period. In addition, in § 3.42(d)(1), we have revised the phrase ''on an initial basis'' to ''for the first time.'' The revised language clarifies application of the July 1st exception to the 183-day rule.

Effective Dates

One commenter stated that the effective date provision in § 3.405(c) of the interim final rule invites misinterpretation. By using the term ''date of the rating'' in conjunction with the later phrase ''such rating action,'' it appears to refer to the date of the decision rather than the effective date of the decision.

We agree and have amended the regulation accordingly by changing the phrase ''Effective date of the rating establishing service connection'' to ''Effective date of service connection'' and the phrase ''such rating action'' to ''the decision establishing service connection.'' These changes appear in § 3.405(a)(3) of the final rule.

One commenter stated that § 3.405 in the interim final rule violated 38 U.S.C. 5110, Effective dates of awards. The rule listed several dates and provided that the latest of the dates would be the initial effective date for full-dollar rate benefits. This commenter stated that the general statutory rule for determining effective dates is found in 38 U.S.C. 5110(a), which states ''(a) Unless specifically provided otherwise in this chapter [38 U.S.C. 5100 *et seq.*], the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.'' The commenter asserted that § 3.405(e) of the interim final rule delays initial entitlement on a basis not permitted by statute.

Section 3.405(e) of the interim final rule applied to resumption of payment at the full-dollar rate after the Filipino veteran or survivor was absent for 183 days or more in one calendar year and then returns to the United States. It did not apply to initial entitlement and neither did § 3.405(d). Only the introductory text of § 3.405 and paragraphs (a), (b), and (c) applied to initial entitlement. We have reorganized § 3.405 to make this distinction more clear.

The statutory authority for § 3.405 is 38 U.S.C. 107, not 38 U.S.C. 5110, because resumption of payment at the full-dollar rate is more closely associated with the definition of ''residing in the United States'' than with general effective date provisions. Therefore, no changes are being made based on this comment.

The same commenter asserted that section 5110(g) should apply because Public Law 106–377 was liberalizing legislation. We agree that section 5110(g) is applicable to the implementation of Public Law 106–377, and the first sentence of the introductory text of § 3.405 was designed for that application. However, it appears that a direct citation to 38 CFR 3.114(a) would more clearly indicate that the special effective date rules for liberalizing legislation apply. In addition, since we must now include the additional full-dollar rate entitlement created by Public Law 108–183, we have decided to reorganize and revise the content of § 3.405 to more clearly identify the beneficiaries of these liberalizing laws and specify that § 3.114(a) applies to all of them.

Changes Made To Implement Public Law 108–183

Public Law 108–183 amended 38 U.S.C. 107 to allow payment of compensation, DIC, and burial benefits at the full-dollar rate for New Philippine Scouts and their survivors as well as DIC for survivors of veterans who served in the Philippine Commonwealth Army and recognized guerrilla forces, if the beneficiary is residing in the United States and is either a United States citizen or a legally admitted resident alien. To implement the provisions of Public Law 108–183, we have amended 38 CFR 3.40(b) by adding to the beginning of the second sentence, ''Except as provided in §§ 3.42 and 3.43.'' This clause refers to provisions that extend payment of compensation, DIC, and burial benefits at the full-dollar rate to certain Filipino veterans and their survivors in accordance with amendments made by the new law. We have also amended § 3.1600(a) and (b) concerning payment of monetary burial benefits at the full-dollar rate.

We discovered a minor ambiguity in the law governing the effective date for monetary burial benefits at the full-dollar rate based on the service of a New Philippine Scout. The date of enactment of Public Law 108–183 was December 16, 2003. Section 212(a)(4) of the law provides that the full-dollar rate for burial benefits applies to New Philippine Scouts who die ''after'' the date of enactment, while section 212(c) of the law provides that it applied to New Philippine Scouts who die ''on or after'' the date of enactment. In resolving the issue of whether the death of a New Philippine Scout on December 16, 2003, is within the provisions of Public Law 108–183, we are applying a pro-veteran interpretation and amending § 3.43(b) to provide monetary burial benefits at the full-dollar rate for eligible Filipino veterans who die after December 15, 2003.

Because VA published the interim final rule prior to the enactment of Public Law 108–183, it correctly referred only to benefits for veterans and not to benefits for survivors, other than monetary burial benefits. We have, therefore, amended §§ 3.40, 3.42, 3.43, 3.405, and 3.505 to include benefits for survivors as well as veterans, where appropriate, in accordance with the provisions of Public Law 108–183.

Other Non-Substantive Clarifying Changes to These Rules

We reviewed the regulations and corrected several minor inconsistencies in wording between §§ 3.42 and 3.43. First, § 3.42(a)(4) cited title 8, United States Code, regarding proof of permanent resident alien status and we have added the same citation to § 3.43(a)(4).

Section 3.42(b) is entitled ''Eligibility requirements,'' and we have used this same title for § 3.43(b). We have changed the title of § 3.42(c) to ''Evidence of eligibility,'' the same as the title for § 3.43(c).

Section 3.42(d)(2) incorrectly referred to ''paragraph (a) of this section,'' when the reference should have been to the eligibility requirements of paragraph (b), so we have changed that reference. We also noted that the last sentence of § 3.42(d)(2) dealing with the effective date of restored eligibility for the full-dollar rate is redundant with paragraph (e) of the same section. We have, therefore, deleted the last sentence of § 3.42(d)(2) to eliminate the redundancy.

We have changed the second sentence of § 3.40(a) to clearly state that benefits for veterans who served in the Regular Philippine Scouts are paid at the full-dollar rate in the same manner as veterans who served in the United States Armed Forces. We did this by adding ''at the full-dollar rate'' to the end of the second sentence.

We have change the wording in § 3.42(a)(4) from ''* * * such status not having changed'' to ''and still has this status'', to parallel the language in § 3.43(a)(4). We have added commas between ''rate'' and ''based'' and between ''(d)'' and ''to'' in § 3.42(b) to parallel § 3.43(b).

We have added the phrase ''or the veteran's survivor'' to § 3.42(c), (c)(2), and (c)(3), and the phrase ''or survivor's'' to (c)(4) to clarify that a claimant may be a Filipino veteran's survivor.

Based on the rationale set forth in the interim final rule and this document, we are adopting the interim final rule as a final rule with the changes discussed in this document.

Administrative Procedure Act

With regard to the regulatory amendments in this rulemaking which implement Public Law 108–183, we are making them effective on an emergency basis because there is good cause under the provisions of 5 U.S.C. 553 to publish them as an interim final rule without regard to prior notice and comment and effective date provisions. Compliance with these provisions would be impracticable, unnecessary, and contrary to the public interest. Publication as an interim final rule will implement Public Law 108–183, which provides additional benefits to disabled Filipino veterans and their survivors, most of whom are elderly. Many of these Filipino veterans, and their survivors, have chronic health problems and financial hardships. Publication of these amendments as interim final rules will enable VA to immediately provide to these beneficiaries the increased benefits they need in order to better cope with the cost of living in the United States.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any given year. This rule will have no such effect on State, local, or tribal governments, or the private sector.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Order classifies a rule as a significant regulatory action requiring review by the Office of Management and Budget if it meets any one of a number of specified conditions, including: Having an annual effect on the economy of $100 million or more, creating a serious inconsistency or interfering with an action of another agency, materially altering the budgetary impact of entitlements or the rights of entitlement recipients, or raising novel legal or policy issues. VA has examined the economic, legal, and policy implications of this final rule and has concluded that it is a significant regulatory action because it raises novel policy issues.

Paperwork Reduction Act

All collections of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521) referenced in this final rule have existing OMB approval as forms. No changes are made in this final rule to those collections of information.

Regulatory Flexibility Act

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The reason for this certification is that these

amendments would not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, under 5 U.S.C. 605(b), these amendments are exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

Catalog of Federal Domestic Assistance Program Numbers

The Catalog of Federal Domestic Assistance program numbers are 64.100, Automobiles and Adaptive Equipment for Certain Disabled Veterans and Members of the Armed Forces; 64.101, Burial Expenses Allowance for Veterans; 64.104, Pension for Non-Service-Connected Deaths for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.106, Specially Adapted Housing for Disabled Veterans; 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Veterans, Vietnam.

Approved: October 6, 2005.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

Editor's Note: This document was received at the **Federal Register** on February 10, 2006.

■ For the reasons set forth in this preamble, VA is adopting the interim final rule amending 38 CFR part 3 which was published at 66 FR 66763 on December 27, 2001, as a final rule with the following changes:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

■ 1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

■ 2. Section 3.40 is amended by:

■ a. In paragraph (a), removing the period at the end of the last sentence and adding, in its place, ''at the full-dollar rate.''.

■ b. Revising paragraph (b).

The revision reads as follows:

§ 3.40 Philippine and Insular Forces.

* * * * *

(b) *Other Philippine Scouts.* Service of persons enlisted under section 14, Pub. L. 190, 79th Congress (Act of October 6, 1945), is included for compensation and dependency and indemnity compensation. Except as provided in §§ 3.42 and 3.43, benefits based on service described in this paragraph are payable at a rate of $0.50 for each dollar authorized under the law. All enlistments and reenlistments of Philippine Scouts in the Regular Army between October 6, 1945, and June 30, 1947, inclusive, were made under the provisions of Pub. L. 190 as it constituted the sole authority for such enlistments during that period. This paragraph does not apply to officers who were commissioned in connection with the administration of Pub. L. 190.

(Authority: 38 U.S.C. 107)

■ 3. In § 3.42, paragraphs (a)(4), (b) introductory text, (c)(1) introductory text, (c)(2) through (c)(4), (d), and (e) are revised to read as follows:

§ 3.42 Compensation at the full-dollar rate for certain Filipino veterans or their survivors residing in the United States.

(a) * * *

(4) *Lawfully admitted for permanent residence* means that an individual has been lawfully accorded the privilege of residing permanently in the U.S. as an immigrant by the U.S. Citizenship and Immigration Services under title 8, United States Code, and still has this status.

(b) *Eligibility requirements.* Compensation and dependency and indemnity compensation is payable at the full-dollar rate, based on service described in § 3.40(b), (c), or (d), to a veteran or a veteran's survivor who is residing in the U.S. and is either:

* * * * *

(c) *Evidence of eligibility.* (1) A valid original or copy of one of the following documents is required to prove that the veteran or the veteran's survivor is a natural born citizen of the U.S.:

* * * * *

(2) Only verification by the U.S. Citizenship and Immigration Services to VA that a veteran or a veteran's survivor is a naturalized citizen of the U.S., or a valid U.S. passport, will be sufficient proof of such status.

(3) Only verification by the U.S. Citizenship and Immigration Services to VA that a veteran or a veteran's survivor is an alien lawfully admitted for permanent residence in the U.S. will be sufficient proof of such status.

(4) VA will not pay benefits at the full-dollar rate under this section unless the evidence establishes that the veteran or survivor is lawfully residing in the U.S.

(i) Such evidence should identify the veteran's or survivor's name and relevant dates, and may include:

(A) A valid driver's license issued by the state of residence;

(B) Employment records, which may consist of pay stubs, W–2 forms, and certification of the filing of Federal, State, or local income tax returns;

(C) Residential leases, rent receipts, utility bills and receipts, or other relevant documents showing dates of utility service at a leased residence;

(D) Hospital or medical records showing medical treatment or hospitalization, and showing the name of the medical facility or treating physician;

(E) Property tax bills and receipts; and

(F) School records.

(ii) A Post Office box mailing address in the veteran's name does not constitute evidence showing that the veteran was lawfully residing in the United States on the date of death.

(d) *Continued eligibility.* (1) In order to continue receiving benefits at the full-dollar rate under this section, a veteran or a veteran's survivor must be physically present in the U.S. for at least 183 days of each calendar year in which he or she receives payments at the full-dollar rate, and may not be absent from the U.S. for more than 60 consecutive days at a time unless good cause is shown. However, if a veteran or a veteran's survivor becomes eligible for full-dollar rate benefits for the first time on or after July 1 of any calendar year, the 183-day rule will not apply during that calendar year. VA will not consider a veteran or a veteran's survivor to have been absent from the U.S. if he or she left and returned to the U.S. on the same date.

(2) A veteran or a veteran's survivor receiving benefits at the full-dollar rate under this section must notify VA within 30 days of leaving the U.S., or within 30 days of losing either his or her U.S. citizenship or lawful permanent resident alien status. When a veteran or a veteran's survivor no longer meets the eligibility requirements of paragraph (b) of this section, VA will reduce his or her payment to the rate of $0.50 for each dollar authorized under the law, effective on the date determined under § 3.505. If such veteran or survivor regains his or her U.S. citizenship or lawful permanent resident alien status, VA will restore full-dollar rate benefits, effective the date the veteran or survivor meets the eligibility requirements in paragraph (b) of this section.

(3) When requested to do so by VA, a veteran or survivor receiving benefits at the full-dollar rate under this section must verify that he or she continues to meet the residency and citizenship or permanent resident alien status requirements of paragraph (b) of this

section. VA will advise the veteran or survivor at the time of the request that the verification must be furnished within 60 days and that failure to do so will result in the reduction of benefits. If the veteran or survivor fails to furnish the evidence within 60 days, VA will reduce his or her payment to the rate of $0.50 for each dollar authorized, as provided in § 3.652.

(4) A veteran or survivor receiving benefits at the full-dollar rate under this section must promptly notify VA of any change in his or her address. If mail from VA to the veteran or survivor is returned to VA by the U.S. Postal Service, VA will make reasonable efforts to determine the correct mailing address. If VA is unable to determine the correct mailing address through reasonable efforts, VA will reduce benefit payments to the rate of $0.50 for each dollar authorized under law, effective on the date determined under § 3.505.

(e) *Effective date for restored eligibility.* In the case of a veteran or survivor receiving benefits at the full-dollar rate, if VA reduces his or her payment to the rate of $0.50 for each dollar authorized under the law, VA will resume payments at the full-dollar rate, if otherwise in order, effective the first day of the month following the date on which he or she again meets the requirements. However, such increased payments will be retroactive no more than one year prior to the date on which VA receives evidence that he or she again meets the requirements.

■ 4. In § 3.43, paragraphs (a)(4), (b) introductory text, and (c)(2) through (c)(4) are revised to read as follows:

§ 3.43 Burial benefits at the full-dollar rate for certain Filipino veterans residing in the United States on the date of death.

(a) * * *

(4) *Lawfully admitted for permanent residence* means that the individual was lawfully accorded the privilege of residing permanently in the U.S. as an immigrant by the U.S. Citizenship and Immigration Services under title 8, United States Code, and on the date of death, still had this status.

(b) *Eligibility requirements.* VA will pay burial benefits under chapter 23 of title 38, United States Code, at the full-dollar rate, based on service described in § 3.40(c) or (d), when an individual who performed such service dies after November 1, 2000, or based on service described in § 3.40(b) when an individual who performed such service dies after December 15, 2003, and was on the date of death:

* * * * *

(c) * * *

(2) In a claim based on the deceased veteran having been a naturalized citizen of the U.S., only verification of that status by the U.S. Citizenship and Immigration Services to VA, or a valid U.S. passport, will be sufficient proof for purposes of eligibility for full-dollar rate benefits.

(3) In a claim based on the deceased veteran having been an alien lawfully admitted for permanent residence in the U.S., only verification of that status by the U.S. Citizenship and Immigration Services to VA will be sufficient proof for purposes of eligibility for full-dollar rate benefits.

(4) VA will not pay benefits at the full-dollar rate under this section unless the evidence establishes that the veteran was lawfully residing in the U.S. on the date of death.

(i) Such evidence should identify the veteran's name and relevant dates, and may include:

(A) A valid driver's license issued by the state of residence;

(B) Employment records, which may consist of pay stubs, W–2 forms, and certification of the filing of Federal, State, or local income tax returns;

(C) Residential leases, rent receipts, utility bills and receipts, or other relevant documents showing dates of utility service at a leased residence;

(D) Hospital or medical records showing medical treatment or hospitalization of the veteran or survivor, and showing the name of the medical facility or treating physician;

(E) Property tax bills and receipts; and

(F) School records.

(ii) A Post Office box mailing address in the veteran's name does not constitute evidence showing that the veteran was lawfully residing in the United States on the date of death.

* * * * *

■ 5. Section 3.405 is revised to read as follows:

§ 3.405 Filipino veterans and their survivors; benefits at the full-dollar rate.

Public Laws 106–377 and 108–183, which provide disability compensation and dependency and indemnity compensation at full-dollar rates to certain Filipino veterans and their survivors, are considered liberalizing laws. As such, the provisions of 38 CFR 3.114(a) apply when determining the effective date of an award. If the requirements of § 3.114(a) are not satisfied, then the effective date of an award of benefits at the full-dollar rate under § 3.42 will be determined as follows:

(a) *Initial entitlement to full-dollar rate.* The latest of the following:

(1) Date entitlement arose;

(2) Date on which the veteran or survivor first met the residency and citizenship or permanent resident alien status requirements in § 3.42, if VA receives evidence of this within one year of that date; or

(3) Effective date of service connection, provided VA receives evidence that the veteran or survivor meets the residency and citizenship or permanent resident alien status requirements in § 3.42 within one year of the date of notification of the decision establishing service connection.

(b) *Resumption of full-dollar rate.* (1) Date the veteran or survivor returned to the United States after an absence of more than 60 consecutive days; or

(2) First day of the calendar year following the year in which the veteran or survivor was absent from the United States for a total of 183 days or more, or the first day after that date that the veteran or survivor returns to the United States.

■ 6. Section 3.505 is revised to read as follows:

§ 3.505 Filipino veterans and their survivors; benefits at the full-dollar rate.

The effective date of discontinuance of compensation or dependency and indemnity compensation for a Filipino veteran or his or her survivor under § 3.42 will be the earliest of the dates stated in this section. Where an award is reduced, the reduced rate will be payable the day following the date of discontinuance of the greater benefit.

(a) If a veteran or survivor receiving benefits at the full-dollar rate under § 3.42 is physically absent from the U.S. for a total of 183 days or more during any calendar year, VA will reduce benefits to the rate of $0.50 for each dollar authorized under the law, effective on the 183rd day of absence from the U.S.

(b) If a veteran or survivor receiving benefits at the full-dollar rate under § 3.42 is physically absent from the U.S. for more than 60 consecutive days, VA will reduce benefits to the rate of $0.50 for each dollar authorized under the law, effective on the 61st day of the absence.

(c) If a veteran or survivor receiving benefits at the full-dollar rate under § 3.42 loses either U.S. citizenship or status as an alien lawfully admitted for permanent residence in the U.S., VA will reduce benefits to the rate of $0.50 for each dollar authorized under the law, effective on the day he or she no longer satisfies one of these criteria.

(d) If mail to a veteran or survivor receiving benefits at the full-dollar rate under § 3.42 is returned to VA by the U.S. Postal Service, VA will make

reasonable efforts to determine the correct mailing address. If VA is unable to determine the veteran's or survivor's correct address through reasonable efforts, VA will reduce benefits to the rate of $0.50 for each dollar authorized under law, effective the first day of the month that follows the month for which VA last paid benefits.

(Authority: 38 U.S.C. 107)

■ 7. In § 3.1600, paragraphs (a) and (b) introductory text are revised to read as follows:

§ 3.1600 Payment of burial expenses of deceased veterans.

* * * * *

(a) *Service-connected death and burial allowance.* If a veteran dies as a result of a service-connected disability or disabilities, an amount not to exceed the amount specified in 38 U.S.C. 2307 (or if entitlement is under § 3.40(b), (c), or (d), an amount computed in accordance with the provisions of § 3.40(b) or (c)) may be paid toward the veteran's funeral and burial expenses including the cost of transporting the body to the place of burial. Entitlement to this benefit is subject to the applicable further provisions of this section and §§ 3.1601 through 3.1610. Payment of the service-connected death burial allowance is in lieu of payment of any benefit authorized under paragraph (b), (c) or (f) of this section.

(Authority: 38 U.S.C. 2307)

(b) *Nonservice-connected death burial allowance.* If a veteran's death is not service-connected, an amount not to exceed the amount specified in 38 U.S.C. 2302 (or if entitlement is under § 3.40(b), (c), or (d), an amount computed in accordance with the provisions of § 3.40(b) or (c)) may be paid toward the veteran's funeral and burial expenses including the cost of transporting the body to the place of burial. Entitlement is subject to the following conditions:

* * * * *

[FR Doc. 06–1431 Filed 2–15–06; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 050623166–6027–02; I.D. 061505B]

RIN 0648–AT49

Marine Mammals; Subsistence Taking of Northern Fur Seals; Harvest Estimates

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

ACTION: Final fur seal harvest estimates.

SUMMARY: Pursuant to the regulations governing the subsistence taking of northern fur seals, NMFS is publishing the annual fur seal subsistence harvests on St. George and St. Paul Islands (the Pribilof Islands) for 2002 to 2004, and the annual estimates for the fur seal subsistence needs from 2005 through 2007. NMFS estimates the annual subsistence needs are 1,645–2000 seals on St. Paul and 300–500 seals on St. George.

DATES: Effective March 20, 2006.

FOR FURTHER INFORMATION CONTACT: Michael Williams, (907) 271–5006, e-mail *Michael.Williams@noaa.gov*; Kaja Brix, (907) 586–7824, e-mail *Kaja.Brix@noaa.gov*; or Tom Eagle, (301) 713–2322, ext. 105, e-mail *Tom.Eagle@noaa.gov*.

SUPPLEMENTARY INFORMATION: Electronic Access

A Final Environmental Impact Statement (EIS) is available on the Internet at the following address: *http://www.fakr.noaa.gov/protectedresources/seals/fur.htm*.

The subsistence harvest from the depleted stock of northern fur seals, *Callorhinus ursinus*, on the Pribilof Islands, Alaska, is governed by regulations found in 50 CFR part 216, subpart F, Taking for Subsistence Purposes. The regulations require NMFS to publish every 3 years a summary of the harvest in the preceding 3 years and a discussion of the number of fur seals expected to be taken over the next 3 years to satisfy the subsistence requirements of residents of the Pribilof Islands (St. Paul and St. George). After a 30–day comment period, NMFS must publish a final notification of the expected annual harvest levels for the next 3 years.

On July 18, 2005 (70 FR 41187), NMFS published the summary of the 2002–2004 fur seal harvests and provided a 30–day comment period on proposed estimates of subsistence needs for 2005–2007. One comment letter was received on the proposed estimates. The letter identified two substantive points:

1. There are too many northern fur seals killed to eat, and
2. The season is too long.

The numbers of seals killed has been established through long-term needs analysis and monitoring. The established levels have been in place since 1997, and measures have been implemented to insure full use of each animal. Frequently the harvest is ended before the limits are reached, demonstrating good stewardship of the resource. The length of the season is based on avoiding the accidental harvest of females. Young females are difficult to distinguish from young males and studies have shown in late August the sexes are intermixed, whereas earlier in the summer they are not. The actual harvest frequently does not take the number of animals in the harvest estimates, thereby showing the length of harvest season does not contribute to an overharvest of animals. Final expected annual harvest levels for 2005 through 2007 are up to 1,645–2000 seals on St. Paul Island and up to 300–500 seals on St. George Island. Background information related to these estimates was included in the proposed harvest estimates.

Classification

National Environmental Policy Act

NMFS prepared an EIS evaluating the impacts on the human environment of the subsistence harvest on northern fur seals. The final EIS is available on the Internet (see Electronic Access).

Executive Order 12866 and Regulatory Flexibility Act

This action has been determined to be not significant under Executive Order (E.O.) 12866. The actions are not likely to result in (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions; (3) a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; or (4) novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order. The Chief Counsel for Regulation, Department of

Commerce, certified to the Chief Counsel for Advocacy of the Small Business Administration at the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. Because the harvest of northern fur seals on the Pribilof Islands, Alaska, is for subsistence purposes only, the estimate of subsistence need would not have an economic effect on any small entities. Therefore, a regulatory flexibility analysis was not prepared.

Paperwork Reduction Act

This action does not require the collection of information.

Executive Order 13132 – Federalism

This action does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 13132 because this action does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Nonetheless, NMFS worked closely with local governments in the Pribilof Islands, and these estimates of subsistence needs were prepared by the local governments in St. Paul and St. George, with assistance from NMFS officials.

Executive Order 13175–Consultation and Coordination with Indian Tribal Governments

E.O. 13175 requires that if NMFS issues a regulation that significantly or uniquely affects the communities of Indian tribal governments and imposes substantial direct compliance costs on those communities, NMFS must consult with those governments, or the Federal government must provide the funds necessary to pay the direct compliance costs incurred by the tribal governments. This action does not impose substantial direct compliance costs on the communities of Indian tribal governments. Nonetheless, NMFS took several steps to work with affected tribal governments to prepare and implement the action. These steps included discussions on subsistence needs and mechanisms to ensure that the harvest is conducted in a non-wasteful manner. NMFS signed cooperative agreements with St. Paul in 2000 and with St. George in 2001 pursuant to section 119 of the MMPA.

Dated: February 10, 2006.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 06–1434 Filed 2–15–06; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 224 and 229

[Docket No. 060213033–6033–01; I.D. 021006A]

RIN 0648–AU23

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan (ALWTRP) and Endangered Species Conservation; Restriction of Fishing Activities

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

ACTION: Temporary rule.

SUMMARY: The Assistant Administrator for Fisheries (AA), NOAA, announces temporary restrictions on gillnet fishing in the Southeast U.S. Restricted Area through March 31, 2006, consistent with the requirements of the ALWTRP's implementing regulations. NMFS is taking this action based on its determination that a right whale mortality, documented on January 22, 2006, was the result of an entanglement by gillnet gear within the Southeast U.S. Restricted Area. This action is necessary to protect North Atlantic right whales from further serious injury or mortality from entanglement in gillnet gear in the Southeast U.S. Restricted Area.

DATES: This action is effective from 0001 hours February 15, 2006 through 2400 hours March 31, 2006.

ADDRESSES: Copies of the Environmental Assessment (EA) prepared in association with this temporary rule may be obtained from the persons listed below under **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Vicki Cornish, 727–824–5312, Juan Levesque, 727–824–5312, or Barb Zoodsma, 904–321–2806.

Electronic Access: Regulations and background documents for the ALWTRP can be downloaded from the ALWTRP Web site at *http://www.nero.noaa.gov/whaletrp/.*

SUPPLEMENTARY INFORMATION:

Background

The North Atlantic right whale (*Eubalaena glacialis*) was severely depleted by commercial whaling and despite protection from commercial harvest since 1935, has not recovered. The population is believed to be at or less than 300 individuals, making it one of the most critically endangered large whale species in the world (NMFS, 2005).

The North Atlantic right whale has been listed as endangered under the Endangered Species Act (ESA) since the ESA's passage in 1973 (35 FR 8495, June 2, 1970). In June 1994, NMFS declared three areas of the right whale's range in the United States as critical habitat: (1) Great South Channel, (2) Cape Cod Bay, and (3) the Southeastern U.S. (59 FR 28793, June 3, 1994). The Southeastern U.S. critical habitat includes coastal waters between 31°15′ N lat. and 30°15′ N lat. from the coast out 15 nautical miles, and the coastal waters between 30°15′ N lat. and 28°00' N lat. from the coast out 5 nautical miles (50 CFR 226.203).

North Atlantic right whales occur in coastal and nearshore waters off the eastern United States and Canada, areas also used by fishing and other maritime activities that adversely affect the species. Deaths from collisions with ships and entanglement in fishing gear are significant impediments to the recovery of the species. From 1997 to 2001, human-caused mortality and serious injury to North Atlantic right whales from fishery entanglements and ship strikes was estimated as an average of 2.0 per year (Waring *et al.*, 2003). A serious injury has been defined as ''any injury that will likely result in mortality'' (50 CFR 216.3). Kraus *et al.* (2005) indicated that the overall mortality rate increased between 1980 and 1998 to a level of at least four percent per year, a rate that is not sustainable. The Potential Biological Removal (PBR) level for right whales is zero; thus, any mortality or serious injury to the species is considered significant.

The serious injury and mortality of the right whale as a result of commercial fishing activities continues to occur at a rate above PBR (Waring *et al.*, 2003). Knowlton and Kraus (2001) documented 56 right whale human-related serious injuries and deaths from 1970 to 1999, with at least 31 attributed to entanglements in fishing gear, for an average of 1.0 mortalities and serious injuries per year over that time period. Cole *et al.* (2005) documented, for 1999–2003, 31 reports of entanglements, 5 resulting in serious injuries and 3

resulting in mortalities, for an average of 1.6 mortalities and serious injuries per year over that time period.

NMFS criteria for determining whether an entanglement of a right whale is a serious injury (i.e., an injury likely to result in the mortality of an animal, when its actual fate is unknown), include fishing line constricting the tail flukes of the whale (Cole *et al.*, 2005). The same document states that a whale is typically not considered seriously injured if all constricting lines are shed by the animal or removed (presumably by an experienced team of disentanglement experts).

To reduce the incidental serious injury and mortality of marine mammal stocks in commercial fishing operations, section 118(f) of the Marine Mammal Protection Act (MMPA) directs NMFS to develop and implement Take Reduction Plans (TRP) to assist in the recovery or prevent the depletion of each strategic stock that interacts with a Category I or II fishery, as defined and classified in the annual List of Fisheries.

On August 6, 1996 (61 FR 40819), NMFS established the Atlantic Large Whale Take Reduction Team (ALWTRT) to prepare a draft TRP to reduce the incidental serious injury and mortality of right, humpback, and fin whales in commercial fishing operations, as well as to provide conservation benefits to a fourth, non-endangered species, the minke whale. The ALWTRT submitted a report to NMFS on February 1, 1997, with recommendations to reduce the serious injury and mortality of Atlantic large whales; however, the ALWTRT did not reach consensus on some recommendations. NMFS then developed a final TRP and implementing regulations after considerable public input. An interim final rule was published on July 22,1997 (62 FR 39157), and a final rule was published February 16, 1999 (64 FR 7529), with an April 1, 1999, effective date. Since this time, the ALWTRP has been modified several times to reduce the serious injury and mortality of large whales in commercial fisheries.

The ALWTRP, implemented through regulations at 50 CFR 229.32, relies on a combination of fishing gear modifications, operational restrictions, and time/area closures to reduce the risk of large whales becoming entangled in commercial fishing gear. NMFS implemented specific management measures for commercial fishing operations in Southeast U.S. waters.

The Southeastern U.S. Restricted Area is defined in 50 CFR 229.32(f)(1)(i) as the waters from 32°00′ N. lat. (near Savannah, GA) along the coast south to 27°51′ N. lat. (near Sebastian Inlet, FL) and extending from the shore eastward out to 80°00′ W. long. The regulations define the Southeast U.S. Observer Area as the Southeast U.S. Restricted Area plus an additional area along the coast south to 26°46.5′ N. lat. (near West Palm Beach, FL) and extending from the shore eastward out to 80°00′ W. long. (50 CFR 229.32(f)(1)(ii)).

In the Southeast U.S. Observer Area, the ALWTRP regulations mandate 100-percent observer coverage of the Southeastern U.S. Atlantic shark gillnet fishery during the restricted period (November 15 through March 31), which corresponds with the right whale calving season (50 CFR 229.32(f)(3)). Additionally, fishermen are prohibited from using shark gillnet gear, defined as 5-inches (0.127-m) or greater stretch mesh (50 CFR 229.2), in the Southeast U.S. Restricted Area during the restricted period (November 15 through March 31) (50 CFR 229.32(f)(4)(i)). Shark gillnetting using strikenet gear is allowed in the Southeast U.S. Restricted Area as long as the following conditions are met: (1) No nets are set at night or when visibility is less than 500 yards (460 m); (2) each set is made under the observation of a spotter plane; (3) no net is set within 3 nautical miles of a right, humpback, or fin whale; and (4) if a right, humpback, or fin whale moves within 3 nautical miles of the set gear, the gear is removed immediately from the water (50 CFR 229.32(f)(4)(iv)). Lastly, all gillnet fishermen are prohibited from fishing a straight set of gillnet gear at night within the Southeastern U.S. Restricted Area during the restricted period (November 15–March 31) (50 CFR 229.32(f)(4)(iii)).

Because of the right whale's extremely endangered status, NMFS included in the ALWTRP regulations contingency measures that would allow further restriction on fishing in the Cape Cod Bay critical habitat, Great South Channel restricted area, and the Southeast U.S. Restricted Area, if a right whale mortality or serious injury resulted from the use of certain fishing gear in those areas. Specifically, 50 CFR 229.32(g)(1) states that if a serious injury or mortality of a right whale occurs in the Southeast U.S. Restricted Area from November 15 through March 31 as a result of an entanglement by gillnet gear allowed to be used in that area and time, the AA shall close that area to that gear type for the rest of that time period and for that same time period in each subsequent year, unless the AA revises the restricted period or implements other measures.

Recent Events

On Sunday, January 22, 2006, at 10:30 a.m., a report was made to the United States Coast Guard by a member of the public that a floating whale had been spotted offshore of Jacksonville Beach, Florida. At approximately 11 a.m., a Florida Fish and Wildlife Commission (FWC) aerial survey team confirmed the whale species and location and photographed the carcass. The aerial survey team identified the whale as a right whale calf, and photos indicated the calf as having one large wound along the midline and smaller lesions around the base of its tail. The right whale calf was towed to shore that evening from the location of 30°14.4′ N. lat., 81°04.2′ W. long., which was approximately 1 nautical mile outside of designated right whale critical habitat, but within the Southeast U.S. Restricted Area.

Each year NMFS coordinates an extensive aerial survey effort in the Southeast U.S. right whale critical habitat area from December 1 through March 31. The New England Aquarium's right whale survey photograph database was consulted to determine the sighting history for the dead calf. On Friday, December 30, 2005, the calf and its mother were sighted together off St. Catherines Island, Georgia. The calf did not show evidence of entanglement at the time. On January 8 and 9, 2006, the pair were sighted off the mouth of Nassau Sound, Florida and Cumberland Sound, Georgia, respectively. By that time, the aerial survey photographs suggested the calf had linear scars, consistent with some type of entanglement event. The pair was last observed together off Jacksonville Beach, Florida, on Wednesday, January 11, 2006. On Saturday, January 21, 2006, the calf's mother was observed, without the calf, near the area where the dead calf was recovered the following day. The adult female right whale was observed breaching, blowing bubbles, diving and surface swimming, which may have been signs of agitated behavior. The calf's carcass was found and reported on January 22, 2006, approximately 16 nautical miles off Jacksonville Beach, Florida. Based on the condition of the whale when necropsied and local surface water temperatures, the investigators conclude that this animal died within 3 to 6 days prior to necropsy. An analysis of local wind and water currents prior to January 22 indicated that the winds were west to northwest, placing the location where the calf most likely died as inshore and north of where the carcass was found.

NMFS has determined that both the entanglement and death of the whale occurred within the Southeast U.S. Restricted Area for the following reasons: (1) All sightings of this calf occurred within the Southeast U.S. Restricted Area; (2) all the southeast sightings were recent; (3) mother-calf pairs typically remain on the calving grounds in January; (4) the carcass was found within the Southeast U.S. Restricted Area; and (5) the calf's most likely location when it died was inshore and north of where the carcass was found.

On Monday, January 23, 2006, at 7:15 a.m., a specialized large whale necropsy team, which consisted of various Federal and state government representatives, and university and non-profit marine mammal specialists, performed a thorough necropsy of the whale. This consisted of measuring, photographing, dissecting, and collecting tissues samples of the animal in order to determine the possible cause of death. The necropsy team's gross examination indicated a variety of lesions including numerous small lesions around the tailstock and a single large dorsal lesion. The whale had a complex array of wounds around its tailstock. Two wounds were bites from a small shark. Those wounds had been seen in aerial photos of the calf as early as December 30, 2005. Most of the remaining wounds formed straight-line, vee-, and diamond-shaped patterns. These small lesions appeared to be pre-mortem and caused by a fine cutting edge such as monofilament net, which would also correspond to the characteristic vee and diamond shapes of gillnet gear. There was also some post-mortem scavenging by sharks. The whale had a large wound splitting open most of its back. The wound appeared to have occurred post-mortem and was not the result of a vessel strike. The edges of the middle of the wound were clean-cut, while the ends were ragged. A notable observation by the necropsy team was that cyamids had migrated to the tailstock, indicating significant injury to this area which may have impeded the animal's ability to swim and dive. The necropsy team also noted that the blubber thickness would suggest the animal was in good body condition, but, based on its empty gastrointestinal track, it had not been able to nurse for at least a day prior to its death.

The immediate cause of death of the whale (*e.g.*, drowning, dehydration, infection) has not been determined and may never be completely known. However, all available evidence suggests the entanglement and injury of the whale by gillnet gear ultimately led to the death of the animal. The evidence of recent entanglement was clearly documented by the necropsy team. The degree of entanglement meets NMFS' criteria of a serious injury (*i.e.*, an injury likely to result in mortality). While there was no entangling gear on the animal at the time it was reported, NMFS knows it was not removed through permitted disentanglement efforts, and NMFS believes that the calf did not disentangle itself as it was young and not expected to be strong enough to shed the imbedded gear. Therefore, based on the results of the necropsy, the New England Aquarium's aerial survey database, evidence of gillnet fisheries operating in the area (see Affected Fisheries), and in the absence of other significant explanatory findings, NMFS has determined that the right whale mortality, which occurred on January 22, 2006, was as a result of entanglement in gillnet gear.

Closure of Southeast U.S. Restricted Area to Gillnet Fisheries

NMFS has evaluated the recent right whale mortality event and determined that the criteria specified in 50 CFR 229.32(g)(1) for taking additional action to protect right whales from further serious injury or mortality, under the ALWTRP, have been met. NMFS has determined that the mortality of this right whale was due to entanglement in gillnet gear, and that the entanglement occurred within the Southeastern U.S. Restricted Area. Thus, NMFS believes that closing the Southeast U.S. Restricted Area to all gillnet gear through the remainder of the restricted period, through March 31, 2006, is warranted and urgent. Therefore, the AA announces that all fishing with gillnets is prohibited in the Southeast U.S. Restricted Area, beginning at 0001 hours February 15, 2006 through 2400 hours March 31, 2006. All such gillnets that are currently set must be retrieved by 11:59 p.m on February 15, 2006. Since existing ALWTRP rules already prohibit gillnet fishing at night, except for run-around sets, which are tended sets, there is no need to provide any extended delay in effectiveness to allow fishermen to retrieve set gear.

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

The regulations at 50 CFR 229.32(g)(1) also requires the AA to close the Southeast U.S. Restricted Area for the rest of the time period, and for the time period November 15 through March 31 in each subsequent year, unless the AA revises the restricted period or unless other measures are implemented. NMFS plans to seek assistance and recommendations from the ALWTRT at their next meeting in order to evaluate whether permanent closures within the Southeast U.S. Restricted Area are necessary.

Affected Gillnet Fisheries

In Southeast Atlantic waters, commercial fishermen target various finfish and shark species using gillnet gear of varied sizes and deployment techniques. Fisheries expected to be affected by this rulemaking include, but are not limited to, the Southeastern U.S. Atlantic shark gillnet fishery and the Southeast Atlantic gillnet fishery.

The Southeastern U.S. Atlantic shark gillnet fishery uses 5-inch (0.127 m) or greater stretch mesh gillnet gear, typically targeting various shark species. NMFS believes there are approximately six to eight active vessels in this fishery. The FWC's trip ticket database (2002–2005) for counties within the Southeast U.S. Restricted Area (Nassau, Duval, St. John's, Flagler, Volusia, and Brevard) indicates that overall shark landings, number of trips, and the dollar value of this fishery, has been declining since 2002 within this area. In 2005, there was a total of 280,235 pounds (127,113 kg) of sharks landed, which corresponded to 180 trips and a value of $180,015. Although the Southeast U.S. Restricted Area consists of Florida and Georgia waters, landings information was only obtained from Florida since landings from gillnet gear are prohibited in the State of Georgia. This fishery is managed by the NMFS Office of Sustainable Fisheries, Highly Migratory Species Division.

The Southeast Atlantic gillnet fishery typically uses smaller mesh gillnet gear, less than 5-inch stretch mesh, targeting mostly coastal migratory species (King mackerel, Spanish mackerel, whiting, and bluefish). Based on the FWC's trip ticket database for 2005, NMFS believes that approximately 56 individuals participate in this fishery annually. Data from the same database for 2002–2005 for counties within the Southeast U.S. Restricted Area indicate that overall finfish landings (excluding whiting; see below), number of trips, and the value of the fishery has been decreasing since 2002 for fishermen targeting finfish with gillnets in this area. For 2005, there was a total of 153,905 pounds (69,810 kg) of finfish landed, which corresponded to 978 trips and a value of $129,454. As stated above, the Southeast U.S. Restricted Area consists of Florida and

Georgia waters, but landings information was only obtained from Florida since landings from gillnet gear are prohibited in the State of Georgia. Florida gillnet finfish landings have been dominated by the following species: bluefish, Spanish mackerel, cobia, and King mackerel. These species are managed by NMFS and the South Atlantic Regional Fishery Management Council.

NMFS has also become aware of recent increases in fishing activity by fishermen specifically using sink gillnet gear of various mesh size targeting demersal finfish, primarily whiting (*Menticirrhus americanus*). In contrast to the above landings information, the FWC's trip ticket database (2002–2005) for counties within the Southeast U.S. Restricted Area indicates that overall finfish landings, number of trips, and the value of demersal finfish landings have been increasing since 2002, mostly from fishermen targeting whiting with gillnets in this area. NMFS is unaware how many participants fish for demersal finfish using only sink gillnet gear, since catches from all gillnet gear are combined in the trip ticket database. For 2005, there was a total of 461,858 pounds (209,495 kg) of whiting landed, which corresponded to 589 trips and a value of $363,960. Again, the Southeast U.S. Restricted Area consists of Florida and Georgia waters; however, landings information was only obtained from Florida since landings from gillnet gear are prohibited in the State of Georgia. At this time, the South Atlantic Regional Fishery Management Council does not prohibit the use of gillnets within the southeast Exclusive Economic Zone waters for non-FMP species (50 CFR 600.725). Thus, fishermen who target whiting are not regulated by a FMP, because currently this species is not managed under the Coastal Migratory FMP or any other FMP.

The above-mentioned estimates for the total value of the gillnet fisheries operating in the Southeast U.S. Restricted Area are based on preliminary total annual landings for 2005. FWC's trip ticket data for counties within the Southeast U.S. Restricted Area for the past six years (2000–2005) during the months of February and March, indicate an average of 15 fishermen fish in these areas during the months that will be affected by this temporary closure. Total economic losses during February and March 2006 were projected, based on the combined average total landings and average total revenues from gillnet fishing in these three areas, and are estimated at 92,687 pounds and $74,364.

Additional Conservation Measures

The AA may withdraw or modify any additional restriction on fishing activities if the AA determines that such action is warranted. Notification of any additional, modified, or suspended right whale conservation measures will be published in the **Federal Register** pursuant to 50 CFR 229.32(g)(1) or (2).

NMFS will continue to monitor right whale serious injuries and mortalities to gauge the effectiveness of these conservation measures. In addition, although the ALWTRT recommended additional measures to further protect right whales from serious injury and mortality in commercial fishing operations in southeast waters during 2005 and NMFS published a proposed rule on June 21, 2005 (70 FR 35894), NMFS believes that, at this time, because of the recent entanglement event and the current level of commercial gillnet fishing operations in Southeast waters, NMFS plans to seek assistance and recommendations from the ALWTRT at their next meeting in order to evaluate whether permanent closures within the Southeast U.S. Restricted Area are necessary in addition to the recently proposed measures.

Literature Cited

Knowlton, A.R. and S.D. Kraus. 2001. Mortality and serious injury of North Atlantic right whales (*Eubalaena glacialis*) in the North Atlantic Ocean. J. Cetacean Res. Manage. (Special Issue) 2 (in press).

Kraus, S.D., M.W. Brown, H. Caswell, C.W. Clark, M. Fujiwara, P.K. Hamilton, R.D. Kenney, A.R. Knowlton, S. Landry, C.A. Mayo, W.A. McLellan, M.J. Moore, D.P. Nowacek, D.A. Pabst, A.J. Read, R.M. Rolland. 2005. North Atlantic Right Whales in Crisis. Science 22 July 2005: Vol. 309. no. 5734, pp. 561–562.

NMFS. 2005. Recovery Plan for the North Atlantic Right Whale (*Eubalaena glacialis*). National Marine Fisheries Service, Silver Spring, MD.

Waring, G., R. Pace, J. Quintal, C. Fairfield and K. Maze-Foley. 2003. U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments—2003. NOAA Tech. Mem. NMFS–NE–182. 260 pp.

Classification

In accordance with section 118(f)(9) of the MMPA, the AA has determined that this action is necessary to implement a take reduction plan to protect North Atlantic right whales. In addition, pursuant to section 11(f) of the ESA, the AA may promulgate regulations to enforce the ESA's prohibitions on the taking of endangered right whales.

An Environmental Assessment for this action was prepared and is available from the agency upon request.

Providing prior notice and opportunity for comment on this action would be impracticable because it would prevent NMFS from implementing timely measures, pursuant to regulations at 50 U.S.C. 229(g)(1), to immediately reduce the risk of further serious injury and mortality of endangered right whales. If this action were to be subject to the notice and comment rulemaking requirements of 5 U.S.C. 553, NMFS would not be able to assert these regulatory protections to endangered right whales because the rulemaking would not be concluded until some time beyond the end of the protection period. In order to ensure that right whales are protected during the restricted period, the AA finds that good cause exists, pursuant to 5 U.S.C. 553(b)(B), to waive prior notice and an opportunity to comment on this action to implement a commercial gillnet fishing closure within the Southeast U.S. Restricted Area to reduce the risk of entanglement of endangered right whales in commercial gillnet gear.

For the same reasons, the AA finds that, under 5 U.S.C. 553(d)(3), good cause exists to waive the 30-day delay in effective date. If NMFS were to delay for 30 days the effective date of this action, right whales would be vulnerable to entanglement, which could result in further serious injury and mortality.

NMFS determined that this action is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management programs of Georgia and Florida. This determination was submitted on February 3, 2006, for review by the responsible state agencies under section 307 of the CZMA.

The rule implementing the commercial gillnet fishing closure within the Southeastern U.S. Restricted Area has been determined not to be significant under Executive Order (E.O.) 12866.

This temporary rule is exempt from the procedures of the Regulatory Flexibility Act because the rule is issued without prior notice and opportunity for public comment.

NMFS believes this temporary rule does not contain policies with federalism implications under E.O. 13132, since the state waters affected already prohibit gillneting under state law; however, full consultation with the states was not practicable for this action pursuant to section 6 of E.O. 13132.

This action does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

Authority: 16 U.S.C. 1361 *et seq.*, 16 U.S.C. 1531 *et seq.*, and 50 CFR 229.32(g)(1).

Dated: February 13, 2006.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

[FR Doc. 06–1490 Filed 2–13–06; 3:56 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 71, No. 32
Thursday, February 16, 2006

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 THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Parts 4, 5, and 7

[Notice No. 57; Re: Notice No. 53]

RIN 1513–AB16

Use of the Word ''Pure'' or Its Variants on Labels or in Advertisements of Alcohol Beverage Products; Reopening of Comment Period

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

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

SUMMARY: In response to a request from an alcohol industry trade association, the Alcohol and Tobacco Tax and Trade Bureau reopens the comment period for Notice No. 53, Use of the Word ''Pure'' or Its Variants on Labels or in Advertisements of Alcohol Beverage Products, an advance notice of proposed rulemaking published in the **Federal Register** on December 7, 2005. The comment period is reopened for an additional 30 days.

DATES: Comments on Notice No. 53 must now be received on or before March 20, 2006.

ADDRESSES: You may send comments to any of the following addresses:

- Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, Attn: Notice No. 53, P.O. Box 14412, Washington, DC 20044–4412.
- 202–927–8525 (facsimile).
- *nprm@ttb.gov* (e-mail).
- *http://www.ttb.gov/alcohol/rules/index.htm.* An online comment form is posted with this notice on our Web site.
- *http://www.regulations.gov* (Federal e-rulemaking portal; follow instructions for submitting comments).

You may view copies of this notice, Notice No. 53, and any comments we receive by appointment at the TTB Information Resource Center, 1310 G Street, NW., Washington, DC 20220. To make an appointment, call 202–927–2400. You may also access copies of this notice, Notice No. 53, and the related comments online at *http://www.ttb.gov/alcohol/rules/index.htm.*

FOR FURTHER INFORMATION CONTACT: Lisa M. Gesser, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 128, Morganza, MD 20660; (301) 290–1460.

SUPPLEMENTARY INFORMATION: On December 7, 2005, the Alcohol and Tobacco Tax and Trade Bureau (TTB) published Notice No. 53, Use of the Word ''Pure'' or Its Variants on Labels or in Advertisements of Alcohol Beverage Products; Request for Public Comment, in the **Federal Register** (70 FR 72731). In that advance notice of proposed rulemaking, TTB requested public comment on possible changes to the regulations concerning the use of the word ''pure'' and its variants in the labeling and advertising of alcohol beverage products regulated by TTB. As originally published, the comment period for Notice No. 53 closed on February 6, 2006.

On February 3, 2006, TTB received a written request from the Beer Institute, a major alcohol beverage industry trade association, to extend the comment period for Notice No. 53 for an additional 30 days beyond its closing date. Citing its staff's recent busy schedule, the Beer Institute requested the additional time to ''more thoroughly respond'' to TTB's request for comments on the issues raised in Notice No. 53.

In response to this request, TTB reopens the comment period for Notice No. 53 for an additional 30 days. Therefore, comments on Notice No. 53 are now due on or before March 20, 2006.

Drafting Information

Michael D. Hoover of the Regulations and Rulings Division drafted this notice.

Signed: February 9, 2006.

John J. Manfreda,

Administrator.

[FR Doc. 06–1487 Filed 2–15–06; 8:45 am]

BILLING CODE 4810–31–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 50, 53, and 58

[EPA–HQ–OAR–2001–0017; EPA–HQ–OAR–2004–0018; FRL–8033–6]

RIN 2060–AI44 and RIN 2060–AJ25

Public Hearings for Proposed Rules—National Ambient Air Quality Standards for Particulate Matter and Revisions to Ambient Air Monitoring Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Announcement of public hearings.

SUMMARY: The EPA is announcing three public hearings to be held jointly for two proposed rules—''National Ambient Air Quality Standards for Particulate Matter'' and ''Revisions to Ambient Air Monitoring Regulations'' that were published in the **Federal Register** on January 17, 2006 (71 FR 2620 and 71 FR 2710). The hearings will be held concurrently in Chicago, Illinois; Philadelphia, Pennsylvania; and San Franciso, California.

In the proposed rule entitled ''National Ambient Air Quality Standards for Particulate Matter,'' EPA proposes to make revisions to the primary and secondary national ambient air quality standards (NAAQS) for particulate matter (PM) to provide requisite protection of public health and welfare, respectively, and to make corresponding revisions in monitoring reference methods and data handling conventions for PM.

In the ''Revisions to Ambient Air Monitoring Regulations,'' EPA is proposing to revise the ambient air monitoring requirements for criteria pollutants. The proposal establishes ambient air monitoring requirements in support of the proposed revisions to the NAAQS for PM and proposes other changes to better serve current and future air quality management and research needs.

DATES: The public hearings will be held concurrently on March 8, 2006. Please refer to **SUPPLEMENTARY INFORMATION** for additional information on the public hearings.

ADDRESSES: The hearings will be held at the following locations:

1. *Chicago:* Hyatt Regency, 151 E. Wacker Drive, Chicago, IL 60601, 312–565–1234.

2. *Philadelphia:* Holiday Inn Historic District, 400 Arch Street, Philadelphia, PA 19106, 215–923–8660.

3. *San Francisco:* Courtyard Marriott San Francisco Downtown, 299 Second Street, San Francisco, CA 94105, (415) 947–0700.

Written comments on these proposed rules may also be submitted to EPA electronically, by mail, by facsimile, or through hand delivery/courier. Please refer to the two proposals for the addresses and detailed instructions.

A complete set of documents related to the two proposals is available for public inspection at the EPA Docket Center, located at 1301 Constitution Avenue, NW., Room B102, Washington, DC between 8:30 a.m. and 4:30 p.m., Monday through Friday, excluding legal holidays. A reasonable fee may be charged for copying. Documents are also available through the electronic docket system at *http://www.regulations.gov.*

The EPA Web site for the rulemakings, which includes the proposals and information about the public hearings, can be found at: *http://www.epa.gov/air/particlepollution/actions.html.*

FOR FURTHER INFORMATION CONTACT: If you would like to speak at the public hearings or have questions concerning the public hearings, please contact Ms. Tricia Crabtree at the address given below under **SUPPLEMENTARY INFORMATION**.

Questions concerning the ''National Ambient Air Quality Standards for Particulate Matter'' proposed rule should be addressed to Dr. Erika Sasser, U.S. EPA, Office of Air Quality Planning and Standards, Health and Environmental Impacts Division, (C504–01), Research Triangle Park, NC 27711, telephone number (919) 541–3889, e-mail at *sasser.erika@epa.gov.*

Questions concerning the ''Revisions to Ambient Air Monitoring Regulations'' proposed rule should be addressed to the following individuals. For general questions, please contact Mr. Lewis Weinstock, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Assessment Division (D243–02), Research Triangle Park, NC 27711, telephone number (919) 541–3661, e-mail at *weinstock.lewis@epa.gov.* For technical questions, please contact Mr. Tim Hanley, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Assessment Division (D243–02), Research Triangle Park, NC 27711, telephone number (919) 541–4117, e-mail at *hanley.tim@epa.gov.*

SUPPLEMENTARY INFORMATION: The two proposals for which EPA is holding the public hearings were published in the **Federal Register** on January 17, 2006 and are available on the following Web site *http://www.epa.gov/air/particlepollution/actions.html.* The public hearings will provide interested parties the opportunity to present data, views, or arguments concerning the proposed rules. The EPA may ask clarifying questions during the oral presentations, but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as any oral comments and supporting information presented at the public hearings. Written comments must be postmarked by the last day of the comment period, April 17, 2006, as specified in the two proposals.

The three public hearings will be held concurrently in Chicago, Illinois; Philadelphia, Pennsylvania; and San Francisco, California. The public hearings will begin each day at 9 a.m. (local time) and continue into the evening until 9 p.m., or later if necessary, depending on the number of speakers wishing to participate. The EPA will make every effort to accommodate all speakers that arrive and register before 9 p.m. The EPA is scheduling lunch breaks from 12:30 until 2 p.m. and dinner breaks from 6 p.m. to 7:30 p.m. If you would like to present oral testimony at the hearings, please notify Ms. Tricia Crabtree, (C504–01) U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, *crabtree.tricia@epa.gov*, (919) 541–5688. She will arrange a general time slot for you to speak. The EPA will make every effort to follow the schedule as closely as possible on the day of the hearings.

Oral testimony will be limited to five (5) minutes for each commenter to address either or both proposals. We will not be providing equipment for commenters to show overhead slides or make computerized slide presentations unless we receive special requests in advance. Commenters should notify Ms. Tricia Crabtree if they will need specific equipment. The EPA encourages commenters to provide written versions of their oral testimonies either electronically on computer disk or CD–ROM or in paper copy.

The hearing schedules, including lists of speakers, will be posted on EPA's Web pages for the proposals at *http://www.epa.gov/air/particlepollution/actions.html* prior to the hearings. Verbatim transcripts of the hearings and written statements will be included in the rulemaking dockets.

How Can I Get Copies of This Document and Other Related Information?

The EPA has established the official public docket for the ''National Ambient Air Quality Standards for Particulate Matter'' under Docket Number EPA–HQ–OAR–2001–0017. The EPA has established the official public docket for the ''Revisions to Ambient Air Monitoring Regulations'' under Docket Number EPA–HQ–OAR–2004–0018. The EPA has also developed Web sites for the two proposals at the addresses given above. Please refer to the two proposals, which were published in the **Federal Register** on January 17, 2006, for detailed information on accessing information related to each of the proposals.

Dated: February 9, 2006.

Jeffrey S. Clark,

Acting Director, Office of Air Quality Planning and Standards.

[FR Doc. 06–1462 Filed 2–15–06; 8:45 am]

BILLING CODE 6560–50–M

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket No. FEMA–D–7642]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency (FEMA), Department of Homeland Security, Mitigation Division.

ACTION: Proposed rule.

SUMMARY: Technical information or comments are requested on the proposed Base (1% annual chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed below. The BFEs are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: The comment period is ninety (90) days following the second publication of this proposed rule in a newspaper of local circulation in each community.

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

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

SUPPLEMENTARY INFORMATION: FEMA proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with Section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed base flood elevations and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, state or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

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

Regulatory Flexibility Act. The Mitigation Division Director certifies that this proposed rule is exempt from the requirements of the Regulatory Flexibility Act because proposed or modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to establish and maintain community eligibility in the NFIP. As a result, a regulatory flexibility analysis has not been prepared.

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

Executive Order 13132, Federalism. This rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, flood insurance, reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

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

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

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

Source of flooding and location	# Depth in feet above ground *Elevation in feet (NGVD) • Elevation in feet (NAVD)		Communities affected
	Existing	Modified	
ARIZONA			
Coconino County			
Peak View Wash:			
At the confluence with Rio de Flag	•7,111	•7,112	City of Flagstaff.
Approximately 120 feet upstream of Lois Lane	•7,121	•7,123	
Schultz Creek:			
At the confluence with Rio de Flag	None	#1	Coconino County.
Approximately 125 feet upstream of North Fort Valley Road.	None	#1	(Unincorporated Areas), City of Flagstaff.
Approximately 125 feet upstream of North Fort Valley Road.	None	•7,006	Coconino County.
Just downstream of North Schultz Pass Road	None	•7,140	(Unincorporated Areas), City of Flagstaff.
Switzer Canyon Wash:			
Approximately 170 feet upstream of U.S. Route 66 (Santa Fe Avenue).	•6,865	•6,869	Coconino County.
Approximately 0.6 mile upstream of West Fir Avenue	•7,029	•7,030	(Unincorporated Areas), City of Flagstaff.
Bow and Arrow Wash:			
Just downstream of Lone Tree Road	•6,879	•6,878	City of Flagstaff.
Approximately 0.3 mile upstream of Lake Mary Road	None	•6,949	
Rio de Flag:			
Approximately 868 feet upstream of Townsend-Winona Road.	None	•6,617	Coconino County.
Approximately 580 feet downstream of Hidden Hollow Road.	•7,147	•7,148	(Unincorporated Areas), City of Flagstaff.

Coconino County (Unincorporated Areas)

Maps available for inspection at the Coconino County Community Development, 2500 North Fort Valley Road, Flagstaff, Arizona.
Send comments to Mr. Bill Towler, Coconino County Community Development Director, 2500 North Fort Valley Road, Flagstaff, Arizona 86001.

City of Flagstaff

Maps available for inspection at the City of Flagstaff Community Development, 211 West Aspen Avenue, Flagstaff, Arizona.

Source of flooding and location	# Depth in feet above ground *Elevation in feet (NGVD) • Elevation in feet (NAVD)		Communities affected
	Existing	Modified	
Send comments to Mr. Malcolm Alter, City of Flagstaff Stormwater Manager, 211 West Aspen Avenue, Flagstaff, Arizona 86001.			
ARIZONA			
Yuma County			
Colorado River:			
At the downstream county boundary	None	•94	Yuma County (Unincorporated Areas), Cities of Yuma and San Luis.
At the upstream county boundary	None	•202	
Yuma County (Unincorporated Areas)			
Maps available for inspection at the Yuma County Community Department of Development Services, 2351 West 26th Street, Yuma, Arizona. Send comments to Ms. Kathryn Prochaska, Chairperson of the Yuma County Board of Supervisors, 198 South Main Street, Yuma Arizona 85364.			
City of Yuma			
Maps available for inspection at the Yuma City Department of Development Services, One City Plaza, Yuma, Arizona. Send comments to The Honorable Lawrence K. Nelson, Mayor of the City of Yuma, P.O. Box 13014, Yuma, Arizona 85366–3014.			
City of San Luis			
Maps available for inspection at the San Luis City Public Works Administration Office, 751 North 4th Avenue, San Luis, Arizona. Send comments to The Honorable Guillermina Fuentes, Mayor of the City of San Luis, 767 North 1st Street, San Luis, Arizona 83459.			
CALIFORNIA			
Marin County			
Corte Madera Creek:			
Approximately 100 feet upstream of Bon Air Road	None	*6	Marin County (Unincorporated Areas), City of Larkspur.
Approximately 0.7 mile downstream of U.S. Highway 101.	None	*6	
City of Larkspur			
Maps available for inspection at the City of Larkspur Building Department, 400 Magnolia Avenue, Larkspur, California. Send comments to Ms. Jean Bonander, Larkspur City Manager, 400 Magnolia Avenue, Larkspur, California 94939.			
Marin County (Unincorporated Areas)			
Maps available for inspection at the Marin County Department of Public Works, Land Development Section, 3501 Civic Center Drive, San Rafael, California. Send comments to Mr. Harold C. Brown, Jr., Chairman of the Marin County Board of Supervisors, 3501 Civic Center Drive, Room 329, San Rafael, California 94903.			
CALIFORNIA			
Ventura County			
Arroyo Santa Rosa:			
At the confluence with Conejo Creek	•232	•234	Unincorporated Areas of Ventura County.
Approximately 0.59 mile upstream of East Las Posas Road.	•381	•379	
Arroyo Santa Rosa Overflow:			
Between Arroyo Santa Rosa and Arroyo Santa Rosa Tributary at East Las Posas Road.	#3	#2	Unincorporated Areas of Ventura County.
Arroyo Santa Rosa Tributary:			
At the confluence with Arroyo Santa Rosa	•257	•253	Unincorporated Areas of Ventura County, City of Thousand Oaks.
Approximately 400 feet upstream of Santa Rosa Road	None	•380	
Calleguas Creek:			
At the downstream side of State Highway 1	None	•23	Unincorporated Areas of Ventura County, City of Camarillo, City of Moorpark, City of Simi Valley.
Approximately 0.96 mile upstream of Collins Drive	•624	•619	
Camarillo Hills Drain:			
Approximately 0.9 mile upstream of the confluence with Revolon Slough.	•63	•62	Unincorporated Areas of Ventura County, City of Camarillo.
Approximately 190 feet downstream of South Las Posas Road.	•90	•91	
Conejo Creek:			
At the confluence with Calleguas Creek	None	•95	Unincorporated Areas of Ventura County, City of Camarillo, City of Thousand Oaks.
Approximately 0.47 mile upstream of the confluence of Arroyo Santa Rosa.	None	•247	

Source of flooding and location	# Depth in feet above ground *Elevation in feet (NGVD) • Elevation in feet (NAVD)		Communities affected
	Existing	Modified	
Gabbert Canyon:			
At the confluence with Calleguas Creek	None	•425	Unincorporated Areas of Ventura County.
At the confluence of Walnut Canyon Drain	None	•451	
Lang Creek:			
At the confluence with Arroyo Conejo	None	•728	City of Thousand Oaks.
Approximately 520 feet upstream of Combes Avenue	None	•772	
Peach Hill Wash:			
At the confluence with Calleguas Creek	•427	•425	Unincorporated Areas of Ventura County, City of Moorpark.
Approximately 1.59 miles upstream of Country Hill Road.	•536	•537	
Somis Drain:			
At the confluence with Calleguas Creek	None	•166	City of Camarillo.
Approximately 100 feet upstream of East Landen Street.	None	•202	
Thousand Oaks North Drain:			
At the confluence with Arroyo Conejo	None	•736	City of Thousand Oaks.
Approximately 800 feet upstream of El Cerrito Drive	None	•889	
Walnut Canyon Drain:			
At the confluence with Gabbert Canyon	None	•451	Unincorporated Areas of Ventura County, City of Moorpark.
Approximately 2,840 feet upstream of Casey Road	None	•645	

City of Camarillo

Maps are available for inspection at the Camarillo City Hall, 601 Carmen Drive, Camarillo, California.
Send comments to The Honorable Kevin Kildee, Mayor of the City of Camarillo, 601 Carmen Drive, Camarillo, California 93010.

City of Moorpark

Maps are available for inspection at the Moorpark City Hall, 799 Moorpark Avenue, Moorpark, California.
Send comments to Mr. Steven Kueny, Moorpark City Manager, 799 Moorpark Avenue, Moorpark, California 93021.

City of Simi Valley

Maps are available for inspection at the Simi Valley City Hall, 2929 Tapo Canyon Road, Simi Valley, California.
Send comments to Mr. Mike Sedell, Simi Valley City Manager, 2929 Tapo Canyon Road, Simi Valley, California 93063.

City of Thousand Oaks

Maps are available for inspection at the City of Thousand Oaks Public Works Department, 2100 Thousand Oaks Boulevard, Thousand Oaks, California.
Send comments to Mr. Scott Mitnick, Thousand Oaks City Manager, 2100 Thousand Oaks Boulevard, Thousand Oaks, California 91362.

Unincorporated Areas of Ventura County

Maps are available for inspection at the Ventura County Hall of Administration, 800 South Victoria Avenue, Ventura, California.
Send comments to Ms. Kathy Long, Chairman of the Ventura County Board of Supervisors, c/o the Clerk of the Board of Supervisors, Ventura, California 93009.

NEW JERSEY			
Ocean County			
Cedar Creek:			
Approximately 0.37 mile downstream of U.S. Route 9	None	•5	Township of Lacey.
Just upstream of the southbound lanes of Garden State Parkway.	None	•19	
Jakes Branch:			
Just upstream of County Route 619	None	•16	Township of Beachwood.
Approximately 0.34 mile upstream of County Route 619.	None	•19	
North Branch Metedeconk River: Approximately 95 feet downstream of State Route 88	None	•9	Township of Brick.
Atlantic Ocean: Approximately 0.31 mile southeast of the intersection of State Route 88 and County Route 604	•7	•10	Borough of Point Pleasant.
North Branch Beaverdam Creek: Entire shoreline	•7	•5	Borough of Point Pleasant.
Barnegat Bay: Entire shoreline	•7	•5	Borough of Point Pleasant.
Bayhead Harbor: Entire shoreline	•7	•5	Borough of Point Pleasant.

Borough of Beachwood

Maps available for inspection at the Beachwood Borough Municipal Building, 1600 Pinewald Road, Beachwood, New Jersey.
Send comments to The Honorable Harold Morris, Mayor of the Borough of Beachwood, 1600 Pinewald Road, Beachwood, New Jersey 08722.

Township of Brick

Maps available for inspection at the Brick Municipal Building, 401 Chambersbridge Road, Brick, New Jersey.

Source of flooding and location	# Depth in feet above ground *Elevation in feet (NGVD) • Elevation in feet (NAVD)		Communities affected
	Existing	Modified	

Send comments to The Honorable Joseph C. Scarpelli, Mayor of the Township of Brick, 401 Chambersbridge Road, Brick, New Jersey 08723.

Township of Lacey

Maps available for inspection at the Lacey Township Municipal Building, 818 Lacey Road, Forked River, New Jersey.
Send comments to Mr. John Adams, Lacey Township Administrator, 818 Lacey Road, Forked River, New Jersey 08731.

Borough of Point Pleasant

Maps available for inspection at the Point Pleasant Borough Municipal Building, 2233 Bridge Avenue, Point Pleasant, New Jersey.
Send comments to The Honorable Martin Konkus, Mayor of the Borough of Point Pleasant, P.O. Box 25, Point Pleasant, New Jersey 08742.

NEW YORK

Cayuga County

Cayuga Lake:			
Entire shoreline within communities	None	•386	Town of Aurelius, Town of Genoa, Town of Ledyard, Town of Springport.
Entire shoreline within community	•387	•386	Village of Cayuga.
Cold Spring Brook (Reach 2):			
Approximately 2,200 feet upstream of State Street	None	•554	City of Auburn, Town of Throop.
Approximately 1,380 feet upstream of York Street	None	•590	
Cold Spring Brook/North Brook:			
At confluence with Seneca River/Erie Canal	None	•383	Town of Brutus, Town of Mentz, Village of Weedsport.
Approximately 4,550 feet upstream of Hamilton Road	None	•420	
Crane Brook:			
Approximately 3,175 feet downstream of Conrail	None	•589	City of Auburn, Town of Aurelius.
Approximately 1,600 feet upstream of Genesee Street	None	•649	
Dry Creek:			
At confluence with Owasco Inlet	•733	•731	Village of Moravia, Town of Moravia.
Approximatelty 1,840 feet upstream of Main Street	None	•773	
Dutch Hollow Brook:			
Approximately 780 feet upstream of confluence with Owasco Lake.	•718	•717	Town of Oswasco.
Approximately 2,480 feet upstream of State Route 38A (East Lake Road).	None	•743	
Hunter Brook:			
Approximately 520 feet downstream of Conrail	None	•644	City of Auburn.
Approximately 1,370 feet upstream of Marvine Avenue	•760	•761	
Approximately 520 feet downstream of Conrail	None	•644	City of Auburn.
Approximately 1,370 feet upstream of Marvine Avenue	•760	•761	
Hunter Brook Tributary 1:			
Approximately 1,960 feet downstream of Grant Avenue	None	•653	City of Auburn.
Approximately 1,135 feet upstream of Prospect Street	•754	•755	
Hunter Brook Tributary 2:			
At confluence with Hunter Brook	•720	•716	City of Auburn, Town of Oswasco.
Approximately 940 feet upstream of Second Avenue	None	•767	
Mill Creek:			
At confluence with Owasco Inlet	•729	•728	Town of Moravia, Village of Moravia.
Approximately 2,650 feet upstream of East Cayuga Street (State Route 38A).	None	•783	
North Brook Tributary 1:			
At the confluence with North Brook	•398	•400	Town of Brutus.
Approximately 580 feet upstream of Hamilton Road	None	•420	
Owasco Inlet:			
Approximately 2,070 feet downstream of State Route 38.	None	•722	Village of Moravia, Town of Moravia, Town of Locke.
Approximately 2.16 miles upstream of Aurora Street	None	•744	
Owasco Lake:			
Entire shoreline within community	None	•717	Town of Fleming, Town of Moravia, Town of Niles, Town of Scipio, Town of Venice.
Owasco Lake Outlet:			
Approximately 4,925 feet upstream of Sperry Road	•384	•385	Town of Mentz, Town of Throop, Village of Port Byron.
Approximately 1,930 feet upstream of Hayden Road	None	•427	
Owasco Outlet:			
Approximately 900 feet downstream of Canoga Street	•551	•553	City of Auburn, Town of Aurelius, Town of Fleming, Town of Oswasco.
Approximately 1,040 feet upstream of State Route 437 (White Bridge Road).	•717	•716	

Source of flooding and location	# Depth in feet above ground *Elevation in feet (NGVD) • Elevation in feet (NAVD)		Communities affected
	Existing	Modified	
Paines Creek:			
Approximately 25 feet downstream of State Route 90 (Main Street).	•386	•387	Village of Aurora, Town of Ledyard.
Approximately 1,000 feet upstream of State Route 90 (Main Street).	None	•389	
Putnam Brook:			
At confluence with Cold Spring Brook	•391	•389	Town of Brutus.
Approximately 2,200 feet upstream of Stevens Road	•573	•571	
At confluence with Cold Spring Brook	•391	•389	Town of Brutus.
Approximately 2,200 feet upstream of Stevens Road	•573	•571	
Putnam Brook Tributary No. 1:			
At confluence with Putnam Brook	•453	•454	Town of Brutus, Town of Sennett.
Approximately 2,710 feet upstream of Shepherd Road	None	•562	
Putnam Brook Tributary No. 2:			
At confluence with Putnam Brook	•483	•485	Town of Brutus.
Approximately 2,340 feet upstream of Brutus Street (upstream crossing).	None	•539	
Putnam Brook Tributary No. 3:			
Approximately 110 feet upstream of confluence with Putnam Brook.	•525	•524	Town of Brutus, Town of Sennett.
Approximately 4,450 feet upstream of Jericho Road	None	•551	
Putnam Brook Tributary No. 4:			
At confluence with Putnam Brook	•566	•568	Town of Brutus, Town of Sennett.
Approximately 1,220 feet upstream of Grant Avenue/ State Highway 5.	None	•580	
Seneca River:			
Approximately 225 feet downstream of Haiti Road	•383	•384	Town of Mentz, Town of Conquest.
Approximately 1.69 miles upstream of Haiti Road	None	•384	
Seneca River/Erie Canal:			
Approximately 80 feet upstream of Jordan Road	•381	•382	Town of Mentz, Town of Brutus, Town of Cato, Town of Conquest, Town of Montezuma.
Approximately 8,960 feet upstream of Conrail	None	•384	
Sucker Brook:			
Approximately 1,010 feet upstream of confluence with Owasco Lake.	•718	•717	Town of Oswasco.
Approximately 2,570 feet upstream of East Lake Road (State Route 38A).	None	•730	
Unnamed Tributary 2 to Cayuga Lake:			
Approximately 65 feet upstream of confluence with Cayuga Lake.	•387	•386	Village of Union Springs, Town of Springport.
Approximately 585 feet upstream of Creager Road	None	•560	

City of Auburn

Maps are available for inspection at the Auburn Memorial City Hall, 24 South Street, Auburn, NY 13021.
Send comments to The Honorable Timothy Lattimore, Mayor of the City of Auburn, 24 South Street, Auburn, NY 13021.

Town of Aurelius

Maps are available for inspection at the Aurelius Town Hall, 1241 West Genesee Street Road, Auburn, NY 13021.
Send comments to Mr. Edward J. Ide, Aurelius Town Supervisor, 1241 West Genesee Street Road, Auburn, NY 13021.

Town of Brutus

Maps are available for inspection at the Brutus Town Clerk's Office, 9021 North Seneca Street, Weedsport, NY 13166.
Send comments to Mr. Jeffery Hinman, Brutus Deputy Town Supervisor, 9021 North Seneca Street, Weedsport, NY 13166.

Town of Cato

Maps are available for inspection at the Cato Town Hall, 11320 Shortcut Road, Cato, NY 13033.
Send comments to Mr. Charles Ray, Cato Town Supervisor, 11320 Shortcut Road, Cato, NY 13033.

Town of Conquest

Maps are available for inspection at the Town of Conquest, 1289 Fuller Road, Port Byron, NY 13140.
Send comments to Mr. Charles Knapp, Conquest Town Supervisor, 1289 Fuller Road, Port Byron, NY 13140.

Town of Fleming

Maps are available for inspection at the Town of Fleming, 2433 Dublin Road, Auburn, NY 13021.
Send comments to Mr. James E. Young, Fleming Town Supervisor, 2433 Dublin Road, Auburn, NY 13021.

Town of Genoa

Maps are available for inspection at the Genoa Town Hall, 1000 Bartnick Road, Genoa, NY 13071.
Send comments to Mr. Stuart Underwood, Genoa Town Supervisor, 1000 Bartnick Road, Genoa, NY 13071.

Town of Ledyard

Maps are available for inspection at the Ledyard Town Hall, 1099 Poplar Ridge Road, Aurora, NY 13026.

Source of flooding and location	# Depth in feet above ground *Elevation in feet (NGVD) • Elevation in feet (NAVD)		Communities affected
	Existing	Modified	

Send comments to Mr. William Dugan, III, Ledyard Town Supervisor, Town Hall, 1099 Poplar Ridge Road, Aurora, NY 13026.

Town of Locke

Maps are available for inspection at the Town of Locke, 703 State Route 38, Locke, NY 13092.
Send comments to Mr. Paul Palmer, Locke Town Supervisor, 703 State Route 38, Locke, NY 13092.

Town of Mentz

Maps are available for inspection at the Town of Mentz, 14 Mentz Drive, Port Byron, NY 13140.
Send comments to Mr. Jack O'Neil, Mentz Town Supervisor, P.O. Box 798, Port Byron, NY 13140.

Town of Montezuma

Maps are available for inspection at the Town of Montezuma Memorial Building, Dock Street, 52, Montezuma, NY 13117.
Send comments to Mr. William Saroodis, Montezuma Town Supervisor, P.O. Box 357, Montezuma, NY 13117.

Town of Moravia

Maps are available for inspection at the Town of Moravia, 139 Main Street, Moravia, NY 13118.
Send comments to Mr. Gary Hatfield, Moravia Town Supervisor, 139 Main Street, Moravia, NY 13118.

Town of Niles

Maps are available for inspection at the Niles Town Hall, 5921 New Hope Road, Moravia, NY 13118.
Send comments to Mr. John R. Dewitt, Niles Town Supervisor, 5921 New Hope Road, Moravia, NY 13118.

Town of Oswasco

Maps are available for inspection at the Oswasco Town Hall, 2 Bristol Avenue, Auburn, NY 13021.
Send comments to Mr. Michael J. O'Leary, Oswasco Town Supervisor, 2 Bristol Avenue, Auburn, NY 13021.

Town of Scipio

Maps are available for inspection at the Town of Scipio, 3705 State Route 34, Scipio Center, NY 13147.
Send comments to Mr. Charles Howell, Scipio Town Supervisor, Route 34, Box 71, Scipio Center, NY 13147.

Town of Sennett

Maps are available for inspection at the Town of Sennett, 6931 Cherry Street Road, Auburn, NY 13021.
Send comments to Mr. David Sikora, Sennett Town Supervisor, 6931 Cherry Street Road, Auburn, NY 13021.

Town of Springport

Maps are available for inspection at the Springport Town Hall, 859 State Route 326, Cayuga, NY 13034.
Send comments to Mr. Robert Bower, Springport Town Supervisor, 859 State Route 326, Cayuga, NY 13034.

Town of Throop

Maps are available for inspection at the Throop Town Hall, 7471 Robinson Road, Auburn, NY 13021.
Send comments to Mr. William Tarby, Throop Town Supervisor, 7471 Robinson Road, Auburn, NY 13021.

Town of Venice

Maps are available for inspection at the Town of Venice, 1589 McAllister Road, Genoa, NY 13071.
Send comments to Mr. John Grover, Venice Town Supervisor, 1589 McAllister Road, Genoa, NY 13071.

Village of Aurora

Maps are available for inspection at the Aurora Village Office, 456 Main Street, Aurora, NY 13026.
Send comments to The Honorable Thomas Gunderson, Mayor of the Village of Aurora, 456 Main Street, Aurora, NY 13026.

Village of Cayuga

Maps are available for inspection at the Village of Cayuga, 6205 Railroad Street, Cayuga, NY 13034.
Send comments to The Honorable Ronald L. Erickson, Mayor of the Village of Cayuga, P.O. Box 313, Cayuga, NY 13034.

Village of Moravia

Maps are available for inspection at the Moravia Village Office, 22 Central Street, Moravia, NY 13118.
Send comments to The Honorable Donald Myers, Mayor of the Village of Moravia, 22 Central Street, Moravia, NY 13118.

Village of Port Byron

Maps are available for inspection at the Port Byron Village Hall, 52 Utica Street, Port Byron, NY 13140.
Send comments to The Honorable Ronald Wilson, Mayor of the Village of Port Byron, P.O. Box 398, Port Byron, NY 13140.

Village of Union Springs

Maps are available for inspection at the Village of Union Springs, 26 Chapel Street, Union Springs, NY 13160.
Send comments to The Honorable Edward Trufant, Mayor of the Village of Union Springs, P.O. Box 99, Union Springs, NY 13160.

Village of Weedsport

Maps are available for inspection at the Weedsport Village Hall, 8892 South Street, Weedsport, NY 13166.
Send comments to The Honorable Jean Faroodis, Mayor of the Village of Weedsport, 8892 South Street, Weedsport, NY 13166.

NORTH CAROLINA

Hoke County

Beaver Creek:			
At the confluence with Black Branch	None	•164	Hoke County (Unincorporated Areas).
Approximately 100 feet downstream of SR 401	None	•239	

Source of flooding and location	# Depth in feet above ground *Elevation in feet (NGVD) • Elevation in feet (NAVD)		Communities affected
	Existing	Modified	
Beaver Creek Tributary:			
At the confluence with Beaver Creek	None	•182	Hoke County (Unincorporated Areas).
Approximately 0.3 mile upstream of Doc Brown Road	None	•238	
Tributary to Beaver Creek Tributary:			
At the confluence with Beaver Creek Tributary	None	•237	Hoke County (Unincorporated Areas).
Approximately 0.3 mile upstream of the confluence with Beaver Creek Tributary.	None	•246	
Big Branch:			
Approximately 100 feet upstream of the confluence with Rockfish Creek.	None	•128	Hoke County (Unincorporated Areas).
At the Hoke/Robeson County boundary	None	•144	
Black Branch:			
At the confluence with Puppy Creek	None	•146	Hoke County (Unincorporated Areas)
Approximately 0.6 mile upstream of Saddlebred Lane	None	•192	
Deep Creek:			
At the confluence with Mill Creek	None	•189	Hoke County (Unincorporated Areas)
Approximately 2.9 miles upstream of the confluence of Mill Creek (into Deep Creek).	None	•266	
Flat Creek:			
At the confluence with Little River	None	•195	Hoke County (Unincorporated Areas)
Approximately 1.3 miles upstream of the confluence of Flat Creek Tributary.	None	•266	
Flat Creek Tributary:			
At the confluence with Flat Creek	None	•239	Hoke County (Unincorporated Areas)
Approximately 0.8 mile upstream of the confluence with Flat Creek.	None	•268	
Gully Branch:			
Approximately 250 feet upstream of the confluence with Rockfish Creek.	None	•128	Hoke County (Unincorporated Areas)
Approximately 0.4 mile upstream of Overlake Drive	None	197	
Horse Creek:			
At the confluence with Little River	None	•204	Hoke County (Unincorporated Areas)
Approximately 1.3 miles upstream of the confluence with Little River.	None	•231	
James Creek:			
At the confluence with Little River	None	•210	Hoke County (Unincorporated Areas)
At the Hoke/Moore County boundary	None	•300	
James Creek Tributary:			
At the confluence with James Creek	None	•211	Hoke County (Unincorporated Areas)
Approximately 0.9 mile upstream of the confluence with James Creek.	None	•241	
Jumping Run Creek:			
At the confluence with Little River	None	•182	Hoke County (Unincorporated Areas)
Approximately 2.1 miles upstream of the confluence with Little River.	None	•226	
Little River:			
At the Hoke/Cumberland County boundary	None	•178	Hoke County (Unincorporated Areas)
At the Hoke/Moore County boundary	None	•209	
Little Rockfish Creek:			
At the Hoke/Cumberland boundary	None	•172	Hoke County (Unincorporated Areas)
Approximately 500 feet downstream of Plank Road	None	• 182	
Little Rockfish Creek Tributary 1:			
At the confluence with Little Rockfish Creek	None	•180	Hoke County (Unincorporated Areas)
Approximately 0.2 mile upstream of Plank Road	None	211	
Mill Creek (into Deep Creek):			
At the confluence with Deep Creek	None	•199	Hoke County (Unincorporated Areas)
Approximately 1.4 miles upstream of the confluence with Deep Creek.	None	•240	
Mill Creek (into Rockfish Creek):			
Approximately 200 feet upstream of the confluence with Rockfish Creek.	None	•203	Hoke County (Unincorporated Areas)
Approximately 2.1 miles upstream of the confluence with Rockfish Creek.	None	•249	
Mill Creek Tributary (into Rockfish Creek):			
At the confluence with Mill Creek (into Rockfish Creek)	None	•248	Hoke County (Unincorporated Areas)
Approximately 0.1 mile upstream of the confluence of Mill Creek (into Rockfish Creek).	None	•260	

Source of flooding and location	# Depth in feet above ground *Elevation in feet (NGVD) • Elevation in feet (NAVD)		Communities affected
	Existing	Modified	
Mill Creek Tributary (Hoke):			
At the confluence with Mill Creek (Hoke)	None	•165	Hoke County (Unincorporated Areas)
Approximately 0.7 mile upstream of the confluence with Mill Creek (Hoke).	None	•189	
Mill Creek (Hoke):			
Approximately 350 feet upstream of the confluence of Rockfish Creek.	None	•130	Hoke County (Unincorporated Areas)
Approximately 0.8 mile upstream of Chason Road	None	•178	
Nicholsons Creek:			
Approximately 300 feet upstream of the confluence with Rockfish Creek.	None	•189	Hoke County (Unincorporated Areas)
Approximately 4.0 miles upstream of the confluence with Mott Lake.	None	•310	
Pedler Branch:			
Approximately 2,200 feet upstream of the confluence with Rockfish Creek.	None	•178	Hoke County (Unincorporated Areas), City of Raeford
At South Main Street	None	•226	
Pedler Branch Tributary:			
At the confluence with Pedler Branch	None	•215	Hoke County (Unincorporated Areas), City of Raeford
Approximately 350 feet upstream of the railroad	None	•228	
Silver Run:			
At the confluence with James Creek	None	•283	Hoke County (Unincorporated Areas)
Approximately 2,100 feet from the confluence with Jones Creek.	None	•292	
Stewarts Creek:			
Approximately 700 feet upstream of the confluence with Rockfish Creek.	None	•122	Hoke County (Unincorporated Areas)
Approximately 1.2 miles upstream of Lindsay Road	None	•241	
Stewarts Creek Tributary:			
At the confluence with Stewarts Creek	None	•199	Hoke County (Unincorporated Areas)
Approximately 1.1 miles upstream of Lindsay Road	None	•235	
Tuckahoe Creek:			
At the confluence with James Creek	None	•233	Hoke County (Unincorporated Areas)
Approximately 0.3 mile upstream of the confluence of Tuckahoe Creek.	None	•289	
Tuckahoe Creek Tributary:			
At the confluence with Tuckahoe Creek	None	•277	Hoke County (Unincorporated Areas).
Approximately 0.5 mile upstream of the confluence with Tuckahoe Creek Tributary.	None	•291	

Hoke County (Unincorporated Areas)

Maps available for inspection at the Hoke County Permitting Office, 227 North Main Street, Raeford, North Carolina.
Send comments to Mr. Michael Wood, Hoke County Manager, P.O. Box 210, Raeford, North Carolina 28376.

City of Raeford

Maps available for inspection at the Raeford City Hall, Planning Department, 315 North Main Street, Raeford, North Carolina.
Send comments to The Honorable John K. McNeill, III, Mayor of the City of Raeford, 315 North Main Street, Raeford, North Carolina 28376.

WEST VIRGINIA

Raleigh County

Breckenridge Creek:			
Approximately 90 feet upstream of the confluence with Marsh Fork.	None	•1,762	Raleigh County (Unincorporated Areas).
Approximately 0.2 mile upstream of State Route 99	None	•1,991	
Clear Fork:			
Approximately 0.4 mile upstream of Clear Fork Road	None	•1,126	Raleigh County (Unincorporated Areas).
Approximately 250 feet upstream of CR 119	None	•1,602	
Crab Orchard Creek:			
Approximately 100 feet upstream of the confluence with Piney Creek.	•2,232	•2,231	Raleigh County (Unincorporated Areas).
Approximately 0.4 mile upstream of Route 54/24	None	•2,320	
Cranberry Creek:			
At the confluence of Piney Creek	None	•1,679	Raleigh County (Unincorporated Areas), City of Beckley.
Approximately 2.3 miles upstream of the upstream side of Stanford Road.	None	•2,311	

Source of flooding and location	# Depth in feet above ground *Elevation in feet (NGVD) • Elevation in feet (NAVD)		Communities affected
	Existing	Modified	
North Sand Branch:			
Approximately 40 feet upstream of the confluence with Sand Branch.	•1,768	•1,767	Raleigh County (Unincorporated Areas).
Approximately 3.9 miles upstream of the confluence with Sand Branch.	None	•2,281	
Sycamore Creek:			
At the confluence with Clear Fork	None	•1,020	Raleigh County (Unincorporated Areas).
Approximately 2.2 miles upstream of the confluence with Clear Fork.	None	•1,230	
Tributary 1 to Breckenridge Creek:			
At the confluence with Breckenridge Creek	None	•1,973	Raleigh County (Unincorporated Areas).
Approximately 0.4 mile upstream of the confluence with Breckenridge Creek.	None	•1,990	
Tributary 2 to Breckenridge Creek:			
At the confluence with Breckenridge Creek	None	•1,976	Raleigh County (Unincorporated Areas).
Approximately 700 feet upstream of the confluence with Breckenridge Creek.	None	•1,983	
Tributary 3 to Breckenridge Creek:			
At the confluence with Breckenridge Creek	None	•1,981	Raleigh County (Unincorporated Areas).
Approximately 1,000 feet upstream of the confluence with Breckenridge Creek.	None	•1,987	
White Oak Creek:			
Approximately 650 feet upstream of the confluence with Clear Fork.	None	•1,336	Raleigh County (Unincorporated Areas).
Approximately 3.3 miles upstream of the confluence with Clear Fork.	None	•1,827	

City of Beckley

Maps available for inspection at the Beckley City Municipal Building, 409 South Kanawha Street, Beckley, West Virginia.
Send comments to The Honorable Emmett S. Pugh, III, Mayor of the City of Beckley, P.O. Box 2514, Beckley, West Virginia 25802.

Raleigh County (Unincorporated Areas)

Maps available for inspection at the Raleigh County Commission Building, 16 1/2 North Herber Street, Beckley, West Virginia.
Send comments to Mr. John Aliff, Raleigh County Commission President, 215 Main Street, P.O. Drawer AN, Beckley, West Virginia 25802.

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

Dated: February 3, 2006.

David I. Maurstad,

Acting Director, Mitigation Division, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. E6–2259 Filed 2–15–06; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AF21

Endangered and Threatened Wildlife and Plants; Removing the Bald Eagle in the Lower 48 States From the List of Endangered and Threatened Wildlife

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of public comment period with new information.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the public comment period for the proposal to remove the bald eagle (*Haliaeetus leucocephalus*) from the List of Endangered and Threatened Wildlife in the lower 48 States of the United States, under the Endangered Species Act of 1973 (ESA), as amended. The proposed delisting rule for the bald eagle was published on July 6, 1999 (64 FR 36454). Comments previously submitted on the July 6, 1999, proposed rule need not be resubmitted as they have been incorporated into the public record as part of this reopening of the comment period, and they will be fully considered in the preparation of the final rule. In reopening the comment period, we provide new information, respond to the comments we received in the proposed rule, and further clarify our reasons for proposing to delist the species.

The best available scientific and commercial data available indicates that the bald eagle has recovered. The bald eagle population in the lower 48 States has increased from approximately 487 active nests in 1963, to an estimated minimum 7,066 breeding pairs today. The recovery of the bald eagle is due in part to habitat protection and management actions, and the reduction in levels of persistent organochlorine pesticides (such as DDT) occurring in the environment. This rule will not affect protection provided to the species under the Bald and Golden Eagle Protection Act (BGEPA) or the Migratory Bird Treaty Act (MBTA).

In addition, the Bald and Golden Eagle Protection Act will continue to provide protection to the bald eagle, if delisting under the ESA is found to be warranted. To help clarify the BGEPA protections provided to the bald eagle, the Service is also soliciting public comments on two related draft bald eagle documents under the BGEPA that are being published simultaneously with this proposed delisting rule. First,

we are publishing a notice of availability and request for public comments on draft National Bald Eagle Management Guidelines (Guidelines). The Guidelines provide guidance on how to comply with the requirements of the BGEPA by avoiding disturbance to bald eagles under different land use scenarios. Second, we are publishing a proposed rule to add the definition of ''disturb'' to our regulations at 50 CFR 22.3, which implement the BGEPA. These two documents are published separately in this part of today's **Federal Register** and include additional information about submitting comments on them.

DATES: We must receive comments by May 17, 2006 in order to ensure their consideration in our final decision. Any comments that we receive after the closing date may not be considered in the final decision on this proposal.

ADDRESSES: You may submit comments and other information, identified by RIN 1018–AF21, by any of the following methods:

- Mail: Michelle Morgan, Chief, Branch of Recovery and Delisting, Endangered Species Program, U.S. Fish and Wildlife Service, Headquarters Office, 4401 N. Fairfax Drive, Room 420, Arlington, Virginia 22203. Attn: RIN 1018–AF21.
- Hand Delivery/Courier: Same address as above.
- E-mail: *baldeagledelisting@fws.gov.* Include ''RIN 1018-AF21'' in the subject line of the message.
- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and Regulatory Identification Number (RIN) for this rulemaking. For detailed instructions on submitting comments, file format and other information about electronic filing, and additional information on the rulemaking process, see the ''Public Comments Solicited'' heading of the **SUPPLEMENTARY INFORMATION** section of this document. In the event that our Internet connection is not functional, please submit your comments by the alternate methods mentioned above.

Comments and materials received for this rule will be available for public inspection, by appointment, during normal business hours at the above address after the close of the comment period. Call (703) 358–2061 to make arrangements.

FOR FURTHER INFORMATION CONTACT: Mary Klee, Biologist, at the Headquarters Office (see **ADDRESSES** section), or via e-mail at *Mary_Klee@fws.gov*; telephone (703) 358–2061.

Additional information is also available on our World Wide Web site at *http://www.fws.gov/migratorybirds/BaldEagle.htm.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 1–800–877–8339 for TTY assistance, 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION:

Background

Note: Unless otherwise noted with specific citations, the following life history information is derived from our five recovery plans for the bald eagle and from Gerrard and Bortolotti (1988) (see References).

Current data indicate that the bald eagle in the lower 48 States has recovered. The bald eagle population in the lower 48 States has increased from approximately 487 active nests in 1963 to an estimated minimum 7,066 breeding pairs today. The recovery of the bald eagle is due in part to habitat protection and management actions, and the reduction in levels of persistent organochlorine pesticides (such as DDT) occurring in the environment.

The bald eagle is well known as our Nation's symbol. Its appearance is distinguished in adult birds by its white head and tail contrasting against its dark brown body. Its Latin name, *Haliaeetus leucocephalus*, literally means sea eagle with a white head. The bald eagle is the only species of sea eagle native to North America, and was first described in 1766 as *Falco leucocephalus* by Linnaeus. This South Carolina specimen was later renamed as the southern bald eagle, subspecies *Haliaeetus leucocephalus leucocephalus* (Linnaeus) when Townsend identified the northern bald eagle as *Haliaeetus leucocephalus alascanus* in 1897 (Peters 1979). By the time the bald eagle was listed throughout the lower 48 States under the ESA, subspecies of the bald eagle were no longer recognized by ornithologists (American Ornithologists Union 1983).

The bald eagle is a bird of aquatic ecosystems, frequenting large lakes, rivers, estuaries, reservoirs and some coastal habitats. It feeds primarily on fish, but waterfowl, gulls, cormorants, and a variety of carrion may also be consumed. Adult birds are brown with a white head and tail, while the sub-adult's plumage varies. Female bald eagles usually weigh 10 to 14 pounds and are larger than the males, which usually weigh 8 to 10 pounds.

Bald eagles usually nest in trees near water, but may use cliffs in the southwest United States, and ground nests have been reported from Alaska. Nests are usually built in large trees along shorelines, but may be up to one-half mile or more from the shoreline. The nest is often 4 to 6 feet wide, and after years of use, may weigh 1,000 pounds. Adults use the same breeding territory, and often the same nest, year after year. They may also use one or more alternate nests within their breeding territory.

Bald eagles are relatively long lived. The longest living bald eagle known in the wild was reported near Haines, Alaska, as 28 years old (Schempf 1997). It is thought that bald eagles may live even longer in captivity. It is presumed that bald eagles mate for life, though if a member of a pair is lost, the survivor will find another partner. Courtship begins about a month prior to egg-laying, with eagles in southern latitudes beginning as early as September, and the northern latitudes, as late as May. The nesting season is approximately 6 months. Eggs are incubated for approximately 35 days, and fledging takes place at 11 to 12 weeks old. Parental care may extend 4 to 11 weeks after fledging (Wood, Collopy, and Sekerak 1998). Between fledging and adulthood, the bald eagle's plumage changes from solid dark brown as fledglings to include the distinctive white head and tail as mature adults at age 4 to 5. The timing and distance of dispersal from the breeding territory varies. Some bald eagles stay in the general vicinity while some migrate up to hundreds of miles to their wintering grounds and remain there for several months. Young eagles may wander randomly for years before returning to nest in their natal areas. In Arizona, most bald eagles return to within 124 miles of their natal areas to breed (Terry Johnson, pers. comm.).

Eagles seek wintering (non-nesting) areas offering an abundant and readily available food supply with suitable night roosts. Night roosts typically offer isolation and thermal protection from winds. Northern bald eagles winter in areas such as the Upper Mississippi River and Great Lakes area. For mid-continent bald eagles, wintering grounds include the southern States. Southern bald eagles nest during the winter months, and may utilize foraging areas of Chesapeake Bay and Yellowstone National Park during the summer.

The first major decline in the bald eagle population probably began in the mid to late 1800s. Widespread shooting for feathers and trophies led to extirpation of eagles in some areas. Shooting also reduced part of the bald

eagle's prey base. Waterfowl, shorebirds, and small mammals were also reduced in numbers. Carrion treated with strychnine, thallium sulfate, and other poisons was used as bait to kill livestock predators and ultimately killed many eagles as well. These were the major factors, in addition to loss of nesting habitat from forest clearing and development, which contributed to a reduction in bald eagle numbers through the 1940s.

In the late 1940s, shortly after World War II, the use of dichloro-diphenyl-trichloroethane (DDT) and other organochlorine pesticide compounds became widespread. Initially, DDT was sprayed extensively along coastal and other wetland areas to control mosquitoes (Carson 1962). Later, it was widely used as a general crop insecticide. Dichlorophenyl-dichloroethylene (DDE), the principal metabolic breakdown product of DDT, devastated eagle productivity from the 1950s through the mid-1970s. DDE accumulated in the fatty tissue of adult female bald eagles, and impaired calcium metabolism necessary for normal eggshell formation, causing eggshell thinning. Many eggs broke during incubation, while others suffered embryonic mortality resulting in massive reproductive failure.

Breeding and productivity surveys have been conducted annually on a State-by-State basis since the early 1970s. Data collection methods vary, but generally include surveys by aircraft or ground observations each year during the breeding season to determine the number of occupied breeding areas; a second survey is conducted just before fledging to count the number of young produced at the site. Surveys continue to be conducted by the Service and cooperators, primarily the States and the U.S. Forest Service. However, recently some States have discontinued annual surveys. The last rangewide survey was conducted in 2000. Since that time, more than half of the States have updated their bald eagle population figures. Of the 48 States in which the bald eagle is listed, 30 States completed surveys in 2003, 5 States completed the last survey in 2002, and 9 States completed the last survey in 2001.

Previous Federal Actions

The Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703–712) was passed in 1918. It implements various treaties and conventions between the U.S. and Canada, Japan, Mexico, and the former Soviet Union for the protection of migratory birds. Under the MBTA, taking, killing, or possessing migratory birds is unlawful. Unless permitted by regulations, the MBTA provides that it is unlawful to pursue, hunt, take, capture, or kill; attempt to take, capture or kill; possess, offer to or sell, barter, purchase, deliver or cause to be shipped, exported, imported, transported, carried or received any migratory bird, part, nest, egg or product, manufactured or not.

The Bald Eagle Protection Act (16 U.S.C. 668–668d) was passed in 1940, specifically protecting bald eagles in the United States. A 1962 amendment to this Act included the golden eagle in this protection, and the amended statute became known as the Bald and Golden Eagle Protection Act (BGEPA). The golden eagle was given protected status because of population declines, value to agriculture in the control of rodents, and to afford greater protections to bald eagles because of the similarity of appearance to juvenile bald eagles. This law prohibits the take, possession, sale, purchase, barter, or offering to sell, purchase or barter, transport, export or import, of any bald eagle, alive or dead, including any part, nest, or egg, unless allowed by permit (16 U.S.C. 668(a)). ''Take'' includes pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest, or disturb (16 U.S.C. 668c; 50 CFR 22.3).

On March 11, 1967 (32 FR 4001), the Secretary of the Interior listed bald eagles south of 40 degrees north latitude as endangered under the Endangered Species Preservation Act of 1966 (Pub. L. 89–699, 80 Stat. 926) due to a population decline caused by DDT and other factors. Bald eagles north of this line were not included in that action because the northern populations had not experienced the same threats and population declines and, therefore, were not considered endangered in 1967.

On December 31, 1972, the U.S. Environmental Protection Agency canceled and suspended registration of DDT in the United States. The following year the Endangered Species Act of 1973 (16 U.S.C. 1531–1544) was passed. Among the purposes of the ESA are ''* * * to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, and to provide a program for the conservation of such endangered and threatened species''. 16 U.S.C. *Id.* At 1531(b). The ESA contains provisions for listing, protection, and recovery of imperiled species. An endangered species is defined under the ESA as a species that is in danger of extinction throughout all or a significant portion of its range. A threatened species is defined as any species that is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. The ESA and its implementing regulations prohibit the unauthorized take of any listed species. Take is defined as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt any of these acts. The ESA also prohibits shipment in interstate commerce in the course of commercial activity or sale or offer for sale in interstate or foreign commerce.

In 1978, the Service listed the bald eagle as endangered under the ESA in 43 of the contiguous States, and threatened in the States of Michigan, Minnesota, Wisconsin, Oregon, and Washington (43 FR 6233, February 14, 1978). Sub-specific designations for northern and southern eagles were removed.

The protection available under the ESA and the banning of DDT and other harmful chemicals resulted in significant increases in the breeding population of bald eagles throughout the lower 48 States. In response to the increasing population, we published an advanced notice of a proposed rule on February 7, 1990, (55 FR 4209) to reclassify the bald eagle from endangered to threatened in the remaining 43 States where it had been listed as endangered and retained threatened status for the other 5 States. On July 12, 1994, we published a proposed rule to accomplish this reclassification (59 FR 35584), and the final rule was published on July 12, 1995, (60 FR 36000). Populations of bald eagles have continued to increase, and on July 6, 1999, we published a proposed rule to delist the bald eagle throughout the lower 48 States due to recovery (64 FR 36454).

Bald Eagle Recovery

Section 4(f) of the ESA directs us to develop and implement recovery plans for listed species. In some cases, we appoint experts to recovery teams to assist in the preparation of recovery plans. To facilitate the recovery of the bald eagle, we divided the lower 48 States into five recovery regions (Table 1). Separate recovery teams composed of experts in each geographic area prepared recovery plans for their region. The teams established recovery objectives and criteria and identified tasks to achieve those objectives. Coordination meetings were held regularly among the five teams to exchange data and discuss progress towards recovery.

TABLE 1.—THE FIVE BALD EAGLE RECOVERY REGIONS AND DATES OF APPROVED RECOVERY PLANS

Recovery region	Date of recovery plan	States
Chesapeake Bay	1982, rev. 1990	Delaware, Maryland, the southern two-thirds of New Jersey, the eastern half of Pennsylvania, Virginia east of the Blue Ridge Mountains, and the ''panhandle'' of West Virginia.
Pacific	1986	California, Idaho, Montana, Nevada, Oregon, Washington, and Wyoming.
Southeastern	1984, rev. 1989	Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Eastern Texas.
Southwestern	1982	Arizona, the area of California bordering the Lower Colorado River, New Mexico, and Oklahoma and Texas west of the 100th meridian.
Northern States	1983	All remaining 24 States or parts thereof.

Recovery Accomplishments

The Service and other Federal, State, tribal, and local cooperators from across the Nation have funded and carried out many of the tasks described within the recovery plans. Annual expenditures for the recovery and protection of the bald eagle by public and private agencies have exceeded $1 million each year for the past decade (Service records). State fish and wildlife agencies have played a vital role in restoring bald eagles to areas from which they were extirpated or in which their numbers were greatly reduced. These activities include conducting annual surveys of breeding and productivity, purchasing lands for the protection of bald eagle habitat, reintroduction and habitat management programs, and public outreach.

A partial survey conducted by the National Audubon Society in 1963 reported on 417 active nests in the lower 48 States, with an average of 0.59 young produced per nest. Surveys we coordinated in 1974 resulted in a population estimate of 791 occupied breeding areas for the lower 48 States.

Since the early 1980s, breeding and productivity surveys were conducted annually on a State-by-State basis. Data collection methods vary somewhat from State to State but generally include surveys by aircraft or visits to the site each year during the breeding season to determine the number of occupied breeding areas, and a second survey just before fledging to count the number of young produced at the site. Some States conduct the survey themselves with agency personnel, others collate data from partners (including cooperating agencies), while some data is collected by personal interviews with reliable sources. Though the data collection methods may vary, most States agree that the data provided to us represent a minimum number of known, occupied breeding areas. The last National bald eagle census was recorded in 2000. Since then, a number of States have collected bald eagle data every other year or every few years.

Since the development and implementation of the five recovery plans, the bald eagle's population growth has exceeded most of the goals established in the various recovery plans. In 1994, our cooperators reported about 4,450 nesting pairs with an estimated average young of 1.16 young per nest. Compared to the survey conducted in 1974, the number of nesting pairs in 1994 in the lower 48 had increased by 462 percent.

Based on the improvements through 1994, including a significant increase in numbers of nesting pairs, increased productivity, and expanded distribution, we reclassified the bald eagle in 1995 from endangered to threatened (60 FR 36000, July 12, 1995). In 1999, we proposed the bald eagle for delisting due to recovery (64 FR 36454, July 6, 1999).

Recovery continues to progress at an impressive rate. Between 1989 and 1999, the bald eagle's nesting population increased at a rate of 8 percent per year. In 2000, the last year a National census was conducted, there were an estimated 6,471 nesting pairs of bald eagles.

Approximately 60 percent of the lower 48 States have reported nesting pair numbers for 2003, totaling 4,044 nesting pairs. We estimate a current bald eagle nesting population in the lower 48 States to be a minimum of 7,066 nesting pairs, using the numbers last reported from the States. Of the 48 States in which the bald eagle is listed, 30 States completed surveys in 2003, 5 States completed the last survey in 2002, and 9 States completed the last survey in 2001. This population estimate may be conservative given that several States that support large bald eagle populations have not continued annual monitoring. Therefore, based on the 2000 census data, the current national bald eagle population is likely larger than the numbers available to the Service.

The bald eagle has successfully recovered throughout its range. In 1984, 13 of the lower 48 States had no nesting pairs of bald eagles, and 73 percent of the nesting pairs were located within only six States: Florida, Wisconsin, Michigan, Minnesota, Washington, and Oregon. By 1996, all but two States supported nesting pairs. By 2000, these six States had a reduced share of 59 percent of all nesting pairs, due to increased nesting in other States. In 2000, there were an estimated 6,471 occupied breeding areas.

In order to maintain a stable population of bald eagles, a minimum productivity of 0.7 young per nesting pair per year is necessary (Sprunt, *et al.* 1973). With a national average productivity of at least one fledgling per nesting pair per year between 1990 and 2000, the bald eagle population has increased and continues to maintain a healthy reproductive rate.

Recovery within the individual recovery regions has also been successful. Recovery plans and objectives were designed to guide and measure recovery efforts. They are intended to provide targets rather than absolute numeric criteria. We discuss bald eagle recovery goals for the five regions and how these goals have been attained below.

Regional Recovery Status

The following is a comparison of the status of the bald eagle in each of the five recovery regions against specific objectives in each of the five recovery plans:

Chesapeake Recovery Region

Delisting Goals: Sustain a nesting population of 300–400 pairs with average productivity of 1.1 young per nest over 5 years, and permanently protect enough habitat to support this nesting population and enough roosting and foraging habitat to support population levels commensurate with increases throughout the Atlantic Coastal area. Habitat protection will be accomplished through landowner cooperation, land easements and acquisition, incentive programs, and a continuing effort to pursue broad-based

shoreline protection through State legislation and policy initiatives.

Achievements: The numeric recovery goals were met in 1992, when the number of nesting pairs exceeded 300 nesting pairs, and the population has continued to increase, with over 800 nesting pairs reported in 2003. The average productivity of 1.1 young per nest over 5 years has been met, with the average between 1998 and 2003 being 1.19 young per nest. The objective of permanently protecting enough habitat to sustain these population numbers is close to being achieved. Habitat has been protected for approximately 200 nesting pairs. These protected lands include, but are not limited to, National Wildlife Refuges, State management areas, National Park Service lands, and conservation easements. Since 1990, occupied breeding areas for the bald eagle have more than doubled in this region, indicating that habitat has not been a limiting factor and that potential nesting habitat is still available for an increasing population of bald eagles, despite land development pressures.

Approximately 75 percent of the nest sites in the Chesapeake Bay area are on private lands. Habitat protection continues to proceed. For instance, the State of Maryland, where 40 percent of the nesting pairs occur, has established the Chesapeake Bay Critical Area Program. This program regulates development and timber harvest operations within 1,000 feet of the Chesapeake Bay and its tidal tributaries in Maryland. Approximately 70 to 80 percent of all eagle nests in Maryland are within the Critical Area. Much of the forested areas within the Critical Area will be conserved (Therres, 4/19/04 in litt), which will likely contribute to the ability to meet the habitat preservation goal established in the recovery plan.

Northern States Recovery Region

Delisting Goals: By the year 2000, establish 1,200 occupied breeding areas distributed over a minimum of 16 States with an average annual productivity of 1.0 young per occupied nest.

Achievements: The delisting goal was achieved in 1991, with 1,349 occupied breeding areas distributed over 20 States. Since 1991, average productivity was estimated to be greater than 1.0. In 2000, the Northern States Recovery Region had an estimated 2,559 occupied breeding areas. When the recovery plan was approved in 1983, nesting bald eagles were considered extirpated in Connecticut, Indiana, Kansas, Massachusetts, New Hampshire, Nebraska, and Utah, and there was no evidence that the species ever had nested in Vermont or Rhode Island. As of 2003, only Vermont remains without a nesting pair of bald eagles, with some of the aforementioned States having more than 25 active eagle nests.

Pacific Recovery Region

Delisting Goals: A minimum of 800 nesting pairs with an average annual productivity of 1.0 fledged young per occupied breeding area, and an average success rate for occupied breeding areas of not less than 65 percent over a 5-year period. Additionally, breeding population goals should be met in at least 80 percent of 30 management zones, and wintering populations should be stable or increasing.

Achievements: The recovery goals have been met, with the numeric delisting objectives having been met since 1995. According to the Pacific Bald Eagle Recovery Plan, the estimated number of nesting pairs for the entire recovery unit in 1985 was 527. However, between 1985 and 2001 the number of nesting pairs of bald eagles for this recovery unit more than tripled, totaling 1,627 nesting pairs. The number of nesting pairs exceeded the recovery goal of 800 in 1990, and has continued to increase. Productivity has averaged approximately 1.0 young per nesting pair since 1990. In 1998, six of the seven Pacific Region States reported an average success rate of 75 percent. Distribution of nesting pairs among management zones was achieved in 1999, with the Olympic Peninsula and Central California Coast meeting their recovery goals. The Pacific Recovery Plan identifies 47 management zones with recovery goals identified for 37 of the zones. As of 1999, 30 of the 37 targeted management zones had met their goals, or 81 percent of the zones. Of the 30 zones where target levels have been met, at least 11 have more than doubled the established objective. At least three zones where no targets were set have one or more nesting pairs of bald eagles.

Data indicate that the objective of stable to increasing trends in wintering populations of bald eagles has been attained on the average for the recovery region. Wintering populations have been tracked in the Pacific and many other States using the mid-winter bald eagle surveys. Wintering populations are difficult to assess because bald eagle concentrations depend upon weather and food supply and consequently will vary from year to year. With these constraints, the information suggests that Washington, Oregon, Idaho, and California have experienced an increasing trend in wintering populations of 1.5 to 4.5 percent, while Nevada and Montana report a decline of about 2.5 percent for 1986–2000. As of 2002, the Pacific Coast Region's counts increased at 1.6 percent per year, and the Great Basin counts increased 1.3 percent per year (K. Steenhof, pers. comm.).

Southeastern Recovery Region

Delisting Goals: The original recovery plan stated that delisting would be considered if the recovery trend continues for 5 years after reclassification goals are met, and the criteria for delisting would be developed when the species is reclassified from endangered to threatened. After reclassifying the species to threatened in 1995, the Southeastern States Bald Eagle Recovery Team reconvened to consider criteria for delisting. The current recommendations of the recovery team are to achieve 1,500 occupied breeding areas over the most recent 3-year period, with average productivity of 0.9 young per occupied breeding area over the same 3-year period, and have 8 of 11 States meet their nesting and productivity goals.

Achievements: The delisting goal of 1,500 occupied breeding areas over the most recent 3-year period has been met, with over 1,700 pairs counted in 2000. Production between 1997 and 2000 averaged 1.24 young per occupied territory, thus exceeding the 0.9 goal for the last surveyed consecutive 3-year period. Individual population goals for all 11 States were first attained in 2000, and the population levels have continued to increase.

Southwestern Recovery Region

Delisting Goals: Although the 1982 recovery plan does not have delisting goals for the Southwestern Recovery Region, it does outline goals for reclassifying the bald eagle from endangered to threatened. The recovery plan states that when the reproductive effort has been effectively doubled to 10–12 young per year over a 5-year period, and the population range has expanded to include one or more river drainages in addition to the Salt and Verde River Systems, the southwestern bald eagle should be reclassified to threatened. The 1982 recovery plan indicated that Arizona was the only State in the recovery region containing nesting bald eagles, with 42 unverified historic nesting territories in the State, 12 occupied territories in the Salt and Verde River Systems, and 1 occupied territory along the Colorado River.

Achievements: The goal established in the recovery plan has been exceeded. In 2003, 46 occupied breeding areas were reported in New Mexico and Arizona alone. In 2004, the State of Arizona had

41 occupied breeding areas, and productivity was estimated at 0.75 young per occupied breeding area (Terry Johnson, pers. comm.). The number of occupied breeding areas has more than doubled in the past 15 years.

The information from the five recovery regions demonstrates that bald eagle numbers have greatly increased and productivity has substantially improved during the past two decades. The increases have continued throughout the species' range since publication of the original July 6, 1999, proposed delisting rule and several States, notably Wisconsin and Minnesota have changed the status to a species of special concern. Currently the Service estimates that more than 7,066 occupied breeding areas occur in the lower 48 States.

Summary of Comments on the July 6, 1999, Proposed Delisting Rule

In the July 6, 1999, proposed delisting rule (64 FR 36454), we requested that all interested parties provide information and comments on the proposal to delist the bald eagle. Announcements of the proposed rule were sent to Federal, State, and local officials, Federal and State agencies, tribes, interested private citizens, and local newspapers and radio stations. We held public hearings in Nashville, Tennessee, on September 13, 1999; in Yorktown, Virginia, on September 21, 1999, and in Phoenix, Arizona, on September 23, 1999.

We considered all comments provided in writing, received through our Web site, and presented orally at the public hearings. The public hearings were attended by a total of 137 people, who provided 47 oral comments. Among those submitting comments were 12 Federal agencies, 22 State resource agencies, 41 conservation organizations, 10 academic institutions, and 213 private citizens. By recovery region, 132 comments were received from the Southwest Region, 79 from the Chesapeake Bay Region, 35 from the Southeastern Region, 28 from the Pacific Region, and 22 from the Northern States Region.

In addition, five bald eagle experts from the Raptor Research Foundation, Inc. volunteered to provide scientific review of the proposal to delist the bald eagle and they submitted comments during the public review period. The Raptor Research Foundation, Inc. is an organization representing approximately 1,200 professional raptor biologists and scientists throughout the world.

We address both the comments of the Raptor Research Foundation's five bald eagle experts along with other comments received during the public comment period under the respective issues below:

Issue 1: Habitat protection for the bald eagle will be reduced once it is removed from the List of Endangered and Threatened Wildlife. The Service should develop a strategy to ensure a core amount of nesting, wintering, and foraging habitat is identified and protected and should give adequate consideration to the species future management needs.

Our Response: As further discussed under Factor A below, we recognize that the level of habitat protection for the bald eagle will be reduced once it is delisted. However, as discussed under Factor D, the Federal and State laws will continue to provide adequate protection to bald eagles and their core nesting, wintering, and foraging habitat. Environmental laws that regulate polluted discharges and fill into waterways, wetlands, and associated habitats, will contribute to the protection of bald eagle habitat.

Issue 2: The Service did not adequately enlist the help and advice of the bald eagle recovery teams, nor did it update or revise the five recovery plans.

Our Response: Though formal recovery team meetings did not reconvene, we worked with, and sought the advice of, many of the individual recovery team members throughout the rulemaking process. During the rulemaking process, we solicited information from numerous other sources including the States; bald eagle working groups; Federal, tribal, and university affiliated biologists; and the public.

Issue 3: Habitat protection objectives in the Chesapeake Bay, Northern States and Pacific region recovery plans were not addressed. The draft revised population objectives for the Southeastern Recovery Region have not been met.

Our Response: All recovery plans state ''that approved recovery plans are subject to modification as dictated by new findings, changes in species status, and the completion of recovery tasks.'' The objectives identified during the recovery planning process provide a guide for measuring the success of recovery, but are not intended to be absolute prerequisites, and should not preclude a reclassification or delisting action if such action is otherwise warranted.

The Northern States and Pacific Recovery Plans did not include specific habitat protection goals. The Northern States Recovery Plan instead focused on site-specific and general habitat management. This management approach has contributed to a population level that is more than double the number of breeding pairs identified in the delisting goals. The Pacific Recovery Plan states that if the breeding population goal is reached, we can assume that adequate breeding habitat has been secured. The breeding population goal in the Pacific Recovery Plan has been achieved. The habitat protection goal of the Chesapeake Bay Recovery Plan has not yet been met. However, as discussed earlier, between one-half and one-third of the original habitat protection goal has been met. The bald eagle population is more than double the population goal and continues to increase and has not yet reached carrying capacity—indicating that habitat is not a threat to the maintenance of the population goal for the foreseeable future. The population objectives for the Southeastern Recovery Region were met in 2000, and numbers in that recovery region continue to increase.

Issue 4: Once the bald eagle is removed from the List of Endangered and Threatened Species, legal protections for the bald eagle and its habitat will be reduced or nonexistent. The BGEPA should be strengthened. Federal and State law enforcement officials should be informed about the BGEPA.

Our Response: The ESA has been used to provide the primary regulatory protection for the bald eagle since the listing of the species. However, after delisting occurs, the protections of the BGEPA will remain in effect. The BGEPA restrictions and other existing regulatory mechanisms are discussed under Factor D. We believe these mechanisms are adequate to protect the species if it is delisted, for the reasons discussed under Factor D. BGEPA provides indirect habitat protection, by protecting the bald eagle itself from disturbance. Through the public comment period on this proposed delisting rule, the proposed National Bald Eagle Management Guidelines, and the proposed definition of ''disturb,'' the States will have the opportunity to review and submit any concerns their law enforcement officials may have regarding the protections afforded the bald eagle if it is delisted.

Issue 5: The Service should conduct rigorous long-term monitoring after the species is delisted. The condition and security of habitat should be assessed every 5 years. The contaminant monitoring outlined in the discussion of the monitoring plan in the original proposed rule is also inadequate.

Our Response: We are in the process of updating the post-delisting

monitoring plan that was included in the 1999 proposed delisting rule by addressing comments we received, and we will publish a revised draft monitoring plan for public comments in the near future. We will also seek peer review of the revised monitoring plan by independent scientists. The primary objective of the monitoring plan is to monitor effectively, in cooperation with the States, for not less than 5 years the status of all species delisted due to recovery. (See ''Monitoring'' section).

Issue 6: The Service should consider establishing minimum criteria that might signal the need for relisting.

Our Response: The Service has not at this time established any criteria that might specifically trigger the need to consider relisting. As required by section 4(g)(1) of the ESA, the Service will monitor the status of the bald eagle for at least five years after delisting. If at any time following delisting, information indicates that the bald eagle may become threatened or endangered, we will evaluate the need to relist the species in accordance with section 4 of the ESA.

Issue 7: The Service should support the U.S. Geological Survey's efforts to develop a streamlined protocol for monitoring wintering bald eagles in the future as part of the post-delisting monitoring plan under the ESA.

Our Response: We support the U.S. Geological Survey's efforts to develop a standardized wintering bald eagle monitoring protocol. However, our goal for bald eagle monitoring after delisting is to detect significant declines in numbers of breeding pairs in the lower 48 States, and we will be working in cooperation with the U.S. Geological Survey in developing the post-delisting monitoring plan. Winter survey results are highly variable; the influx of bald eagles from Canada and Alaska can make assessment of the breeding population in the lower 48 States extremely difficult. We believe that our most reliable and cost-effective approach for detecting population trends in the lower 48 States is to focus on nest site occupancy. These nest surveys have been conducted since the bald eagle was listed under the ESA and form the basis for our determination of recovery. Thus, we believe that post-delisting monitoring should focus on nest site occupancy. Until the U.S. Geological Survey's wintering bald eagle monitoring protocols are completed, the Service will continue working with the States to monitor breeding pairs and productivity.

Issue 8: The annual census of breeding areas and productivity fails to provide the demographic information that is necessary to detect population trends.

Our Response: We disagree. Annual bald eagle breeding area and productivity surveys to date have been conducted in the majority of the lower 48 States for more than 15 years and have provided an extensive database on geographic and National population trends. These surveys not only monitor performance of known territories, but also document recruitment of new territories. The results provide a comprehensive database that clearly demonstrates an increasing population trend.

Issue 9: The Service should initiate shoreline surveys (Chesapeake Bay).

Our Response: We will monitor bald eagles of the Chesapeake Bay using the protocols set up in the National post-delisting monitoring plan under the ESA. The draft monitoring plan will be announced for public comment in the **Federal Register** at a later date. States may choose to conduct more comprehensive monitoring for management purposes on a State level.

Issue 10: Several commenters recommended retaining threatened or endangered status for bald eagles in the Southwest and Chesapeake Bay Recovery Regions, possibly by designation as distinct population segments.

Our Response: Listing under the ESA in taxonomic terms is limited to species, but the term ''species'' is defined by the ESA to include any subspecies and any distinct vertebrate population segment. To facilitate meeting the intent of the law, we and the National Marine Fisheries Service jointly developed a ''Policy Regarding the Recognition of Distinct Vertebrate Population Segments under the Endangered Species Act'' (DPS Policy) (61 FR 4722; February 7, 1996). Three elements are considered regarding the potential recognition of a DPS as endangered or threatened. These elements include: discreteness, defined as being markedly separated from other populations or separated by international boundaries; significance, defined in terms of the population segment's importance to its species; and status, defined as the population's classification as endangered or threatened.

We are not aware of threats specific to any part of the eagle's range, including the Southwest and Chesapeake Bay Recovery Regions, that suggest that the bald eagle is likely to become endangered in any particular geographic area. As discussed above, the bald eagle's recovery is widespread. Even in the Southwest region, where there has historically and is currently limited available habitat, the bald eagle has significantly exceeded the reclassification goals outlined tine the recovery plan. Therefore, we need not at this time analyze whether any particular geographic area would constitute a DPS pursuant to our DPS policy.

Issue 11: Another commenter stated that the Service did not cite the papers by Dr. Jim Fraser and his colleagues (Fraser *et al.*, 1996) documenting the impact of human population growth on bald eagles and indicating a likelihood of extirpation in the Chesapeake Bay area given present trends in habitat loss. Therefore, the Service should evaluate the rate of habitat loss in Chesapeake Bay before delisting.

Our Response: The analysis under Factor A has considered the subject papers. We are aware of development pressure in the Chesapeake Bay area. However, we disagree with Dr. Fraser about the long-term prospects for eagle survival in this area. The bald eagle population numbers continue to increase at a healthy rate in each of the States covered under this recovery region. During the past decade, we have added several new National Wildlife Refuges encompassing thousands of acres of eagle habitat to the refuge system. Newer refuges at James River and Rappahannock in Virginia, and recent expansions at Blackwater Refuge in Maryland, are notable examples. In addition, the State of Maryland will continue to implement the Chesapeake Bay Critical Area Program (discussed under the ''Regional Recovery Status'' section above). While any species would benefit by having its entire habitat permanently protected, such a level of protection is not required to ensure the long-term persistence of the bald eagle in the Chesapeake Bay watershed. Bald eagles have not yet reached carrying capacity in the Chesapeake Bay recovery unit. Because habitat is not currently limiting the species' population growth, it is likely that the species will continue to expand into available habitat after delisting.

We recognize that the bald eagle's continued population expansion will likely cause its population to reach the carrying capacity of the Chesapeake Bay area. At that point, additional habitat loss may in fact cause the population to decline from its future peak level to some degree. Moreover, it is conceivable that at some point in the future, continued habitat loss could, under certain scenarios, result in the eagle being in danger of extirpation in the Chesapeake Bay area. However, having reviewed all of the available information regarding habitat threats as well as the existing regulatory mechanisms that

directly or indirectly protect eagle habitat, it is our judgment that this outcome is not likely in the foreseeable future.

Issue 12: Demographic data show that the Arizona bald eagle population faces a high likelihood of decline. Mortality of breeding adults is excessive. Subadults constitute a higher percentage of breeding eagles than is the case for other populations. Fledgling mortality is excessive and reproductive rates are below those characteristic of other eagle populations. Direct human intervention through the Arizona Bald Eagle Nestwatch Program has saved 16 percent of all southwestern bald eagle fledglings since 1983; but continuance of this program is not assured. Some human intervention will be required to maintain this population.

Our Response: We fully recognize the role that active management of the bald eagle has played in the Southwest in achieving recovery. With that said, this population has increased since listing in 1978, and may have reached its carrying capacity given the extent and nature of available nesting habitat, and the difficult conditions under which it nests. We will continue to work with other involved agencies to assure continuation of existing management and protection regimens, which we believe will adequately protect the current nesting population.

Issue 13: Threats to the continued existence of the bald eagle in the southwest are increasing. These threats include habitat loss, river dewatering, human encroachment through recreation and development, toxic substances, low-flying aircraft, fishing line entanglement, grazing, and global warming. The Service has issued a number of biological opinions that document the perilous status of southwestern bald eagles.

Our Response: We agree that a number of biological opinions have been issued relevant to the Southwest population of bald eagles. Section 7 of the ESA requires Federal agencies to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of listed species. Biological opinions analyze and document project-level effects to the bald eagle in the context of the effects on the recovery region and ultimately to the National population. In other words, the potential effects to the southwestern or any of the other four populations are considered in terms of whether they appreciably reduce the likelihood of both survival and recovery of the bald eagle throughout the lower 48 States, not solely for the geographic area in which the impacts may occur. In making these population level determinations, the biological opinions assess the status of the recovery unit populations. The current status of the Southwest Recovery Region indicates that population numbers are nearly equal to the estimated historical occupancy and are expanding into new watersheds.

Issue 14: No laws other than the ESA provide the necessary protection for the continued survival of Southwestern bald eagles. Many of the existing laws the Service plans to rely on were in place when the bald eagle was listed, thus demonstrating their inadequacy.

Our Response: The primary reason the bald eagle was listed was due to the catastrophic reproductive failure resulting from the widespread use of DDT. That major threat has been eliminated since DDT was banned in 1972. Though it did take some time after the ban for DDT and DDE (its metabolic breakdown product) to dissipate from the food chain, the banning of DDT effectively stopped the declining trend. Although the protective mechanisms of the ESA will no longer apply if the species is delisted, a number of other laws provide protection to the bald eagle throughout its range and these protections will continue after delisting. Many of the current laws and regulations protecting our environment (such as the Clean Water Act of 1972) were enacted about the same time as the ESA. We believe that existing laws and regulations, including the BGEPA and the Migratory Bird Treaty Act, will provide adequate protection from potential threats to maintain a recovered population of the bald eagle. (See discussion under Factor D of the ''Summary of Factors Affecting the Species'' section of this proposed rule.)

Issue 15: Statements made in the proposed rule that eagles are thriving on private land, thus implying that they may be adapting to human presence, remain unsubstantiated.

Our Response: Based on the best available data, we have determined that bald eagle response to human presence is highly variable. For example, Florida hosts the largest number of nesting pairs of bald eagles of any of the lower 48 States, exceeding 1,100 nesting pairs. Available data indicate that approximately 66 percent of these nest sites occur on private lands. The remaining 34 percent of these nest sites occur on publicly owned lands or some form of conservation lands. In addition, these Florida eagles have shown remarkable adaptation to human presence and activities and continue to thrive in environments that, until recently, would have been considered unsuitable habitat.

Issue 16: The Service should initiate a coordinated research effort and seek funding to investigate the ecology of Avian Brain Lesion Syndrome in the Southeastern Recovery Region.

Our Response: This disease, now known as Avian Vacuolar Myelinopathy, is being studied and tracked by the National Wildlife Health Center in Madison, Wisconsin. This is further discussed under ''Factor C'' of the Summary of Factors Affecting the Species.

Issue 17: The 90-day comment period was not adequate to conduct a thorough scientific review. The Service should have published a notice of intent to delist. The Service held too few public hearings, engaged in too little advertisement about them, and did not allow for extension of time.

Our Response: We believe the 90-day comment period for the proposed delisting rule, which exceeded the required 60-day comment period, was adequate. Prior to the publication of the proposed rule, we solicited input from numerous entities, including the States, tribes, and many recovery team members. The number of public hearings was based on the number of requests we received. We had seven requests for public hearings, and offered three hearings at locations close to the requesters' home towns. The advertisements regarding the hearings followed our standard procedures and included direct coordination with the requesters. The Service received a few requests for extensions of the comment period; however, the requests did not provide adequate justification for an extension. In any case, due to new information we have now reopened the public comment period on the proposed delisting.

Summary of Factors Affecting the Species

Section 4 of the ESA and the regulations (50 CFR part 424) promulgated to implement its listing provisions set forth the procedures for listing, reclassifying, and delisting species. We may list a species if one or more of the five factors listed in Section 4(a)(1) of the ESA threatens the continued existence of the species. A species may be delisted, according to 50 CFR 424.11(d), if the best scientific and commercial data available substantiate that the species is neither endangered nor threatened for one of the following reasons: (1) Extinction; (2) recovery; or (3) original data for classification of the species were in error.

The bald eagle was proposed for delisting on July 6, 1999. This notice further indicates our intent to delist and supply more information to the public than was provided previously. Discussion of the five listing factors and their application to the recovery of the bald eagle are discussed below.

A. The Present or Threatened Destruction, Modification or Curtailment of its Habitat or Range. Nesting, wintering, and foraging habitat are essential to the continued survival of the bald eagle. The current increasing population trend clearly indicates that habitat is not presently limiting the growth of the bald eagle population in the lower 48 States, that the population has not yet reached carrying capacity in many parts of its range, and that the population will continue increasing following delisting. We recognize that the bald eagle occupies habitats that are often subject to development or other encroachment in some parts of the range. In addition, we acknowledge that habitat availability may limit future growth of certain local populations. The population will likely increase at a much slower rate than what has been documented during the recovery period. In addition, population numbers will naturally fluctuate in areas where the habitat has reached its carrying capacity.

Despite these potential limitations, however, numerous factors ensure the bald eagle is not likely to become endangered in the foreseeable future by loss of suitable habitat or range in any of the five recovery regions. First, the bald eagle thrives near a variety of different aquatic environments including reservoirs, lakes, rivers, estuaries, and the marine environment. These environments exist in each of the lower 48 States, and currently, bald eagles occupy these types of habitats in 47 out of the 48 States. This tremendous distribution of bald eagles throughout the entire United States, combined with the eagles' ability to exploit such a wide range of geographic habitat settings provides an important buffer against any potential threats to the population in each recovery region and as a whole.

In addition, information suggests that some individual eagles in many parts of their range are demonstrating a growing tolerance of human activities in proximity to nesting and foraging habitats. Eagles in these situations continue to successfully reproduce in settings previously considered unsuitable. For example, where our Southeastern nesting management guidelines have been followed in Florida, some bald eagles pairs have shown a remarkable adaptation to human presences by nesting in residential subdivisions, commercial and industrial parks, on cell phone towers, and alongside expressways. A common thread throughout these urban landscapes is the availability of ample food sources such as natural lakes, rivers and ponds, artificial stormwater retention ponds, and public landfills. As the eagles begin to reach the carrying capacity in local areas and face development or other encroachments, it is anticipated that some eagles will adapt to these circumstances, while other eagles may not be successful. However, because this species utilizes numerous aquatic environments and many areas have not yet reached carrying capacity, we expect many of these displaced eagles will be able to relocate to more suitable habitats.

Additionally, there will continue to be numerous bald eagles nesting on protected lands, including, but not limited to, National Wildlife Refuges, National Parks, National Forests, as well as State management areas, and lands owned by private conservation organizations. Therefore, a substantial number of bald eagle nesting territories will remain protected and provide strongholds throughout the range of the species.

Absent any range-wide, catastrophic impacts such as epidemic disease or widespread environmental contamination, habitat loss is not likely to become a limiting factor for the recovery regions or the national bald eagle population in the foreseeable future, and is not likely to rise to the level where the bald eagle meets the definition of either threatened or endangered. Given the existence of suitable habitat sufficient to support a bald eagle population at a recovered level into the foreseeable future, the demonstrated increasing levels of tolerance of some local bald eagle populations to increasing levels of human disturbance, and continued protections afforded under various laws described below under Factor D, the bald eagle is not threatened by present or future destruction, modification, or curtailment of its habitat or range.

B. *Overutilization for Commercial, Recreational, Scientific, or Educational Purposes.* The shooting of bald eagles, and the taking of their nests and eggs, was prohibited in 1940 with the Bald Eagle Protection Act. Shooting of bald eagles was prohibited again in 1972, when eagles were added to the list of birds protected by the MBTA. Large-scale mortality from unregulated shooting, like that which occurred early in the last century, has been eliminated. Hunter education courses include bald eagle identification material to educate hunters about bald eagles and the protection that the species is afforded. There is currently a low level of illegal shooting and commerce in eagle feathers and parts, and it is likely that this level will continue in the future. We will continue to enforce the restrictions of BGEPA and MBTA.

There is no legal commercial or recreational use of bald eagles, and such uses of bald eagles will remain illegal under various statutes, as described under Factor D below. We consider current laws and enforcement measures apart from the ESA sufficient to protect the bald eagle from illegal activities, including trade. We exercise very strict control over the use of bald eagles or their parts for scientific, education, and Native American religious activities. To respond to the religious needs of Native Americans, we established the National Eagle Repository in Commerce City, Colorado, which serves as a collection point for dead eagles. As a matter of policy, all Service units transfer salvaged bald eagle parts and carcasses to this repository. Members of federally recognized tribes can obtain a permit from us authorizing them to receive and possess whole eagles, parts, or feathers from the repository for religious purposes. After removal from protection under the ESA, we will still have the ability to issue permits for limited exhibition and education purposes, selected research work, and other special purposes, including Native American religious use, consistent with Federal regulations implementing the BGEPA (50 CFR part 22). We will not issue these permits if they are incompatible with the preservation of the bald eagle.

In summary, there is no current or anticipated future overutilization of the bald eagle for commercial, recreational, scientific, or educational purposes. Such uses will remain regulated under the BGEPA, the Migratory Bird Treaty Act, and Lacey Act.

C. *Disease or Predation.* Predation has been documented but it does not constitute a significant problem for bald eagle populations.

Diseases such as avian cholera, avian pox, aspergillosis, tuberculosis, and botulism may affect individual bald eagles, as do parasites such as the Mexican chicken bug, but are not considered to be a significant threat to overall bald eagle numbers. According to the National Wildlife Health Center (NWHC) in Madison, Wisconsin, only a small percentage of bald eagles submitted to the NWHC between 1985 and 2003 died of infectious disease. The species' widespread distribution

generally helps to protect the bald eagle from catastrophic losses due to disease.

Since 1994, it is estimated that 104 bald eagles died of avian vacuolar myelinopathy (AVM). Confirmed cases of bald eagle deaths due to AVM are recorded in Arkansas, North Carolina, South Carolina, and Georgia. At present, this disease continues to be investigated. While a toxic agent is suspected as the cause of this condition, cooperative efforts are under way to determine the prevalence of this disease and its origin. These mortalities can have a localized impact on bald eagle populations; however, there is currently no evidence that the overall recovery of the species is affected.

In more recent years, the West Nile Virus (WNV) has affected some individual bald eagles. According to NWHC, between January 2002 and January 2004, 81 bald eagles were tested for WNV at the Center, and 4 tested positive. Individual States have also conducted tests on dead bald eagles with an overall small percentage testing positive. For example, the State of New York annually counts the number of bald eagles residing in the State. The count has averaged over 300 individual bald eagles each year since 2000, with only two confirmed cases of WNV. The recovery of the bald eagle should not be affected by the small percentage of localized cases of WNV.

The NWHC is investigating winter mortality to bald eagles along the lower Wisconsin River. Unusual mortality to birds wintering in two counties along the lower Wisconsin River, Wisconsin, began in 1994–1995 with the deaths of at least 14 bald eagles. However, no sick bald eagles were found at roosts from 10–65 km upriver and 10–150 km downriver from the affected region, and elsewhere in the State. Beginning in 2000–2001, after a hiatus of 4 years, similar bald eagle mortality has reoccurred each winter, with 30 to 40 confirmed cases. The current hypothesis is that the syndrome is caused by a severe thiamine deficiency as a result of feeding largely on gizzard shad, but that hypothesis remains to be adequately tested (G. S. McLauglin *et al.* 2004, abstract). This syndrome is very localized, and is not having an impact on the Statewide bald eagle population. Wisconsin's eagle population has been rising each year since the mid-1980s, with over 830 nesting pairs counted in 2003 (Beheler, WIDNR 2003).

In summary, like all wildlife populations, the bald eagle is affected by numerous natural and environmentally related diseases, as well as predation. While these diseases and predation may have significant impacts on small, local populations, there are no known natural or environmentally related disease threats that currently have, or are anticipated to have, widespread impacts on any of the five recovery regions or the national bald eagle population in the lower 48 States. Therefore, neither predation nor disease constitutes a significant threat to the bald eagle.

D. *The Inadequacy of Existing Regulatory Mechanisms.* After removal from the list of species protected by the ESA, the bald eagle and its nests and eggs will remain protected in the United States by other Federal wildlife laws. These statutes will continue to protect and sustain a recovered bald eagle population within the lower 48 States. The following discusses the protections that will continue to be afforded the bald eagle.

The Bald and Golden Eagle Protection Act (BGEPA) (16 U.S.C. 668–668d) enacted by Congress in 1940, was the first law intended to prevent extinction of the bald eagle. It prohibits the taking or possession of and commerce in bald and golden eagles, with limited exceptions. The law provides significant protections for bald eagles by prohibiting, without specific authorization, take, possession, selling, purchase, or bartering, offering to sell, purchase, or barter, transport, export or import any bald or golden eagle, alive or dead, or any part, nest, or egg thereof.

Take under the BGEPA is defined as ''to pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb'' (16 U.S.C. 668c). Under BGEPA, permits may be issued to take of bald eagles only for scientific or exhibition purposes, for religious purposes of Native American tribes, or for the protection of wildlife, agriculture, or other interests (50 CFR part 22). All other take is prohibited. Thus, unless permitted for any of the aforementioned activities, any and all other activities that take bald eagles constitute a violation of the BGEPA.

Unlike the ESA, which provides exceptions and exemptions to the prohibitions against take (i.e., via section 7 incidental take statements, and section 10 incidental take permits) for take resulting from an ''otherwise lawful activity,'' there is no similar mechanism expressly available under BGEPA to permit the incidental take of bald eagles, including take by ''disturbance.''

To help land managers, landowners, and others who conduct activities in bald eagle habitat avoid a prohibited disturbance of bald eagles after ESA delisting, the Service has developed draft National Bald Eagle Management Guidelines. A Notice of Availability to solicit public input on the draft Guidelines is being published in the **Federal Register** concurrent with this proposed delisting rule.

The purposes of the National Bald Eagle Management Guidelines are to: (1) Publicize the provisions of the BGEPA and the MBTA that continue to protect bald eagles to reduce the possibility that the law will be violated, (2) advise landowners, land managers, and the general public of the potential for various activities to disturb bald eagles, and (3) encourage land management practices that benefit bald eagles and their habitat.

Concurrent with this proposed delisting rule and draft National Bald Eagle Management Guidelines, we are also publishing a proposed rule in the **Federal Register** to promulgate a regulatory definition of ''disturb'' to 50 CFR 22.3, part of our regulations that implement the BGEPA. A regulatory definition of the term ''disturb'' will provide a clarification of the scope of the BGEPA's prohibitions of take, and will provide the basis for the recommendations contained in the draft National Bald Eagle Management Guidelines.

The Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703–712) implements various treaties and conventions between the U.S. and Canada, Japan, Mexico, and the former Soviet Union for the protection of migratory birds. Unless permitted by regulations, the MBTA provides that it is unlawful to pursue, hunt, take, capture, or kill; attempt to take, capture or kill; possess, offer to sell, barter, purchase, deliver or cause to be shipped, exported, imported, transported, carried or received any migratory bird, part, nest, egg or product, manufactured or not.

In 2001, the President signed Executive Order 13186, ''Responsibilities of Federal Agencies to Protect Migratory Birds'' requiring Federal agencies to incorporate migratory bird conservation measures into their agency activities. Under the Executive Order, each Federal agency whose activities may adversely affect migratory birds was required to enter into a Memorandum of Understanding (MOU) with the Service, outlining how the agency will promote conservation of migratory birds. Although the MOUs are still under development, per the Executive Order, Federal agencies are encouraged to immediately begin implementing conservation measures.

Specific Federal agency responsibilities addressed in the Executive Order that could have direct or indirect benefits to bald eagles

include: Integrating bird conservation principles, measures, and practices into agency activities; avoiding or minimizing, to the extent practicable, adverse impacts on migratory bird resources; preventing detrimental alteration of migratory bird habitat; designing migratory bird habitat and population conservation into agency plans and planning processes; and recognizing and promoting economic and recreational values of birds.

The Lacey Act Amendments of 1981 (16 U.S.C. 3372–3378) make it unlawful to import, export, transport, buy or sell wildlife taken or possessed in violation of Federal, State, or tribal law. Interstate or foreign commerce in wildlife taken or possessed in violation of foreign law also is illegal. The Lacey Act helps foreign countries and our individual States enforce their wildlife conservation laws.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) establishes a system of import/export regulations to prevent the over-exploitation of plants and animals listed in its three appendices. For species listed under Appendix I, there is no commercial trade allowed, only import/export for scientific/propagation purposes, which requires a permit from both the countries of origin and import. Although Appendix II species may be commercially traded, a permit is required from the country of export or re-export, and a permit is only issued if certain conservation conditions are met.

The bald eagle is currently listed as an Appendix II species. However, commercial trade is prohibited due to the BGEPA, which prohibits import and export. Bald eagles are limited to North America—Canada, the United States, Mexico, and the French Island territories of St. Pierre and Miquelon. A bald eagle is considered a vagrant when found in Belize, Bermuda, Ireland, Puerto Rico, and the U.S. Virgin Islands.

Section 101(a) of the Clean Water Act (33 U.S.C. 1251–13287) states that the objective of this law is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters and provide the means to assure the ''protection and propagation of fish, shell fish, and wildlife'' (section 101(a)(2)). If the bald eagle is delisted, this statute will continue to contribute in a significant way to the protection of the species and its food supply through provisions for water quality standards, protection from the discharge of harmful pollutants, contaminants (section 303(c), section 304(a), and section 402) and discharge of dredge or fill material into all waters, including wetlands (section 404).

The Fish and Wildlife Coordination Act (16 U.S.C. 661–666c) requires that agencies sponsoring, funding, or permitting activities related to water resource development projects request review by the Service and the State natural resources management agency. This Act allows the resource agencies to examine impacts to fish and wildlife resources from all aspects of the proposed project and to make recommendations to offset those impacts. These comments must be given equal consideration with other project purposes.

Another important regulatory mechanism affecting the bald eagle is the requirement that pesticides be registered with the Environmental Protection Agency (EPA). Under the authority of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136), the EPA requires environmental testing of new pesticides. It specifically requires testing the effects of pesticides on representative wildlife species before a pesticide is registered. It is meant as a safeguard to avoid the type of environmental catastrophe that occurred from organochlorine pesticides, such as DDT, that led to the listing of this species as endangered.

Many States protect the bald eagle under their State wildlife and endangered species laws. After Federal delisting, many States may follow suit by removing their special protections for the bald eagle. Most State laws that protect bald eagles are not as comprehensive as the ESA; they provide little habitat protection and, therefore, have generally played a smaller role in protection of eagles while the eagle has been listed under the ESA. After delisting, those States that also remove the bald eagle from their State protection laws will continue to manage the recovered population as they do their other wildlife resources.

In summary, several existing Federal laws and regulations will continue to provide a limited amount of protection to the recovered bald eagle population in the lower 48 States. Take of bald eagles will remain restricted through the BGEPA, the MBTA, and the Lacey Act. The BGEPA protection of individual bald eagles from disturbance, as defined in the proposed regulation, will continue to protect the species and maintain recovered population levels. The National Bald Eagle Management Guidelines will provide the public with a guide for complying with the requirements of the BGEPA by avoiding activities that disturb the bald eagle.

E. *Other Natural or Manmade Factors Affecting Its Continued Existence*. Bald eagles have been subjected to direct and indirect mortality from a variety of human-related activities, for example, poisoning (including indirect lead poisoning) electrocution, strikes by wind turbines, collisions with trains and other vehicles, and death and reproductive failure resulting from exposure to pesticides.

The threat of death and reproductive failure was dramatically reduced in 1972 when DDT was banned from use in the United States. An additional step to halt the decline was taken in 1976, when registrations of dieldrin, heptachlor, chlordane, and other toxic persistent pesticides were cancelled for all but the most restricted uses in the United States. Although persistent levels of DDT in the environment of the Channel Islands (located off the coast of California) are continuing to affect the reproduction of bald eagles on the islands, the effects are highly localized and have a negligible impact on the bald eagle population in the lower 48 States.

By 1977, most uses of polychlorinated biphenyls (PCBs) were restricted in the United States. Some industrial and commercial applications where PCBs were used include: Electrical, heat transfer, and hydraulic equipment; as plasticizers in paints, plastics, and rubber products; and in pigments, dyes, and carbonless copy paper. More than 1.5 billion pounds of PCBs were manufactured in the United States prior to 1977 (U.S. EPA 2004). PCBs do not readily break down and may persist in the environment for decades. There continues to be a risk of reproductive failure to individual bald eagles that consume prey that have accumulated levels of PCBs in their system. However, cases where PCBs have impaired bald eagle reproductive success are relatively low and localized. For example, Bowerman (1993) documented lower reproduction among the bald eagles nesting along the coasts of the Great Lakes in Michigan compared to those nesting further inland. Nevertheless, Michigan's bald eagle population has continued to increase.

Mercury is a toxic metal that is emitted into the atmosphere by industrial activities like coal-fired power generation. It can travel long distances and can be deposited on the surface of the earth in remote areas far from the industry emitting the atmospheric mercury. Mercury that accumulates in soil can be transported to waterways in runoff and subsurface water flow. Once in the water, mercury begins to accumulate in the aquatic organisms, with concentrations highest

at the top of the food chain. Consumption of prey with elevated levels of mercury can cause a variety of neurological problems in bald eagles. Flight and other motor skills can be significantly altered (Eisler 1987). Elevated levels of mercury have been reported in bald eagles in the Northeast, Great Lakes region, Northwest, and Florida. However, populations of bald eagles continue to increase in each of these areas, albeit at a slower rate in some; thus mercury exposure seems to have a negligible impact on the bald eagle population in the lower 48 States.

Lead poisoning has caused death and suffering in birds and other wildlife for many years. Bald eagles died from lead poisoning as a result of feeding on hunter killed or crippled waterfowl containing lead shot and from lead shot that was inadvertently ingested by prey waterfowl. In 1991, the Service completed its 5-year program to phase out the use of lead shot for waterfowl hunting (USFWS, Bald Eagle Biologue (no date)). However, the use of lead sinkers remains legal in every State except New Hampshire, and could potentially pose a threat to the bald eagle. According to the National Wildlife Health Center in Madison, Wisconsin, numerous bald eagles that have succumbed to lead poisoning are sent to the center each year.

Other causes of injury and mortality to individual bald eagles continue to exist. Raptor electrocution has been a concern since the early 1970s. Although power companies are starting to become more proactive in preventing bird electrocution (USGS, Field Manual of Wildlife Diseases, 1999), a significant amount of progress is needed before bird electrocutions are completely prevented.

While structures and vehicles continue to kill or injure individual birds, and environmental contaminants can cause death or reduced productivity in local areas, given the geographic range of the bald eagle and its widespread recovery, these negative impacts appear to have a negligible effect on regional or national populations. Therefore, we have determined that these other natural or manmade factors affecting the bald eagle are not sufficient to cause the bald eagle to become threatened in the future.

Conclusion of Recovery Analysis and Status Review

In summary, the bald eagle has made a dramatic resurgence from the brink of extinction. With the protections of the ESA, the banning of DDT, and cooperative conservation efforts of the Service, States, other Federal agencies, non-government organizations, and individuals, our National symbol has recovered and the purposes and policy of the ESA have been achieved.

Bald eagle recovery goals have generally been met or exceeded for the species on a rangewide basis. There is no recovery region in the lower 48 States where we have not seen substantial increases in eagle numbers. Conversely, there are no sizeable areas where bald eagle numbers continue to decline. We believe the surpassing of recovery targets over broad areas and on a regional basis, and the continued increase in eagle numbers since the 1995 reclassification from endangered to threatened, effectively compensates for any local shortfall in meeting targets in a few recovery sub-areas or regions.

We have reviewed the national status of the bald eagle and evaluated past, present, and future threats to the regional and national bald eagle populations in the preceding five-factor analysis. Adequate habitat is available to support existing bald eagles and to ensure future population growth; disease or predation is not a significant threat; there is no current or anticipated future overutilization for commercial, recreational, scientific, or educational purposes; adequate regulatory mechanisms will remain in place after delisting to ensure the continued recovery of the bald eagle; and the level of other natural and manmade factors is not high enough to threaten the survival of the species. We have determined that none of these existing or potential threats, either alone or in combination with others, are likely to cause the bald eagle to become in danger of extinction within the foreseeable future throughout all or a significant portion of its range. The bald eagle no longer requires the protection of the ESA, and therefore, we propose its removal from the list of threatened and endangered species.

In accordance with our joint peer review policy that was published in the **Federal Register** on July 1, 1999 (59 FR 34270), we will solicit the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our delisting decision is based on scientifically sound data, assumptions relating to the taxonomy, population models, and supportive biological and ecological information on this proposed rule. We will send copies of this proposed rule to these peer reviewers immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed delisting. We will also solicit peer review on the post-delisting monitoring plan when the proposed plan is completed.

Effects of This Rule

This rule as proposed will remove the protection afforded the bald eagle under the Endangered Species Act, including the special rule at 50 CFR 17.41(a). The provisions of the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act (including prohibitions on the taking of bald eagles) will remain in place. These and other laws affecting bald eagles are discussed in Factor D above. This rule will not affect the bald eagle's status as a threatened or endangered species under State laws or suspend any other legal protections provided by State law. Critical habitat was not designated for the bald eagle, so the delisting will not affect critical habitat provisions of the Act. This rule will not affect the bald eagle's Appendix II status under CITES.

Post-Delisting Monitoring

Section 4(g)(1) of the ESA requires us, in cooperation with the States, to implement a monitoring program for not less than 5 years for all species that have been recovered and delisted. The purpose of this requirement is to develop a program that detects the failure of any delisted species to sustain itself without the protective measures provided by the ESA. If, at any time during the monitoring period, data indicate that protective status under the ESA should be reinstated, we can initiate listing procedures, including, if appropriate, emergency listing.

A monitoring plan was provided in the proposed delisting rule on July 6, 1999 (64 FR 36454). Slightly more than 10 percent of all comments we received on the proposed rule were concerned with post-delisting monitoring and our monitoring proposal. We have been working with biostatisticians to redevelop our monitoring plan to be responsive to the comments we received, including extension of the monitoring period beyond the required 5 years.

The post-delisting monitoring plan will use occupied breeding areas (territories) as representative of the population. It will contain a sample design to estimate numbers of occupied territories, acknowledging that some States will no longer conduct their census-type survey of bald eagle nesting every year. The occupied territory estimates will be compared to those at the time of delisting to determine trends. The sample design, protocol, and estimates for each recovery region

will be developed in cooperation with our State partners.

We, in cooperation with the U.S. Geological Survey, Biological Resources Division and selected States, have recently completed a series of pilot studies for the monitoring plan. The pilot studies incorporate the methods traditionally used by the States to monitor their occupied territories while adding techniques to check accuracy and reduce variability.

The first pilot study was conducted in cooperation with the State of Maine in the spring of 2004. We conducted additional pilot studies in cooperation with the States of Florida, Minnesota, and Washington in the winter/spring of 2005. All of the general habitat types were represented in these pilot studies. Based on the results from 2 years of pilot studies and comments from States, researchers (including peer review), and the public, a final post-delisting monitoring plan will be prepared. We anticipate that our revised draft bald eagle post-delisting monitoring plan will be available for public review in 2006.

Public Comments Solicited

We request comments on three aspects of this proposed rulemaking:

A. Proposed Delisting of the Bald Eagle

We intend any final action resulting from this proposal will be based on the best available scientific information. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule. We do not anticipate extending or reopening the comment period on this proposed rule after this comment period ends (see **DATES**). We are particularly seeking comments concerning:

(1) Biological, commercial, trade, or other relevant data concerning any threat (or lack thereof) to the bald eagle;

(2) Additional information on the range, distribution, and population size of the bald eagle and its habitat;

(3) The location of any additional populations of the bald eagle;

(4) Data on population trends.

All previous comments and information submitted during the initial comment period on the July 6, 1999, proposed rule need not be resubmitted. We will take into consideration the comments and any additional information received, and such communications may lead to a final determination that differs from the proposal.

If you wish to provide comments and/or information, you may submit your comments and materials concerning this proposed rule by any one of several methods (see **ADDRESSES** section). Please submit Internet comments to *baldeagledelisting@fws.gov* in ASCII file format and avoid the use of special characters or any form of encryption. Please also include ''Attn: RIN 1018–AF21'' in your e-mail subject header, and your full name and return address in the body of your message. Please note that the Internet address *baldeagledelisting@fws.gov* will be closed at the termination of the public comment period.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Comments and materials related to this rulemaking will be available for public inspection, by appointment, during normal business hours at the above address (see **ADDRESSES** section). Individual respondents may request that we withhold their home addresses from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

We anticipate a large public response to this proposed rule. After the comment period closes, we will organize the comments and materials received and make them available for public inspection, by appointment, during normal business hours at the above address (see **ADDRESSES** section).

B. Executive Order 12866

Executive Order 12866 requires agencies to write regulations that are easy to understand. We invite your comments on how to make this proposal easier to understand including answers to questions such as the following: (1) Is the discussion in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposal? (2) Does the proposal contain technical language or jargon that interferes with its clarity? (3) Does the format of the proposal (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? What else could we do to make the proposal easier to understand?

C. Paperwork Reduction Act

Office of Management and Budget (OMB) regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3501 *et seq.*), require that interested members of the public and affected agencies have an opportunity to comment on agency information collection and recordkeeping activities (see 5 CFR 11320.8(d)). The OMB regulations at 5 CFR 1320.3(c) define a collection of information as the obtaining of information by or for an agency by means of identical reporting, recordkeeping, or disclosure requirements imposed on ten or more persons. Furthermore, 5 CFR 1320.3(c)(4) specifies that ''ten or more persons'' refers to the persons to whom a collection of information is addressed by the agency within any 12-month period. We will submit the final post-delisting monitoring plan to OMB for approval under the Paperwork Reduction Act.

National Environmental Policy Act

We have determined that an Environmental Assessment or an Environmental Impact Statement, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act 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).

Executive Order 13211

On May 8, 2001, the President issued an Executive Order 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. As this proposed rule is not expected to significantly affect energy supplies, distribution, or use, this action is not a significant energy action and no Statement of Energy Effects is required.

References Cited

A complete list of all references cited herein is available upon request from the Headquarters Office (see **ADDRESSES** section).

Author

The co-authors of this proposed rule are Jody Gustitus Millar, U.S. Fish &

Wildlife Service, Rock Island Field Office and Diane Lynch, U.S. Fish & Wildlife Service, Northeast Regional Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Proposed Regulation Promulgation

Accordingly, as first proposed July 6, 1999, at 64 FR 36454, we propose to 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.

§ 17.11 [Amended]

2. Section 17.11(h) is amended by removing the entry for ''Eagle, bald'' under ''BIRDS'' from the List of Endangered and Threatened Wildlife.

§ 17.41 [Amended]

3. Section 17.41 is amended by removing and reserving paragraph (a).

Dated: October 31, 2005.

H. Dale Hall,

Director, Fish and Wildlife Service.

[FR Doc. 06–1442 Filed 2–15–06; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AT38

Endangered and Threatened Wildlife and Plants; Designating the Greater Yellowstone Ecosystem Population of Grizzly Bears as a Distinct Population Segment; Removing the Yellowstone Distinct Population Segment of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; extension of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce an extension of the comment period for the proposed rule to establish a distinct population segment (DPS) of the grizzly bear (*Ursus arctos horribilis*) for the greater Yellowstone Ecosystem and surrounding area and remove the Yellowstone DPS from the List of Threatened and Endangered Wildlife. Comments previously submitted need not be resubmitted as they have already been incorporated into the public record and will be fully considered in the final decision and rule.

DATES: The public comment period is extended until March 20, 2006. Any comments that are received after the closing date may not be considered in the final decision on the proposal.

ADDRESSES: If you wish to comment on the proposal, you may submit your comments and materials concerning the proposal by any one of several methods—

1. You may submit written comments to the Grizzly Bear Recovery Coordinator, U.S. Fish and Wildlife Service, University Hall 309, University of Montana, Missoula, Montana 59812.

2. You may hand deliver written comments to our Missoula office at the address given above.

3. You may send comments by electronic mail (e-mail) to *FW6_grizzly_yellowstone@fws.gov*. *See* the Public Comments Solicited section below for file format and other information about electronic filing.

Comments and materials received, as well as supporting documentation used in preparation of the proposed action, will be available for inspection after the close of the public comment period, by appointment, during normal business hours, at our Missoula office (*See* address above).

FOR FURTHER INFORMATION CONTACT: Dr. Christopher Servheen, Grizzly Bear Recovery Coordinator, U.S. Fish and Wildlife Service, at our Missoula office (*see* address above) or telephone (406) 243–4903. Persons who use a Telecommunications Device for the Deaf may call the Federal Information Relay Service at 1–800–877–8339, 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION:

Background

On November 17, 2005, the Service published a proposal to establish a DPS of the grizzly bear (*Ursus arctos horribilis*) for the greater Yellowstone Ecosystem and surrounding area and to remove the Yellowstone DPS from the List of Threatened and Endangered Wildlife (70 FR 69854). Robust population growth, coupled with State and Federal cooperation to manage mortality and habitat, widespread public support for grizzly bear recovery, and the development of adequate regulatory mechanisms, has brought the Yellowstone grizzly bear population to the point where making a change to its status is appropriate. The proposed delisting of the Yellowstone DPS would not change the threatened status of the remaining grizzly bears in the lower 48 States, which would remain protected by the Endangered Species Act (16 U.S.C. 1531 *et seq.*). The comment period on this proposal opened for 60 days on November 17, 2005. Due to the complexity of this proposed action, we are extending the comment period for an additional 30 days to allow all interested members of the public ample opportunity to comment.

Public Comments Solicited

We intend that any final action resulting from the proposed rule will be as accurate and as effective as possible. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning the proposed rule. Generally, we seek information, data, and comments concerning the status of grizzly bears in the Yellowstone ecosystem. Specifically, we seek documented, biological data on the status of the Yellowstone ecosystem grizzly bears and their habitat, and the management of these bears and their habitat.

Submit comments as indicated under **ADDRESSES**. If you wish to submit comments by e-mail, please avoid the use of special characters and any form of encryption. Please also include your name and return address in your e-mail message.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and other information received, as well as supporting information used to write the proposal, will be available for public inspection, by appointment, during normal business

hours at our Missoula Office (*see* **ADDRESSES**). In making a final decision on the proposed rule, we will take into consideration the comments and any additional information we receive. Such communications may lead to a final rule that differs from the proposal.

Authority

The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: February 9, 2006.

Marshall P. Jones, Jr.,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. E6–2205 Filed 2–15–06; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List *Sidalcea hendersonii* (Henderson's checkermallow) as Threatened or Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list *Sidalcea hendersonii* (Henderson's checkermallow) under the Endangered Species Act of 1973, as amended. We find the petition does not provide substantial scientific information indicating that listing *S. hendersonii* may be warranted. Therefore, we will not be initiating a further status review in response to this petition, however, we ask the public to submit to us any new information that becomes available concerning the status of the species or threats to it.

DATES: The finding announced in this document was made on February 16, 2006.

ADDRESSES: You may submit information by any of the following methods:

(1) E-mail: *Liz_Kelly@fws.gov.* Include *Sidalcea hendersonii* (Henderson's checkermallow) in the subject line of the message.

(2) Fax: 503–231–6195.

(3) Mail: Kemper McMaster, State Supervisor, Oregon Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2600 SE. 98th Avenue, Suite 100, Portland, OR 97266–1398.

(4) Hand Delivery/Courier: You may hand-deliver documents to our office (*see* mailing address above).

The petition and supporting information are available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Liz Kelly, Newport Field Office, U.S. Fish and Wildlife Service, 2127 SE. Marine Science Drive, Newport, OR 97365; or by electronic mail to *Liz_Kelly@fws.gov* (telephone: 541–867–4558; fax: 541–867–4551). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339, 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific information to indicate that the petitioned action may be warranted. To the maximum extent practicable, this finding is to be made within 90 days of receipt of the petition, and the finding is to be published promptly in the **Federal Register**.

This finding summarizes the information included in the petition and information available to us at the time of the petition review. Under section 4(b)(3)(A) of the Act and our regulations in 50 CFR 424.14(b), our review of a 90-day finding is limited to a determination of whether the information in the petition meets the ''substantial scientific information'' threshold. Our standard for substantial scientific information with regard to a 90-day listing petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)).

We have to satisfy the Act's requirement that we use the best available science to make our decisions. However, we do not conduct additional research at this point, nor do we subject the petition to rigorous critical review. Rather, at the 90-day finding stage, we accept the petitioner's sources and characterizations of the information, to the extent that they appear to be based on accepted scientific principles (such as citing published and peer reviewed articles, or studies done in accordance with valid methodologies), unless we have specific information to the contrary. Our finding considers whether the petition states a reasonable case for listing on its face. Thus, our 90-day finding expresses no view as to the ultimate issue of whether the species should be listed.

On December 29, 2003, the Service received a petition dated December 15, 2003, from Dr. Rhoda Love on behalf of The Native Plant Society of Oregon (NPSO) requesting that the Service list *Sidalcea hendersonii* (Henderson's checkermallow) as a threatened or endangered species under the Act. Action on this petition was precluded by nearly all of our listing funds being obligated to court orders and settlement agreements for other listing actions.

The petition contained detailed information on the natural history of *Sidalcea hendersonii*, its population status, and existing threats to the species. Potential threats discussed in the petition include destruction and modification of habitat, predation, inadequacy of existing regulatory mechanisms, and other natural and manmade factors such as flooding and siltation. In response to the petitioner's request to list *S. hendersonii*, the Service sent a letter to the petitioner dated February 13, 2004, explaining that initial review of the petition did not indicate that an emergency listing was warranted and that the Service would review the petition and determine whether or not the petition presents substantial scientific information indicating that listing *S. hendersonii* may be warranted.

On January 17, 2006, we received additional information from the NPSO dated January 7, 2006, related to the petition. The additional information included an analysis of the Washington Natural Heritage Program (WNHP) 2005 report on the Washington Status of *Sidalcea hendersonii* (Henderson's checkermallow).

Species Information

Sidalcea hendersonii was first recorded in 1841 by botanist William Breckenridge in southwestern Washington. Two more specimens were collected from British Columbia on Saturna Island in 1858 and Vancouver Island in 1883. Originally identified as either *S. malvaeflora* or *S. campestris*, the specimens were not recognized as *S. hendersonii* until examined by Eva M. F. Roush for her 1931 monograph on the genus. *Sidalcea hendersonii* did not gain its scientific name until 1887. In Oregon, the plant was first collected by Louis F. Henderson on July 3, 1887, on the Columbia River estuary ''near Clatsop Bay.'' Two weeks earlier on June 15, 1887, the plant had been collected by Thomas Jefferson Howell at the mouth of the Umpqua River and labeled as *S. campestris* Greene. The

plant was re-annotated in 1930 as *S. hendersonii* Watson by Eva Roush and then later in 1952 by C. Leo Hitchcock (Gisler and Love 2005; H. Kesner, pers. comm. 2005).

Sidalcea hendersonii, in the mallow family (Malvaceae), is a perennial herb with pinkish-lavender to pinkish-purple flowers borne in clusters at the end of 1.6 to 5 foot (ft) (0.5 to 1.5 meter (m)) tall stems. Inflorescences (flowering parts of the plant) are spikelike (Hitchcock and Cronquist 1973). The flower is distinguished from other *Sidalcea* species primarily by its habitat and by its glabrous (lacking hairs) foliage and smooth carpels (modified leaf forming the ovary) (Gisler and Love 2005). *Sidalcea hendersonii* is a gynodioecious species, which means that the plants have either perfect flowers (male and female) or pistillate (female) flowers. The plant can reproduce vegetatively by rhizomes (horizontal underground stems) and produces seeds that drop near the parent plant (Hitchcock and Cronquist 1973). Flowering typically occurs from June to August.

Sidalcea hendersonii occurs sporadically in coastal areas from Douglas County, Oregon, to Chilkat Peninsula, Alaska. Prior to 2003, when it was discovered in Howard Bay on the southern tip of the Chilkat Peninsula, the known range only extended as far north as southwestern British Columbia, Canada.

The historical record contains uncertainty as to the number of sites that supported *Sidalcea hendersonii* populations. In Oregon, 10 locations were documented (Gisler and Love 2005); in Washington there were 47 documented sites (WNHP 2005). Based on surveys from 2002–2005, 23 extant populations have been documented in Washington. If populations found since 1980 (but not necessarily revisited in 2002–2005) are included, Washington may support as many as 32 populations (WNHP 2005). Populations in British Columbia appear to be less intensively studied, with at least 30 extant populations today (J. Penny, pers. comm. 2005a). We do not have information on the number of historical populations for British Columbia. The single population discovered in Alaska in 2003 is well-documented.

Based on information in our files, nine of the ten historical populations of *Sidalcea hendersonii* found in Clatsop, Tillamook, Lane, and Douglas Counties may have been extirpated from Oregon. The record for the remaining population cited in the petition, the Siuslaw River estuary population in Lane County, is unclear. As documented by L.F. Henderson in 1931, the location is described as ''Sandy flats of Siuslaw Bay just above tide, Florence'' (Table 1 in NPSO 2003). Based on this description, a single population may no longer be in existence, and may have shifted to form two extant populations associated with Cox Island in the Siuslaw River estuary and Bull Island in the North Fork Siuslaw River. In addition to these two populations in Oregon, introductions of *S. hendersonii* occurred in 2005 at Siletz Bay National Wildlife Refuge, Lincoln County and at Blacks and Goose Islands, Umpqua River, Douglas County (M.Gisler, pers. comm. 2005), resulting in a total of four populations in Oregon.

Sidalcea hendersonii occurs in a habitat unlike that occupied by other members of its genus. It is found in tidally-influenced high salt marsh or the brackish transition zone of coastal marshes (WNHP 2005; Gisler and Love 2005). The top seven indicators of suitable habitat for *S. hendersonii* in Oregon and Washington at five sites were *Argentina egedii (Potentilla pacifica*) (silverweed), *Juncus balticus* (Baltic rush), *Angelica lucida* (sea-watch), *Achillea millefolium* (yarrow), *Galium asparine* (cleavers), *Deschampsia caespitosa* (tufted hairgrass), and *Hordeum brachyantherum* (meadow barley) (Gisler and Gisler 2005).

In British Columbia, *Sidalcea hendersonii* primarily occurs in tidal marshes as well as salt-water influenced ditches and man-made channels. Associated species in natural habitats include *Rumex* spp. (sorrel), *Carex lyngbyei* (Lyngbye's sedge), *Aster subspicatus* (Douglas' aster), *Lycopus europaeus* (gypsywort), *Lythrum salicaria* (purple loosestrife), *Caltha palustris* (marsh marigold), *Cardamine pratensis* (cuckoo flower), *Juncus balticus, Triglochin maritime* (seaside arrowgrass), *Typha latifolia* (broadleaf cattail), *Iris pseudacorus* (yellow flag), *Argentina egedii, Festuca rubra* (red fescue), and *Phalaris arundinacea* (reed canary grass) (J. Penny, pers. comm. 2005a).

In Alaska, *Sidalcea hendersonii* was found in the transitional habitat areas of beach meadow/forest habitats. The beach meadow was dominated by *Geranium erianthum* (geranium), *Lathyrus palustris* (beach pea), and *Lupinus nootkatensis* (Nootka lupine). The adjacent forest edge was dominated by *Alnus viridis* spp. *sinuate* (Sitka alder), *Picea sitchensis* (Sitka spruce), *Rubus spectabilis* (salmonberry), and *Heracleum lanatum* (cow parsnip) (Stensvold 2005).

Population Status

Sidalcea hendersonii occurs in up to 67 locations rangewide (NPSO 2003; WNHP 2005; J. Penny, pers. comm. 2005; Stensvold 2005). Records in our files indicate that there are at least 5,000 to 10,000 plants in Washington, approximately 1,200 to 1,400 plants in Oregon, and 3 plants in Alaska. At least 30 populations with an unknown number of individuals are believed to exist in British Columbia (J. Penny, pers. comm. 2005a). Precise counts of *S. hendersonii* are difficult to obtain due to observer subjectivity and the use of incomparable metrics to quantify population numbers (WNHP 2005). For example, during surveys conducted by the NPSO and The Nature Conservancy (TNC) in Oregon (Appendix 1 in NPSO 2003), the terms ''stems'' and ''individuals'' were used interchangeably. In Washington, individual plants were defined as having either individual or multiple stems (WNHP 2005).

Sidalcea hendersonii is currently considered globally rare, uncommon or threatened, but not immediately imperiled (G3) and is considered critically imperiled (S1) in Oregon by the NatureServe and Natural Heritage Network (Oregon Natural Heritage Information Center (ONHIC) 2004). The ONHIC (2004) ranks *S. hendersonii* with the group of taxa that are threatened with extinction or thought to be extinct throughout their range (List 1). Washington recently recommended *S. hendersonii* as vulnerable (S3), and it will continue to be maintained on the State's Watch List (WNHP 2005).

In British Columbia, *Sidalcea hendersonii* is listed as ''blue'' or vulnerable (NatureServe 2005). Taxa on Canada's ''blue list'' are considered at risk, but not extinct, endangered, or threatened. Due to rarity in Alaska, *S. hendersonii* is ranked as critically imperiled (S1) (Alaska Natural Heritage Program (ANHP) 2005).

The following is a summary of the current information on *Sidalcea hendersonii*'s population status.

Oregon

According to the petition and our files, at least ten Oregon sites for *Sidalcea hendersonii* were identified from the 1880s to 1950, and the species has disappeared from nine of these sites since the 1950s. In 2003, a survey organized by the NPSO occurred in June, July, and August. As stated in the petition, at least ''23 trained botanists'' searched for the plant at historical locations and in other likely coastal habitat in Clatsop, Tillamook, Lane and

Douglas Counties. As described in the petition, *S. hendersonii* was found at a single, known location in Lane County with 900 to 1,100 individuals. Although the petitioner provided information on survey results, survey methodology was not submitted. Regarding the site where the plant was found in Lane County, the petition does state that this area is the only site where monitoring of the species regularly takes place. According to the petition, this scattered population is divided into five ''aggregations,'' with only two aggregations (Cox Island and nearby Wilbur Island) considered viable (NPSO 2003).

Based on information from the petition and our files, we now believe there are four populations of *Sidalcea hendersonii* in Oregon. According to the maps provided in the petition, the Siuslaw River estuary population appears to be two populations. One large population exists in the Siuslaw River estuary on Cox Island and nearby Wilbur Island. Cox Island is located on TNC property and supports a population of 545 stems NPSO 2003). The peninsula northeast of Cox Island is under unknown ownership and supports scattered individuals (*see* TNC Report, Summer 2003, Appendix 1 in NPSO 2003). Wilbur Island is private property adjacent to Cox Island, and supports an estimated 300 to 500 stems (*see* TNC Report, July 9, 2003, Appendix 1 in NPSO 2003).

A second small population is found in the North Fork Siuslaw River, and is comprised of the ''North Fork'' site and Bull Island. The ''North Fork'' site is located on private property and supports 13 individuals (*see* NPSO Report, July 3, 2003, Appendix 1 in NPSO 2003). The Bull Island site is located on Oregon Department of Fish and Wildlife property and contains 31 stems (NPSO 2003). The confluence of the North Fork Siuslaw River with the Siuslaw River estuary is downriver from both populations and the two populations are at least one mile apart.

Since the petition was submitted, two introductions of *Sidalcea hendersonii* were made on sites with suitable habitat in Oregon; at Siletz Bay National Wildlife Refuge (131 plants) in Lincoln County and at Blacks and Goose Islands, Umpqua River estuary (154 plants) in Douglas County (M. Gisler, pers. comm. 2005). It is unknown if either of these locations were historical sites.

As included in the petition, the NPSO (2003) speculated that *Sidalcea hendersonii* declined in Oregon due to a number of factors, including conversion of wetlands for agricultural purposes, livestock grazing, weed invasions, urban and rural development, highway and bridge construction, off-road vehicle use, and recreational activities.

Washington

In Washington, 47 current and historical sites of *Sidalcea hendersonii* have been documented (WNHP 2005), twenty-seven of which were revisited from 2002 to 2005 through incidental surveys, or during a status review conducted by the Washington Natural Heritage Program in 2004 to 2005 and documented in the 2005 Status Report (WNHP 2005). These surveys described 23 extant populations with a total of 18,000 to 20,000 stems. Distribution was concentrated along the coastal areas of Grays Harbor and Pacific County, with scattered populations in Clallam, Island, Snohomish, and San Juan Counties (WNHP 2005). If populations found since 1980 (but not revisited in 2002 to 2005) are included, Washington may support as many as 32 populations and 5,000 to 10,000 plants (WNHP 2005). The Status Report stated that any of the populations may be much larger than the area surveyed and that ''there is little evidence of population decline or loss, and the habitat appears currently stable and secure, despite the large proportion of populations on private land.''

British Columbia and Alaska

In British Columbia, the most recent estimate of *Sidalcea hendersonii* populations is that there are 21 populations (69 percent) located along the coast of the lower mainland (greater Vancouver) and 7 populations (24 percent) are found on Vancouver Island. There are two locations on the Gulf Islands (North Pender Island and Briola Island) and one on Trial Island, off of Oak Bay, Victoria (J. Penny, pers. comm. 2005a). Inventory is incomplete so there is a likelihood of finding more locations (J. Penny, pers. comm. 2005a).

In Alaska in 2003, two *Sidalcea hendersonii* were discovered at one location on the Chilkat Peninsula, Tongass National Forest. This was the first record of a plant within the family Malvaceae for the State. Three *S. hendersonii* were found at the same location in 2005 (Stensvold 2005).

Threats Analysis

Pursuant to section (4) of the Act, we may list a species, subspecies, or vertebrate taxa distinct population segment (DPS) on the basis of any of the following five factors: (A) Present or threatened destruction, modification, or curtailment of habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. In making this finding, we evaluated whether the information related to *Sidalcea hendersonii* presented in the petition, or in our files, suggests that the petitioned action may be warranted. The Act identifies the five factors to be considered, either singly or in combination, to determine whether a species may be threatened or endangered. Our evaluation of these threats, based on information provided in the petition and available in our files, is presented below.

A. Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

The petition states that the historical range of *Sidalcea hendersonii* extended from Vancouver Island, British Columbia, to Umpqua River estuary, Oregon, and based on the available scientific evidence, approximately 40 sites currently exist for the species. The petitioner states that, based on the decrease in *S. hendersonii*'s range in Oregon alone, the species is in clear danger of extinction within a significant portion of its range. The petition also states that, based on the plight and lack of protection of *S. hendersonii*, the species is in danger of extinction throughout its range.

There is little information regarding the historical population size or viability for *Sidalcea hendersonii* prior to the 1980s, particularly for Oregon. Records prior to 2003 may not accurately reflect the species' historical distribution because they were not collected in a systematic, comprehensive manner with the goal of determining species distribution and abundance. The petition does not provide comprehensive information on the current range of *S. hendersonii* within estuarine ecosystems.

It appears that in nine of the ten known historical locations in Oregon the species is no longer present. A single population of *Sidalcea hendersonii* as identified in the petition has recently been recognized as two extant populations at the Siuslaw River estuary location. In 2005, a population of *S. hendersonii* was introduced in Lincoln County and another was introduced in Douglas County. The four populations are located on protected lands, private land, or on relatively inaccessible islands, and do not appear to be at risk from threats such as wetlands conversion, weed invasions, development, or recreational activities. The locations where *S. hendersonii*

populations are no longer found were located on the north coast of Oregon, and constitute a relatively minor geographic area in relation to the species' range. In view of the fact that the net loss of 6 locations in Oregon represents only 9 percent of the 67 existing locations rangewide, we do not consider the loss of the Oregon populations to be a significant loss to the rangewide existence of *S. hendersonii*. There are no major geographic areas where *S. hendersonii* was once viable but no longer is viable.

Although the petition states that *Sidalcea hendersonii* evolved in Oregon, no published or peer-reviewed articles were provided in support of the species' evolutionary origin. The petitioner states that *S. hendersonii* is the only member of its genus that has adapted to an environment between salt and fresh water, thereby limiting its distribution to estuaries from central Oregon to southwestern British Columbia. The petition claims *S. hendersonii* has been subject to population losses and declines due to various land management practices such as conversion of wetlands for agricultural purposes, livestock grazing, weed invasions, urban and rural development, highway and bridge construction, off-road vehicle use, and recreational activities. Based on these, and other threats, the petitioner claims that *S. hendersonii* is in danger of extinction throughout its entire range, and provides the following information to substantiate this claim.

The petitioner cites wetland conversion for agriculture and grazing purposes as a threat to *Sidalcea hendersonii*. Wetland conversion was reported as a factor in the extirpation of *S. hendersonii* at five of the ten sites investigated by the NPSO (Table 1 in NPSO 2003) in Oregon. Surveyors noted channelization and diking at three sites in Clatsop County. Grazing was cited as a threat at one site in Lane County and one site in Douglas County. Forestry practices and grazing in the Umpqua River estuary, Oregon, have impacted wetland habitat (Miller 2003). Henderson (1891) described hundreds of acres of estuarine habitat that have since been converted to pasture in Tillamook County. Although the petition provided a list of sites where anthropogenic threats to habitat exist, the petition did not provide information on wetland conversion for portions of the *S. hendersonii's* range where *S. hendersonii* is known to exist or to have existed.

The information in the petition suggests that conversion of wetlands for agricultural and grazing purposes has been, in part, responsible for the reduction of high salt marsh habitat in Oregon. The petitioner provides general statements regarding wetland loss, but does not cite specific examples of losses in specific areas where the *Sidalcea hendersonii* has been found.

In Washington during the 2004–2005 survey, two marsh areas were noted as being actively grazed and no longer providing habitat to *Sidalcea hendersonii* due to diking and associated changes in hydrology. However, the grazing had been on-going for 100 years and would not likely be responsible for the recent declines in the population (WNHP 2005). No information was available in the petition or in our files on wetland loss for current or historical sites in British Columbia. No wetland loss has occurred where *S. hendersonii* was recently discovered in Alaska. However, the loss of high salt marsh habitat is a factor that likely contributed to population declines in Oregon and some individual populations rangewide (Adamus *et al.* 2005; WNHP 2005).

Invasive Plants

The petition claims weed invasions pose a threat to *Sidalcea hendersonii* throughout its range. In Oregon, invasive weeds were reported as threats at three of the ten sites surveyed for *Sidalcea hendersonii* (NPSO 2003). The petitioner claims that invasive weedy competitors such as *Phalaris arundinacea*, *Cytisus scoparius* (scotch broom), *Lythrum salicaria*, *Festuca arundinacea* (tall fescue), *Erechtites minima* (coastal burnweed), and *Spartina patens* (saltmeadow cordgrass) invade the *Sidalcea hendersonii* habitat. *Spartina patens* has become established at Cox Island and is the target of TNC control efforts (Pickering 2000). The petition does not provide specific information on the threat of invasive weeds in other portions of *Sidalcea hendersonii*'s range.

The petitioner provides information about general weed invasions in *Sidalcea hendersonii* habitat, and several sites where the presence of weeds may be a threat in Oregon. However, the petitioner does not provide substantial information that documents impacts by invasive species outside of Oregon.

On Cox Island, although there is some overlap in habitat of *Spartina patens* and *Sidalcea hendersonii*, Pickering (pers. comm. 2005) states that *Phalaris arundinacea* is more of a threat than *Spartina patens*. In Washington, invasive species were present at low levels within 11 populations of *Sidalcea hendersonii* (WNHP 2005). Of the greatest concern were *Lythrum salicaria*, *Erechtites minima*, *Iris pseudoacorus*, and *Cirsium arvense* (Canada thistle). *Lythrum salicaria* was the only invasive species that posed a major threat to *Sidalcea hendersonii* at one site, where it was also being actively controlled. All other invasives were considered a low threat to the *Sidalcea hendersonii's* viability (WNHP 2005), including *Spartina patens* which occurs much lower in the tidal zone and not in the high marsh where *Sidalcea hendersonii* occurs.

In British Columbia, the role of the introduced *Lythrum salicaria* in competition with *Sidalcea hendersonii* is unknown, although in one location *L. salicaria* seems to grow in wetter areas than those with *S. hendersonii* (J. Penny, pers. comm. 2005b).

It is likely that invasive weeds pose a significant threat to some individual populations and have contributed, in part, to the loss of populations. However, the petition does not provide substantial information on the magnitude and the extent of habitat impacts by invasive weeds such that we might conclude that they threaten the continued existence of *Sidalcea hendersonii* throughout all or a significant portion of its range.

Urban and Rural Development

The petition identifies habitat loss from urban and rural development as a negative impact to *Sidalcea hendersonii*. The construction of the Columbia River jetty and Winchester Bay boat basin, resorts, industrial development and airport construction were examples cited in the petition. The infrastructure that accompanies development (*i.e.*, roads, highways, bridges) is also considered a threat. In the 2003 NPSO survey, five of the ten sites were found to have some form of development associated with them. Although the petition provides a list of sites where anthropogenic threats to habitat exist, it does not provide specific information on the threat of urban and rural development throughout *S. hendersonii*'s range.

Recreational Activities

The petitioner claims that off-road vehicle use is a threat to *Sidalcea hendersonii*, specifically at Bob Straub State Park (Nestucca River). According to the petition, the last sighting of *S. hendersonii* in Bob Straub State Park was in 1987, when 45 stems were found, although the exact location is unknown. One stem was found at nearby Whalen Island in 2000. The petitioner also states that the potential park expansion and

prospective golf course at Sand Lake are a threat to *S. hendersonii.*

While recreational activities could be an issue in parks where heavy recreational pressure or lack of enforcement lead to trampling of habitat by users where *Sidalcea hendersonii* is found, the petition does not provide information that links the actual loss of *S. hendersonii* habitat to off-road vehicle use locally.

Summary of Habitat Threats

While a variety of anthropogenic activities that affect wetlands (*e.g.*, agriculture, grazing, coastal development) are occurring across the range of *Sidalcea hendersonii*, the petition does not provide substantial information that these activities, either singly or in combination, are destroying or modifying *S. hendersonii* habitat over all or a significant portion of the species' range. Also, with limited exceptions, the petition fails to provide scientific documentation to demonstrate that the areas where habitat loss has occurred are the same areas where *S. hendersonii* populations have been documented.

Based on the preceding discussion, we do not believe that substantial information is available indicating that the present or threatened destruction, modification, or curtailment of habitat or range may, either singularly or in combination with other factors, rise to the level of a major threat to the continued existence of the species throughout all or a significant portion of the species' range.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

No information was presented in the petition, nor is any in our files, to suggest that *Sidalcea hendersonii* has been overutilized for commercial, recreational, scientific, or educational purposes.

C. Disease or Predation

The petition states that weevil predation poses a threat to *Sidalcea hendersonii* populations by impacting seedling recruitment into a population through the reduction or elimination of perfect flowers. The petition cites the following information to support these claims.

Two species of curculionid beetles (weevils), *Macrorhoptus sidalcea* Sleeper and *Anthonomus melancholicus* Dietz, are known to parasitize the flowers of *Sidalcea hendersonii* in British Columbia. In populations where female plants were abundant, weevil larvae destroyed significantly more seeds from hermaphrodite plants, substantially reducing seed production by perfect flowers overall (Marshall and Ganders 2001). In 2003, weevils were collected from *S. hendersonii* on Cox Island, Siuslaw River estuary, Oregon (R. Love, pers. comm. 2004), although the significance of weevils to reproduction in this population is unknown. The petition does not provide specific information on the threat of weevil predation in other portions of the *S. hendersonii*'s range. The information presented indicates that this potential threat has been evaluated in British Columbia (although no details were provided), and that further research is needed to determine actual impacts to *S. hendersonii* rangewide. In Washington, weevils were found in 1 out of 14 populations searched (WNHP 2005).

Since weevils co-occur with other members of *Sidalcea*, their occurrence in habitats with *Sidalcea hendersonii* is not surprising. The petition does not present documentation to indicate that weevil predation is a significant threat to the continued existence of *S. hendersonii*.

D. Inadequacy of Existing Regulatory Mechanisms

The petition states that State and Federal agencies have failed to conduct monitoring for *Sidalcea hendersonii* in most of its range and have failed to protect it from numerous direct and indirect impacts associated with conversion of wetlands for agricultural purposes, livestock grazing, and development (*see* Factor A above). The petition further states that mechanisms to regulate and control these various activities have failed to prevent harm to *S. hendersonii* habitat in a significant portion of its range. The petitioner states that in Oregon, one population is protected and actively managed on Cox Island through invasive species management by TNC. The petition also states that *S. hendersonii* has no known legal protection or conservation status in Washington since the majority of sites are on private land, and that in British Columbia only one population out of the 27 known sites is protected (NPSO 2003).

While many *Sidalcea hendersonii* sites are not protected, several sites are managed in a manner beneficial to the species. As stated in the petition, Cox Island receives active weed management control and protection under TNC (Pickering 2000). *Sidalcea hendersonii* was recently introduced to the Siletz Bay National Wildlife Refuge on U.S. Fish and Wildlife Service property in Oregon to help stabilize and conserve the species (Gisler 2005). In Washington, the site that occurs on National Park Service land is managed as a natural area (L. Smith, pers. comm. 2005). Two populations on Washington Department of Natural Resources (WDNR) property are found within Natural Area Preserves. At John's River and Smith Creek on Washington Department of Fish and Wildlife (WDFW) land, conservation measures are in place for the estuarine ecosystems where *S. hendersonii* is found. At John's River, estuary restoration is creating an additional 200 acres (81 hectares) of tidally influenced high salt marsh with the breaching of the dike on the East side (J. Gerchak, pers. comm. 2005).

In British Columbia, *Sidalcea hendersonii* occurs in protected areas at Medicine Beach on Pender Islands, Trial Island Ecological Reserve, and in a fen (marshland) sanctuary in greater Vancouver. Most locations are likely on private land with unknown status (J. Penny, pers. comm. 2005). In Alaska, *S. hendersonii* is protected on Tongass National Forest land under the National Forest Management Act of 1976 (M. Stensvold, pers. comm. 2005).

While many areas where *Sidalcea hendersonii* occurs are not protected, a number of sites are managed in a manner consistent with conservation of the species. Therefore, we conclude that the petition does not present substantial information to indicate that *S. hendersonii* may be threatened by the inadequacy of existing regulatory mechanisms across all or a significant portion of its range.

E. Other Natural or Manmade Factors Affecting the Species' Continued Existence

The petition mentions several other factors, not discussed above, that negatively impact *Sidalcea hendersonii* populations. Some of these are found within the text of the petition, others within the survey data provided as attachments. These factors include changes to the estuarine ecosystem, the species' breeding system, succession, browsing, and pollution.

Changes to the Estuarine Habitat

The petition states that estuarine habitats are susceptible to flooding, siltation, storm surges, battering by driftwood, and long-term changes in sea level. The petitioner cites the threat of these events within estuarine habitat to *Sidalcea hendersonii*, and provides the following information to support this claim. Dr. R. Frenkel from Oregon State University (NPSO 2003) states that ''complicating the distribution of *S.*

hendersonii is the accumulation of storm driven debris from massive debris deposition. To survive, the plant population in this zone must migrate bayward. For plants like *S. hendersonii*, with a vulnerable reproductive strategy, life is particularly hazardous.'' Glenn Miller from the Oregon Department of Agriculture (NPSO 2003) has stated that *S. hendersonii* has disappeared in the Umpqua River estuary partly due to ''silt events during floods.'' Siltation events were cited as a threat at two of the ten sites surveyed by NPSO in Oregon (2003). However, aside from these two citations, the petition does not provide specific information on the threat of natural estuarine processes or sea-level changes in other portions of the *S. hendersonii*'s range. In Washington, no direct damage from storm or flooding events was apparent at survey sites (WNHP 2005).

Breeding System

Sidalcea hendersonii is a gynodioecious species, which means that the plants have either perfect flowers (male and female) or pistillate (female) flowers. The petition claims that under this breeding system, three scenarios are likely to occur including (1) If numbers of female-only plants become low, cross pollination would become rare and inbreeding depression would occur; (2) if numbers of plants (especially female) become low, recruitment would be negatively impacted as female plants produce the most seeds, and (3) if perfect-flowered plants become scarce, this would destroy the pollen source and prevent sexual reproduction. The only evidence that the petition provided to support these claims was the presence of two small populations in the Siuslaw River estuary comprising 98 percent and 100 percent females. One of these populations did not produce any seeds in 2003 (NPSO 2003). The petition does not provide specific information on the threat of low populations of either female or perfect flowers in other portions of the *S. hendersonii*'s range.

Poor recruitment of individuals is likely a threat locally where populations are low; however, no information exists to suggest this is a current threat to the species rangewide, or in a significant portion of the range. While the claims regarding inbreeding depression and scarcity of perfect-flowered plants are conceivable, no information exists to suggest this is a current threat to the species rangewide or in a significant portion of the range.

Other Threats

Succession, grazing and browsing by deer, road maintenance, and pollution are threats listed either in the petition and its appendices. While discussion of these topics was not provided in the petition, road maintenance was cited as a particular threat to populations adjacent to roads and highways in Washington (see survey data in WNHP 2005). In Alaska, succession was a threat to the single population located near Sitka spruce (*Picea sitchensis*) in the upper beach meadow, which was described as undergoing relatively rapid changes toward forested successional stage (Stensvold 2005).

Based on the foregoing discussion, we do not believe that the petition has presented substantial scientific information relating the changes in geographic range and abundance of the species to the actual threats to the survival of the species. We also do not believe that the petition indicates that natural or manmade factors threaten the continued existence of *Sidalcea hendersonii* throughout all or a significant portion of the species' range. Consequently, we conclude that the petitioner does not present substantial information indicating that a reduction in the species' numbers or range warrants a status review.

Additional Information Provided by Petitioner

The additional information we received on January 17, 2006, from the petitioner in support of the petitioned action claims that 90 percent of the *Sidalcea hendersonii* populations in Oregon and 54 percent of the populations in Washington have been lost, and provides statements about perceived threats to 23 extant populations in Washington. Although as many as nine populations have disappeared in Oregon, two extant and two introduced populations are located in the state, for a net loss of six locations. In Washington there is a total of 47 historic and current sites, of which 27 sites were surveyed between 2002 and 2005, and based on these surveys 23 populations were found. As many as 9 of the remaining 20 unsurveyed sites may have existing populations. Therefore, we do not agree that 54 percent of the populations in Washington have been lost. Although the 2002–2005 surveys were not comprehensive, the species appears to be ''abundant in numerous well-distributed locations within Washington'' (WNHP 2006). After reviewing the NPSO's list of specific threats to *S. hendersonii*, the WNHP (2006) concluded that the ''overall vigor of the populations remains high, and the existing threats are not pushing the species into rapid decline in Washington.'' Based on the preceding discussion, we do not believe that petitioner's new information presents substantial scientific information indicating that natural or manmade factors threaten the species' continued existence.

Finding

We have reviewed the petition and literature cited in the petition, and evaluated that information in relation to other pertinent literature and information available in our files. Based on the current status of the species, our threats analysis, and a lack of information suggesting that the species is threatened in a significant portion of its range, we find the petition does not present substantial information indicating that listing of *Sidalcea hendersonii* may be warranted at this time. While we will not be initiating a status review in response to the petition, we will continue to work with others to monitor the species' status and trends and we encourage interested parties to continue to provide us with information that will assist with the conservation of the species. If you wish to provide information regarding *S. hendersonii*, you may submit your information or materials to the Field Supervisor, Portland Fish and Wildlife Office (*see* **ADDRESSES** section above).

References Cited

A complete list of all references cited herein is available, upon request, from our Oregon Fish and Wildlife Office (*see* **ADDRESSES** section above).

Author

The primary author of this notice is Liz Kelly, U.S. Fish and Wildlife Service, Newport Field Office (*see* **ADDRESSES** section above).

Authority

The authority for this action is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: February 6, 2006.

H. Dale Hall,

Director, Fish and Wildlife Service.

[FR Doc. E6–2206 Filed 2–15–06; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AU52

Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of public comment period and clarification of proposed critical habitat designation.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the public comment period for the proposal to designate critical habitat for the contiguous United States distinct population segment of the Canada lynx (*Lynx canadensis*) under the Endangered Species Act of 1973, as amended, which was published on November 9, 2005 (70 FR 68294). This will allow all interested parties the opportunity to comment on the proposed critical habitat designation. The public comment period is being reopened with this notice until April 30, 2006. In addition, we provide information and maps clarifying the areas proposed for critical habitat designation in the November 9, 2005 (70 FR 68294) publication.

DATES: Comments on the proposed designation of critical habitat for the Canada lynx are due by April 30, 2006. Comments must be submitted directly to the Service (see **ADDRESSES**) on or before the deadline. Any comments received after the closing date may not be considered in the final determination on the proposal.

ADDRESSES: If you wish to comment, you may submit your comments and materials by any one of several methods:

1. You may submit written comments and information by mail or hand-delivery to Field Supervisor, U.S. Fish and Wildlife Service, Montana Ecological Services Office, 585 Shepard Way, Helena, Montana 59601.

2. You may send comments by electronic mail (e-mail) to *fw6_lynx@fws.gov.* Please see the Public Comments Solicited section below for file format and other information about electronic filing.

The critical habitat proposal and supportive maps are available for viewing by appointment during regular business hours at the above address. All comments and materials received, as well as supporting documentation used in preparation of the proposed rule, will be available for public inspection, by appointment, during normal business hours at the above address. Information regarding this proposal is available on the Internet: *http://mountain-prairie.fws.gov/species/mammals/lynx/.*

FOR FURTHER INFORMATION CONTACT: Lori Nordstrom, Montana Ecological Services Office (see **ADDRESSES**), telephone 406–449–5225 extension 208.

SUPPLEMENTARY INFORMATION:

Background

We have received a number of requests to reopen the comment period for the proposal to designate critical habitat for the contiguous United States distinct population segment of the Canada lynx (*Lynx canadensis*) (lynx) pursuant to the Endangered Species Act of 1973, as amended (Act), which was published in the **Federal Register** on November 9, 2005 (70 FR 68294). The original comment period closed on February 7, 2006.

The areas proposed for designation as critical habitat occur within four units in the States of Idaho (ID), Maine, Minnesota, Montana (MT), and Washington (WA). Because of difficulties obtaining accurate delineations of National Forest boundaries in the Northern Rocky Mountains (ID and MT) and Northern Cascades (WA) units in a timely manner, the area estimates for these two units in the proposed rule included National Forest lands although National Forest lands were not proposed as critical habitat for these two units. Tables 1 and 2 are provided below to correct the information in the November 9, 2005, proposed rule; these tables reflect our best estimate of the area and land ownership within these two proposed units. In total, approximately 18,031 square miles (mi^2) (46,699 square kilometers (km^2)) fall within the boundaries of the proposed critical habitat designation.

TABLE 1.—AREA OF THE FOUR CRITICAL HABITAT UNITS PROPOSED FOR THE CANADA LYNX

Critical habitat unit	Miles^2	Kilometers^2
1. Maine	10,633	27,539
2. Minnesota	3,546	9,183
3. Northern Rocky Mountains (ID/MT)	3,549	9,192
4. Northern Cascades (WA)	303	785
Total	18,031	46,699

TABLE 2.—CRITICAL HABITAT PROPOSED FOR THE CANADA LYNX BY LAND OWNERSHIP AND STATE (MI^2/KM^2)

	Federal	State	Private	Tribal	Other
Idaho	0.02/0.05	1/2.6	0/0	0/0	0/0
Maine	13/337	758/1,963	9,741/25,229	86/223	35/91
Minnesota	440/1140	1,355/3,509	1,661/4,302	74/192	15/39
Montana	1,428/3,699	365/945	1,691/4,380	0/0	113/293
Washington	135/350	164/425	2/5	0/0	2/5
Total	2,016/5,221	2,643/6,845	13,095/33,916	160/414	165/427

To further clarify the proposed critical habitat designation, in this notice we are republishing maps of each proposed unit. Map 1 depicts Unit 1 (Maine); Map 2 depicts Unit 2 (Minnesota); Map 3 depicts Unit 3 (Northern Rockies); and Map 4 depicts Unit 4 (North Cascades). For the proposed critical habitat unit in Minnesota, our intention is that the proposed critical habitat boundary reflect Lynx Analysis Unit boundaries. Our narrative description of the

proposed critical habitat boundary may not precisely match the boundaries of the Lynx Analysis Units, which, in some areas, were based on relatively obscure biogeographic boundaries. Furthermore, there have been minor changes in the boundary descriptions for the Minnesota unit that we are not republishing here but are available on our Web site: *http://mountain-prairie.fws.gov/species/mammals/lynx/*.

We hereby solicit data and comments from the public on all aspects of the proposed critical habitat designation, including data on economic and other potential impacts of the designation. We are also soliciting public comments on inclusion of certain lands in the designation, the appropriateness of excluding lands from this designation that are covered by management plans that provide for the conservation of lynx, and our determination as to whether existing management plans provide special management and protection for lynx habitat.

Critical habitat identifies specific areas that are essential to the conservation of a listed species and that may require special management considerations or protection. If the proposed rule is made final, section 7 of the Act will prohibit adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, pursuant to section 7(a)(2) of the Act.

On the basis of public comment, during the development of the final rule we may find, among other things, that areas proposed are not essential to the conservation of the species or do not require special management considerations or protection, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion, and in all of these cases, this information will be incorporated into the final designation. Final management plans and data supporting their effectiveness that address the conservation of the lynx must be submitted to us during the public comment period so that we can take them into consideration when making our final critical habitat determination.

Comments are invited specifically concerning:

(1) The reasons any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act, including, but not limited to, whether the benefit of designation will outweigh any threats to the species due to designation;

(2) Specific information on the amount and distribution of lynx habitat in the contiguous United States, and whether or not occupied habitat proposed for designation has features that are essential to the conservation of the species and why and what unoccupied habitat is essential to the conservation of the species and why;

(3) Comments or information that may assist us with identifying or clarifying the Primary Constituent Elements (PCEs);

(4) Land use designations and current or planned activities in areas proposed as critical habitat and their possible impacts on proposed critical habitat;

(5) Any foreseeable economic, national security, or other potential impacts resulting from the proposed designation and, in particular, any impacts on small entities;

(6) As discussed in the proposed rule, we are considering whether some of the lands we have identified as having features essential for the conservation of the lynx should not be included in the final designation of critical habitat if, prior to the final critical habitat designation, they are covered by final management plans that incorporate conservation measures for the lynx (*i.e.*, the LCAS (Ruediger *et al.* 2000), or comparable). In particular, seven National Forests and one Bureau of Land Management (BLM) district are in the process of revising or amending their Land and Resource Management Plans (LRMP) to provide measures for lynx conservation. It is anticipated that all of these plans will be complete prior to promulgation of the final critical habitat designation. As a result, all National Forest and BLM plans would have measures that provide for conservation of lynx, and consequently will not be in need of special management or protection.

Currently, National Forests that have not revised or amended their LRMPs operate under a Conservation Agreement with the Service in which the parties agree to take measures to reduce or eliminate adverse effects or risks to lynx and its occupied habitat pending amendments to LRMPs. The LCAS is a basis for implementing this Agreement.

In addition, we will be evaluating the adequacy of existing management plans to conserve lynx on lands that are designated wilderness areas or National Parks, as discussed in the proposed rule.

We specifically solicit comment on whether such areas meet the definition of critical habitat based on:

(A) Whether these areas contain features essential to the conservation of the lynx;

(B) The adequacy of these management plans or the Conservation Agreement to provide special management and protection to lynx habitat;

Any of these lands identified above may, if appropriate, be included in the final critical habitat designation, even if not proposed for designation in this notice.

(7) Our proposal to not include tribal lands in the Maine and Minnesota units under the Secretarial Order Number 3206. The size of the individual reservation lands in the Maine and Minnesota units is relatively small. As a result, we believe conservation of the lynx can be achieved by limiting the designation to the other lands in the proposed units (see ''Relationship of Critical Habitat to Tribal Lands'' below).

(8) Whether lands in three areas are essential for the conservation of the species and the basis for why they might be essential. These areas are: (a) The Greater Yellowstone Ecosystem (Wyoming, Montana, and Idaho); (b) the ''Kettle Range'' in Ferry County, Washington; and (c) the Southern Rocky Mountains,

(9) How the proposed boundaries of critical habitat units could be refined to more closely conform to the boreal forest types occupied by lynx. Maps that accurately depict the specific vegetation types on all land ownerships were not readily available. Additionally, even if accurate, detailed vegetation maps were available, we were unsure how to delineate and describe critical habitat boundaries that solely encompassed lands containing the features essential to the conservation of the lynx.

(10) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

If you wish to comment, you may submit your comments and materials concerning the proposal by any one of several methods (see **ADDRESSES** section). Please submit Internet comments to *fw6_lynx@fws.gov* in ASCII file format and avoid the use of special characters or any form of encryption. Please also include ''Attn: lynx comments'' in your e-mail subject header and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly by calling our Montana Ecological Services Office at telephone number 406–449–5225.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address, which we will honor to the extent allowable by law. If you wish us to withhold your name or address, you must state this request prominently at the beginning of your comments. However, we will not consider anonymous comments. To the extent consistent with applicable law, we will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Comments and materials received, as well as supporting documentation used in preparation of the proposal to designate critical habitat, will be available for public inspection, by appointment, during normal business hours at the Montana Ecological Services Office (see **ADDRESSES** section).

Author

The primary author of this notice is Lori Nordstrom, Montana Ecological Services Office (see **ADDRESSES**).

Authority

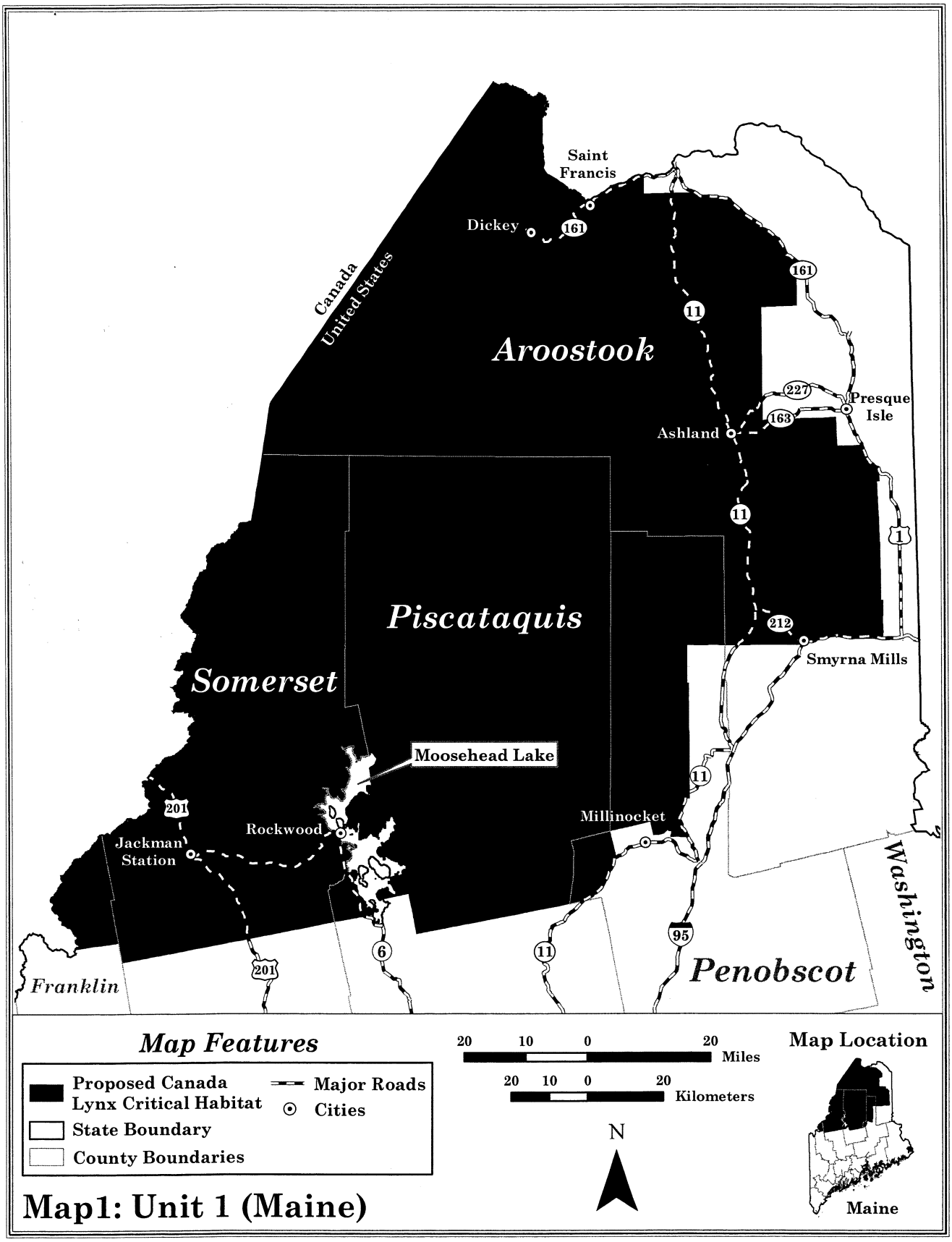
The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: February 9, 2006.

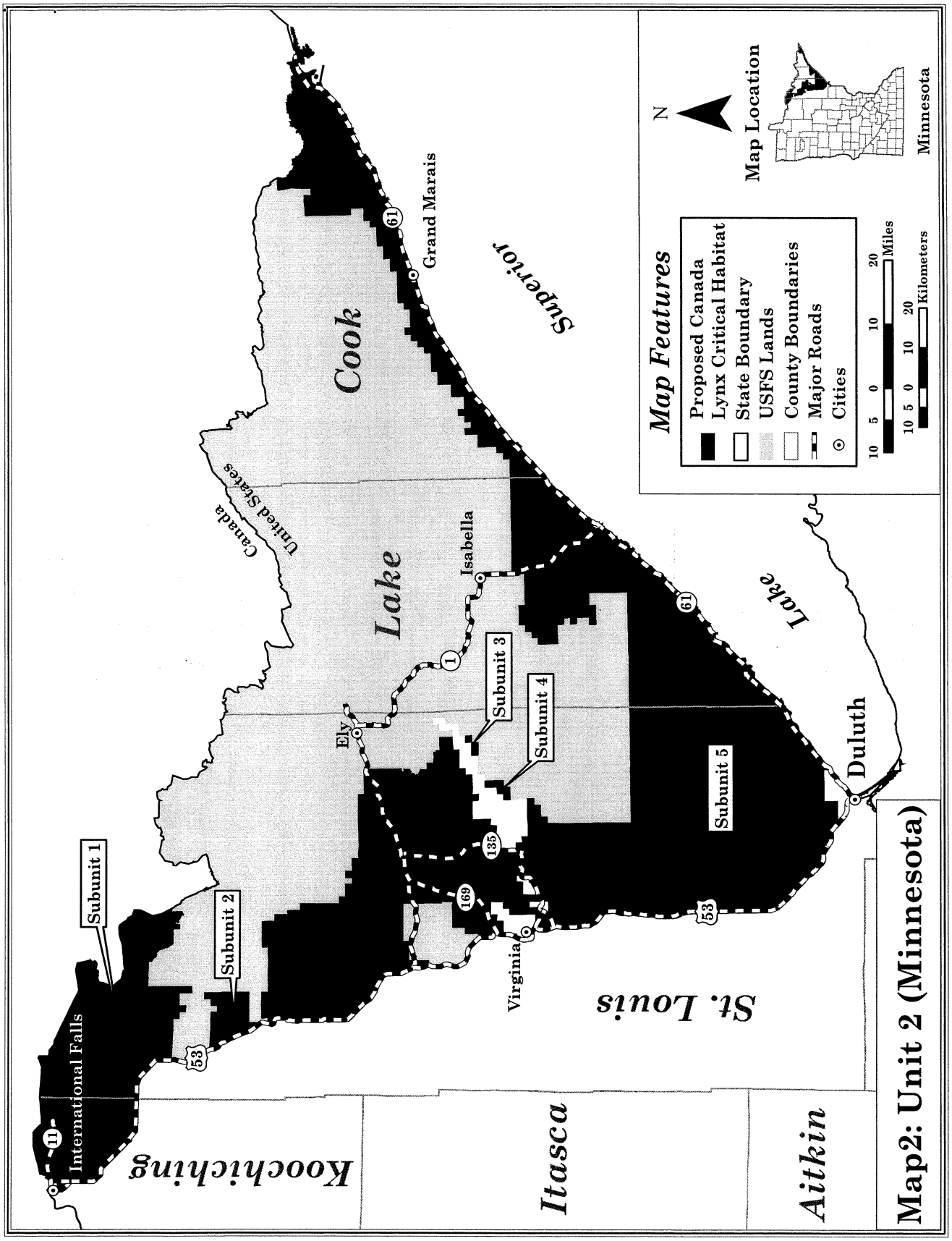
Matt Hogan,

Acting Assistant Secretary for Fish and Wildlife and Parks.

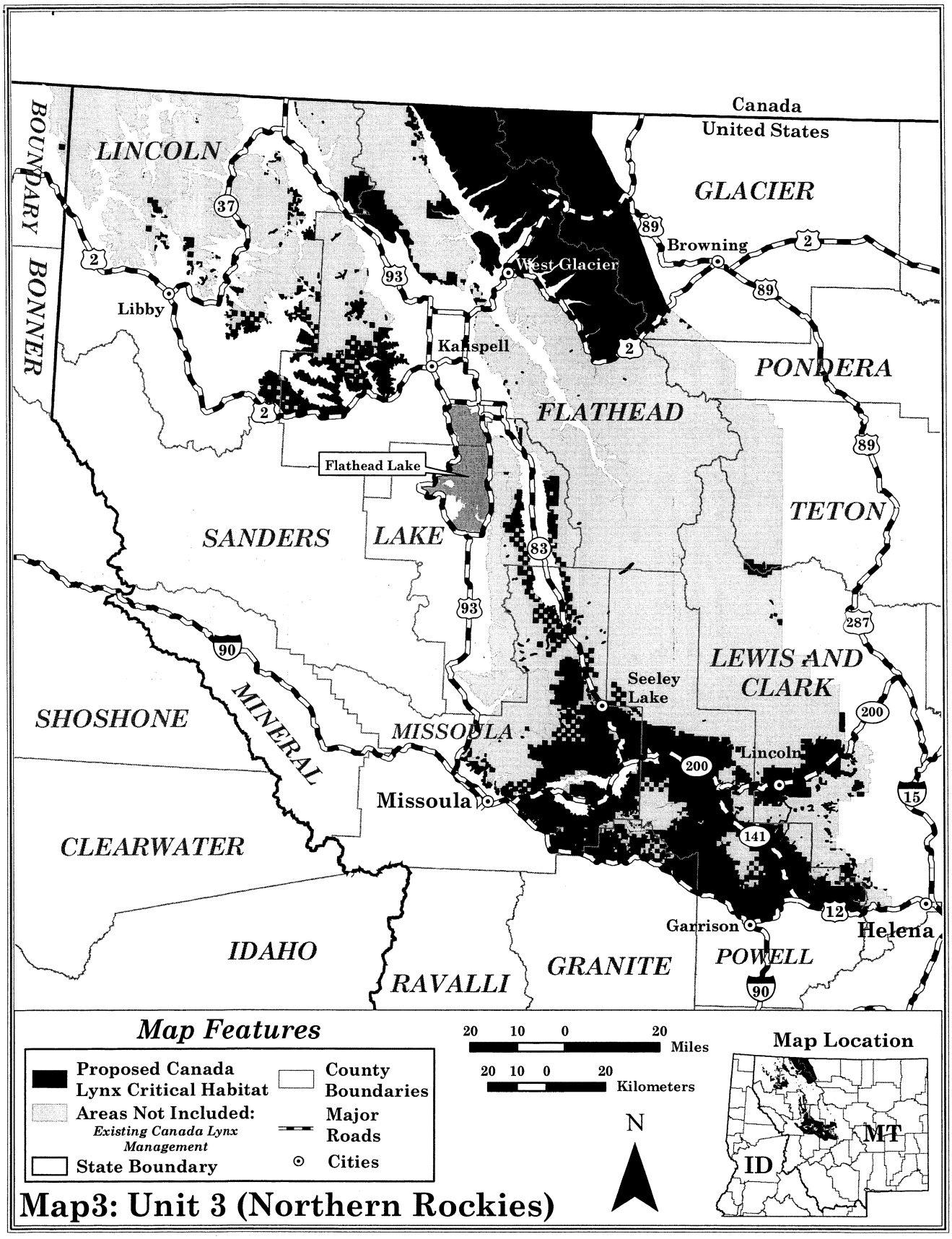
BILLING CODE 4310–55–P



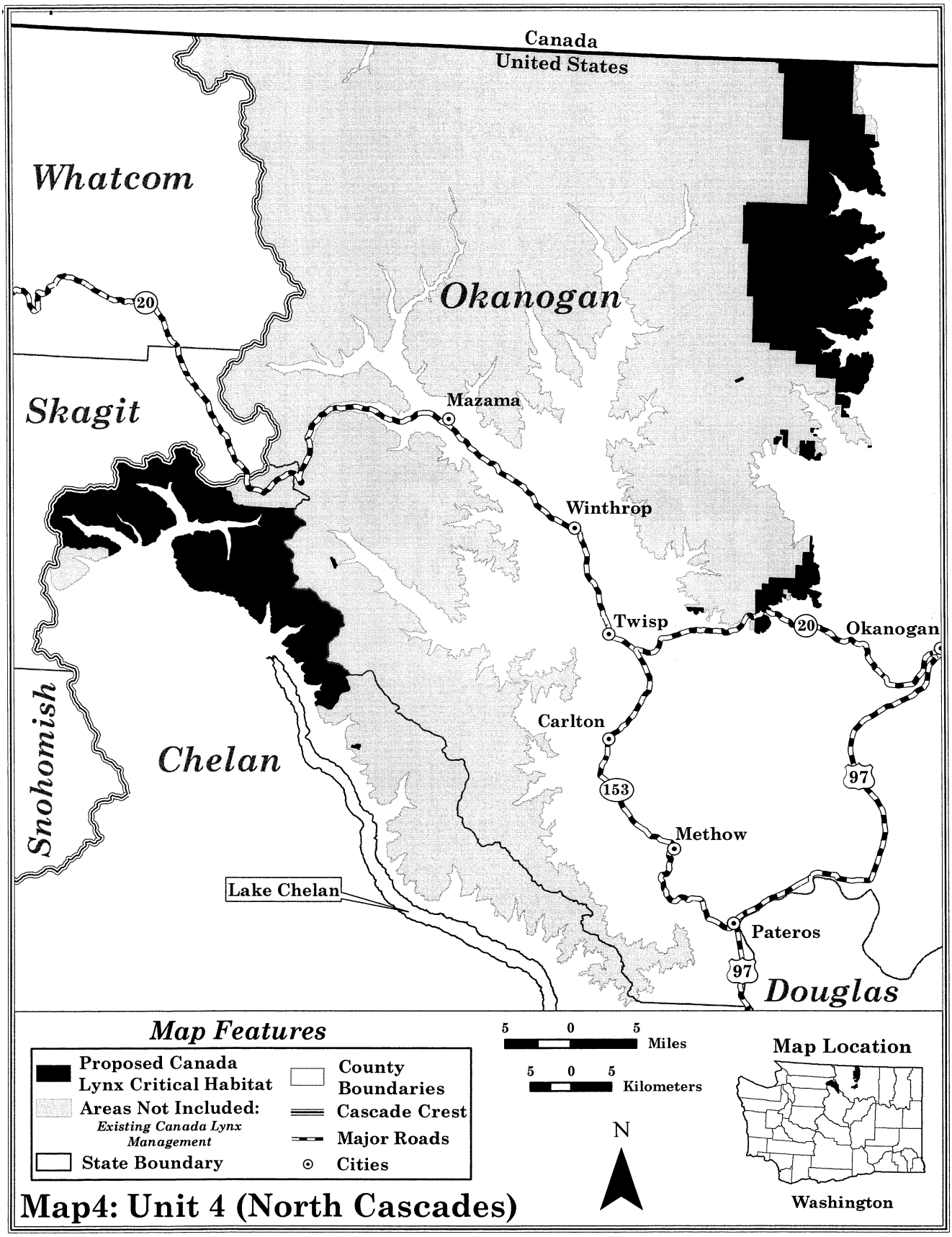
Map1: Unit 1 (Maine)



Map2: Unit 2 (Minnesota)



Map3: Unit 3 (Northern Rockies)



Map4: Unit 4 (North Cascades)

[FR Doc. 06–1443 Filed 2–15–06; 8:45 am]
BILLING CODE 4310–55–C

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 22

RIN 1018–AT94

Protection of Bald Eagles; Definition

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: In anticipation of possible removal (delisting) of the bald eagle in the 48 contiguous States from the List of Endangered and Threatened Wildlife under the Endangered Species Act (ESA), the U.S. Fish and Wildlife Service (the Service) is proposing a definition of ''disturb'' under the Bald and Golden Eagle Protection Act (BGEPA) to guide post-delisting bald eagle management. Because BGEPA's prohibition against disturbance applies to both bald and golden eagles, the definition will apply to golden eagles (*Aquila chrysaetos*) as well as bald eagles (*Haliaeetus leucocephalus*).

If the bald eagle is delisted, the BGEPA will become the primary law protecting bald eagles. BGEPA prohibits take of bald and golden eagles and provides a statutory definition of ''take'' that includes ''disturb.'' Although disturbing eagles has been prohibited by BGEPA since the statute's enactment, the meaning of ''disturb'' has never been explicitly defined by the Service or by the courts. To define ''disturb,'' we rely on the common meaning of the term as applied to the conservation intent of BGEPA and the working definitions of ''disturb'' currently used by Federal and State agencies to manage bald eagles. This proposed definition of disturb will apply to Alaska, where the bald eagle has never been listed under the ESA, as well as the 48 contiguous States. (Eagles do not occur in Hawaii.)

In addition to this proposed rulemaking, the Service is soliciting public comment on two related proposals published separately in this part of today's **Federal Register**. First, the Service is re-opening the public comment period on the proposed rule to remove the bald eagle from the list of threatened species under the ESA (16 U.S.C. 1531 *et seq.*); we originally proposed delisting the bald eagle on July 6, 1999 (64 FR 36453). Second, we are soliciting comment on draft National Bald Eagle Management Guidelines.

DATES: We will accept written comments on this proposed rule until May 17, 2006.

ADDRESSES: You may submit comments and other information, identified by RIN 1018–AT94, by any of the following methods:

- Mail: Brian Millsap, Chief, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, MBSP–4107, Arlington, Virginia 22203. Attn: RIN 1018–AT94.
- Hand Delivery/Courier: Same address as above.
- E-mail: *BaldEagle_ProposedRule@fws.gov*. Include ''RIN 1018–AT94'' in the subject line of the message.
- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and Regulatory Identification Number (RIN) for this rulemaking. For detailed instructions on submitting comments, file format and other information about electronic filing, and additional information on the rulemaking process, see the ''Public Comments Invited'' heading at the end of the **SUPPLEMENTARY INFORMATION** section of this document. In the event that our Internet connection is not functional, please submit your comments by the alternate methods mentioned above.

The complete file for this proposed rule is available for inspection, by appointment, during normal business hours at the Division of Migratory Bird Management, 4501 North Fairfax Drive, Room 4107, Arlington, Virginia 22203–1610. Please call 703–358–1714 to make an appointment to view the files.

FOR FURTHER INFORMATION CONTACT: Eliza Savage, Division of Migratory Bird Management, (*see* **ADDRESSES** section); or via e-mail at: *Eliza_Savage@fws.gov*; telephone: (703) 358–2329; or facsimile: (703) 358–2217.

SUPPLEMENTARY INFORMATION:

Background

For a discussion of the history of the bald eagle's status in the United States, including legislative and regulatory actions taken to protect and recover bald eagle populations, see our re-opening of the comment period on the proposed rule to delist the bald eagle, published separately in this part of today's **Federal Register**.

Bald Eagle National Management Guidelines

Since the bald eagle was listed under the ESA, the ESA has been the primary law protecting bald eagles in the 48 contiguous States. If the bald eagle is delisted under the ESA, the BGEPA (16 U.S.C. 668–668d) will become the primary law protecting bald eagles in the lower 48, as it has continued to be in Alaska where the bald eagle was never listed under the ESA. The BGEPA protects both bald and golden eagles. It prohibits take of both species and provides a statutory definition of ''take'' that includes ''disturb.'' To provide guidance to land managers, landowners, and others who plan activities in the vicinity of bald eagles, the Service has developed draft National Bald Eagle Management Guidelines. (See our notice of availability of the draft guidelines published separately in this part of today's **Federal Register**.) In the event the bald eagle is delisted, the guidelines will provide information to the public regarding how to avoid disturbing bald eagles. Secondly, the guidelines include additional recommended practices that can benefit bald eagles. The draft guidelines are based on the definition of ''disturb'' that we are proposing in this rulemaking.

Although the Guidelines are not law and strict adherence to them is not mandatory, they will benefit both eagles and people by: (1) Publicizing the provisions of the BGEPA and the Migratory Bird Treaty Act (16 U.S.C. 703–712) that continue to protect bald eagles, in order to reduce the possibility that people will violate those laws, (2) advising landowners, land managers and the general public of the potential for various human activities to disturb bald eagles, and (3) encouraging land management practices that benefit bald eagles and their habitat. We are soliciting public input on the guidelines. To obtain a copy, see the **Federal Register** notice announcing the availability of the National Bald Eagle Management Guidelines for public comment published separately in this part of today's **Federal Register**.

Description of the Proposed Rulemaking

Through an amendment to 50 CFR 22.3, we propose to define the term ''disturb'' under the BGEPA. Disturbing bald and golden eagles is prohibited because BGEPA prohibits ''take'' of eagles, and defines ''take'' to include ''disturb.'' Until now, the meaning of ''disturb'' has never been explicitly defined by the Service or by the courts. To define ''disturb,'' we rely on the common meaning of the term as applied to the conservation intent of BGEPA and the working definitions of ''disturb'' currently used by Federal and State agencies to manage bald and golden eagles.

''Disturb'' is defined by the *American Heritage Dictionary of the English Language* (4th ed., 2000) as:

''1. To break up or destroy the tranquillity or settled state of: *''Subterranean fires and deep unrest disturb the whole area''* (Rachel

Carson). 2. To trouble emotionally or mentally; upset. 3a. To interfere with; interrupt: *noise that disturbed my sleep*. b. To intrude on; inconvenience: *Constant calls disturbed her work*. 4. To put out of order; disarrange.

The *Merriam-Webster Online Dictionary* (2004) defines disturb as:

''1a: to interfere with : *INTERRUPT*. b: to alter the position or arrangement of. c: to upset the natural and especially the ecological balance or relations of <land *disturbed* by dumping>. 2a: to destroy the tranquillity or composure of. b: to throw into disorder. c: *ALARM*. d: to put to inconvenience.''

Thus, disturb can be applied to individuals as well as to natural forces and universal concepts (e.g., ''disturbing the peace''). As applied to individuals, the concept of *disturb* implies and requires there be a psychological or physiological component—essentially an agitating effect—on the individual being disturbed.

Biological studies of eagle behavior indicate that eagles are particularly vulnerable to interference during territory establishment, courtship, egg-laying, incubation, and parenting of nestlings. A wide variety of activities, including various types of development, resource extraction, and recreational activities near sensitive areas such as nesting, feeding, and roosting sites can interrupt or interfere with the behavioral patterns of eagles. Further disruption may also result from human activity that occurs after the initial habitat alterations and construction activities (e.g., residential occupancy or the use of commercial buildings, roads, piers, and boat launching ramps).

When the BGEPA was enacted, Congress intended it to be the primary vehicle by which eagles would be protected from extinction, and as such Congress provided a broad prohibition in its definition of ''take,'' by defining it to include: pursue, shoot, shoot at, wound, kill, capture, trap, collect, molest or disturb. (Congress added the term ''poison'' to the definition in 1972 (P.L. 92–535 [86 Stat. 1064)], October 23, 1972).) In keeping with the conservation intent of the BGEPA, we have determined that the following biological premises are necessary to secure long-term protections for the bald and golden eagle populations: prevention of nest abandonment and prevention of death or injury resulting from interference with normal breeding, feeding, and sheltering habits.

Accordingly, we propose to define ''disturb'' under the BGEPA as follows: ''To agitate or bother a bald or golden eagle to the degree that interferes with or interrupts normal breeding, feeding, or sheltering habits, causing injury, death, or nest abandonment.'' In addition to immediate impacts, this definition encompasses impacts that result from human-induced alterations initiated around a previously used nest site during a time when eagles are not present, if, upon the eagle's return, such alterations agitate or bother an eagle to a degree that interferes with or interrupts normal breeding, feeding, or sheltering habits and causes injury, death, or nest abandonment. This definition is consistent with how ''disturb'' has been interpreted in the past by the Service and other Federal and State wildlife and land management agencies.

The definition is intended to cover situations where the interference or interruption of an eagle's breeding, feeding, or sheltering habits causes injury or death not just to themselves, but more typically to other eagles: the juveniles or eggs. For example: if adult eagles are repeatedly flushed from a nest, their young may overheat and die, or their eggs may cool too much and fail to hatch.

Biological literature indicates that factors such as the proximity, frequency, magnitude, and duration of activities, along with the presence or absence of vegetative buffers and topographic changes in terrain, determine how an activity impacts eagles. Vegetation surrounding a nest tree or concentration area may serve to buffer, conceal, or muffle human activities from the eagle's visual or auditory awareness. Therefore, site-specific factors can affect the likelihood and degree of impacts to the eagles. Individual eagles and pairs of eagles demonstrate remarkably different thresholds for disturbance. On-site evaluations of the terrain, existing vegetation, existing human activities and/or development, sight lines from the nest, and observed behaviors of the eagles in that particular locality will help to determine whether disturbance is likely to occur on a case-by-case basis. The National Bald Eagle Management Guidelines will provide assistance to people whose activities may affect bald eagles based on these varying factors (see our notice of availability of the guidelines published separately in this part of today's **Federal Register**).

Required Determinations

Energy Supply, Distribution or Use (E.O. 13211). On May 18, 2001, the President issued an Executive Order addressing regulations that affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to significantly affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Regulatory Planning and Review (E.O. 12866). This rule is a significant regulatory action subject to review by the Office of Management and Budget (OMB). OMB makes the final determination of significance under Executive Order 12866.

a. The Service does not anticipate that this rule will have an effect of $100 million or more on the economy. This rule defines an existing statutory term in a manner largely consistent with how it is currently interpreted by State and Federal agencies. The Service is seeking comments from the public on any potential costs and/or benefits associated with promulgating this regulatory definition of ''disturb'' and providing guidance for avoiding such disturbance. In particular, the Service is interested in information about the level of anticipated conflicts between eagles and various land use activities to help determine the expected impacts.

b. This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. This rule deals solely with governance of bald and golden eagle take in the United States. No other Federal agency has any role in regulating bald or golden eagle take. Although some other Federal agencies regulate activities that impact wildlife (including eagles) and such impacts may constitute take, the definition of ''disturb'' promulgated by this rule is similar to existing operative interpretations of the term.

c. This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. No entitlements, grants, user fees, or loan programs are associated with the regulation of bald or golden eagle take.

d. This rule may raise novel legal or policy issues.

Regulatory Flexibility Act. The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), 5 U.S.C. 804(2).

Description of Small Entities Affected by the Rule. This rule applies to any individual, government entity, or business entity that undertakes or wishes to undertake any activity that may disturb bald or golden eagles. It is not possible to define precisely or

enumerate these entities because of uncertainty concerning their plans for future actions and incomplete scientific knowledge of which activities in specific cases will disturb bald or golden eagles. Small entities that are most likely to engage in activities that may disturb bald or golden eagles include: Small businesses that are engaged in construction of residential, industrial, and commercial developments, small timber companies, small mining operations, and small governments and small organizations engaged in construction of utilities, recreational areas, and other facilities. These may include tribal governments, town and community governments, water districts, irrigation districts, ports, parks and recreation districts, and others.

Expected Impact on Small Entities. The rule defines the term ''disturb,'' which is contained in the definition of ''take'' in the BGEPA. The definition is consistent with the Service's interpretation of ''disturb'' and this interpretation will remain unchanged regardless of whether this rule is implemented. This codification of the Service's definition of ''disturb'' does not change existing law and, therefore, does not impose any new reporting, recordkeeping, or other compliance costs on any small entities. Promulgation of the rule and the accompanying National Bald Eagle Management Guidelines provides clear guidance to all parties that engage in activities that could potentially disturb eagles. Improved compliance with existing laws may result in additional costs to regulated entities. Conversely, promulgation of the rule and guidelines may decrease the costs of complying with the BGEPA by reducing uncertainty and enhancing resolution of potential conflicts between human activities and eagles.

Description of steps the Service has taken to minimize the economic impact of the rule on small entities. The Service is seeking comments on its draft guidelines and definition, including suggestions for ways to structure the guidelines to minimize the burden on small entities while providing appropriate protection for the bald eagle under the BGEPA. The Service is also seeking comments that provide examples of effects on small entities.

Unfunded Mandates Reform Act. In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*):

a. This rule will not ''significantly or uniquely'' affect small governments. A Small Government Agency Plan is not required. This rulemaking will not impose a cost of $100 million or more in any given year on local or State government or private entities.

b. This rule will not produce a Federal mandate of $100 million or greater in any year; *i.e.,* it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. Revisions to State regulations are not required; codifying the definition of ''disturb'' under the BGEPA does not require any future action by State or local governments.

Takings (E.O. 12630). In accordance with Executive Order 12630, the rule does not have significant takings implications. This is an interpretive rule, defining the statutory term ''disturb'' under the BGEPA. The rule promulgates a definition of ''disturb'' that is consistent with working definitions currently applied to private property, and will be used in conjunction with guidelines that provide greater flexibility than existing guidelines used by the Service to advise landowners regarding how to avoid disturbing bald eagles. A takings implication assessment is not required.

Federalism (E.O. 13132). In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. This rule will not interfere with the States' ability to manage themselves or their funds. Defining a term within the prohibitions of BGEPA will not result in significant economic impacts because this definition is consistent with the meaning of the term as currently interpreted by the Service and the States. A Federalism Assessment is not required.

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

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) and 512 DM 2, we have evaluated potential effects on federally recognized Indian tribes and have determined that there are no potential effects. This rule will not interfere with Tribes' ability to manage themselves or their funds.

Paperwork Reduction Act. This proposed rule does not require any information collection from the public. No OMB control number is required.

National Environmental Policy Act. If warranted, the Service will prepare an environmental assessment of this proposed action, pursuant to the National Environmental Policy Act. If undertaken, the environmental review of this action will be conducted in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), National Environmental Policy Act regulations, and policies and procedures of the Service for complying with those regulations.

Clarity of this regulation. Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand. Send a copy of any comments pertaining to how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may also e-mail comments on the clarity of this rule to: *Exsec@ios.doi.gov.*

Public Comment Invited

Interested persons may submit written comments, suggestions, or objections regarding the proposed regulations. Correspondence should be sent to the address given at the beginning of this proposed rulemaking under the **ADDRESSES** section. Please submit Internet comments to *BaldEagle_ProposedRule@fws.gov* in ASCII file format and avoid the use of special characters or any form of encryption. Please also include ''Attn: RIN 1018–AT94'' in your e-mail subject header, and your full name and return address in the body of your message. Please note that the Internet address *BaldEagle_ProposedRule@fws.gov* will be closed at the termination of the public comment period.

We will take into consideration the relevant comments, suggestions, or objections that are received by the deadline indicated above in **DATES**. These comments, suggestions, or objections, and any additional information received, may lead us to adopt a final rulemaking that differs from this proposal.

Our practice is to make comments, including names and home addresses of respondents, available for public review during normal business hours. Individual respondents may request that we withhold their home addresses from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you

wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

List of Subjects in 50 CFR Part 22

Exports, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

For the reasons described in the preamble, we propose to amend subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 22—EAGLE PERMITS

1. The authority citation for part 22 continues to read as follows:

Authority: 16 U.S.C. 668a; 16 U.S.C. 703–712; 16 U.S.C. 1531–1544.

2. In § 22.3, revise the heading and introductory paragraph and add a definition for ''disturb'' in alphabetical order to read as follows:

§ 22.3 Definitions.

In addition to definitions contained in part 10 of this subchapter, the following definitions apply within this part 22:

* * * * *

Disturb means to agitate or bother a bald or golden eagle to the degree that interferes with or interrupts normal breeding, feeding, or sheltering habits, causing injury, death, or nest abandonment.

* * * * *

Dated: November 1, 2005.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 06–1440 Filed 2–15–06; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 228

[I.D. 020806A]

Taking of Cook Inlet, Alaska Beluga Whales by Alaska Natives

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

ACTION: Notice of availability; request for comments.

SUMMARY: The Marine Mammal Protection Act (MMPA) allows NMFS to regulate the subsistence harvest of marine mammals by Alaska Natives when the affected stock of marine mammals is depleted and after the opportunity for a formal hearing on the proposed regulations. After designating the Cook Inlet stock of beluga whales as depleted, NMFS proposed regulations to limit the subsistence harvest from this stock. In December 2000, a formal hearing was conducted on the proposed regulations. In August 2004, a second formal hearing was conducted on proposed long term harvest regulations from 2005 through the CI beluga whale's recovery. The Administrative Law Judge presiding in the August 2004 hearings submitted his recommended decision to the Assistant Administrator for Fisheries (AA) on November 8, 2005. The Judge's recommended decision is available for public review, and NMFS solicits comments on his recommendations.

DATES: Comments must be received by March 8, 2006

ADDRESSES: Copies of the recommended decision may be reviewed and/or copied at the NMFS, Protected Resource Division, 222 West 7th Ave. Room 517, Anchorage, AK 99512; or at the Alaska Regional Office, Protected Resource Division, 709 W 9th St. Room 420, Juneau, AK, 99802. The recommended decision is also available on the Internet (see Electronic Access). Copies of the recommended decision and the entire record of the hearing may be reviewed and/or copied at the Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910. Send comments to Kaja Brix, Assistant Regional Administrator, Protected Resources Division, Alaska Region, NMFS, Attn: Lori Durall. Comments may be submitted by:

- Mail: PO Box 21668, Juneau, AK 99802
- Hand delivery: 709 West 9th Street, Room 420A, Juneau, AK
- Fax: 907–586–7557
- E-mail: *CIB-MMPA-ALJ-recommended-decision@noaa.gov*. Please identify electronic comments with the header: CI Beluga ALJ decision. E-mail comments, with or without attachments, are limited to five (5) megabytes.
- Webform at the Federal eRulemaking Portal: *www.regulations.gov*. Follow the instructions at that site for submitting comments.

FOR FURTHER INFORMATION CONTACT: Barbara Mahoney, NMFS Alaska Region, Anchorage Field Office, (907) 271–5006; or Kaja Brix, NMFS, Alaska Region, (907) 586–7235.

SUPPLEMENTARY INFORMATION:

Electronic Access

The recommended decision, proposed regulations, and other documents related to the administrative hearing and recovery effort are available on the Internet at the following address: *http://www.fakr.noaa.gov/protectedresources/whales/beluga.htm*.

Background

NMFS initially proposed regulations limiting the subsistence harvest of beluga whales in Cook Inlet, AK on October 4, 2000 (65 FR 59164). The proposed rule's objectives are to recover the depleted stock of Cook Inlet beluga whales to its optimum sustainable population level while preserving the traditional subsistence use of the marine mammals by Alaska Natives.

Pursuant to Section 101(b) (3) and section 103(d) of the MMPA, an administrative hearing was held prior to regulations being prescribed to limit the subsistence harvest of marine mammals by Alaska Natives. Judge Parlen L. McKenna convened hearings on the proposed rule in December 2000 and August 2004, in Anchorage, AK.

On November 8, 2005, Judge McKenna submitted his recommended decision to the AA for the proposed regulation governing the taking of Cook Inlet, Alaska, beluga whales by Alaska Natives. Federal regulations (50 CFR 228.20) require the AA to make the recommended decision available for public review and comment for a 20–day period. Following the 20–day comment period, the AA must make a final decision on the proposed regulations, which must include the following:

(1) A statement containing a description of the history of the proceeding;

(2) Findings on the issues of fact with the reasons therefor; and

(3) Rulings on issues of law.

The AA's final decision may affirm, modify, or set aside, in whole or in part, the recommended findings, conclusions and decision of the hearing's presiding officer.

The AA's decision must be published in the **Federal Register** and final regulations shall be promulgated with the decision. In accordance with the administrative regulations, NMFS solicits public comments on Judge McKenna's recommended decision.

Dated: February 10, 2006.

James H. Lecky,

Director, Office of Protected Resources,National Marine Fisheries Service.

[FR Doc. E6–2196 Filed 2–15–06; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 060201022–6022–01; I.D. 012606A]

RIN 0648–AU16

Fisheries of the Exclusive Economic Zone Off Alaska; Control Date for Bering Sea and Aleutian Islands Pacific Cod Fishery

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

ACTION: Advance notice of proposed rulemaking; consideration of control date.

SUMMARY: This document announces that anyone entering the Bering Sea and Aleutian Islands (BSAI) Pacific cod fishery after December 11, 2005 (control date), will not be assured of future access to the Pacific cod resource if a management regime is developed and implemented that limits the number of participants, licenses or vessels in the fishery. This announcement is necessary for public awareness of a potential eligibility criterion for access with commercial fishing gear to the BSAI Pacific cod resource. This announcement does not prevent any other date for eligibility in the fishery or another method of controlling fishing effort from being proposed and implemented. The intended effect of this announcement is to discourage new entry into the fishery based on speculation while discussions continue on whether and how access to the Pacific cod resource should be limited.

FOR FURTHER INFORMATION CONTACT: Jeff Hartman, 907–586–7442, or *jeff.hartman@noaa.gov*.

SUPPLEMENTARY INFORMATION: On December 11, 2005 the North Pacific Fishery Management Council (Council) recommended that NMFS provide a notice to the public that a control date of December 11, 2005, for participation in the BSAI Pacific cod fishery be set. The purpose of this notice is to inform the public that participation in the BSAI Pacific cod commercial fishery after this date may not count for consideration of an allocation or eligibility to fish for Pacific cod.

The BSAI Pacific cod fishery is managed pursuant to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP). The total allowable catch (TAC) for BSAI Pacific cod currently is allocated among trawl, fixed, and jig gear sectors at 50 CFR 679.20(a)(7). The Council is developing a proposed amendment to the FMP (Amendment 85) that would further divide and refine these allocations. During the development of this amendment, the Council became aware that new entrants into some sectors of the Pacific cod fishery would exacerbate competition for increasingly smaller sector allocations under Amendment 85.

In October 2005, the Council developed a problem statement for Amendment 85 identifying that:

> Participants in the BSAI Pacific cod fishery who have made significant investments and have a long-term dependence on the resource need stability in the allocations to the trawl, jig, fixed gear, and CDQ [Community Development Quota] sectors. To reduce uncertainty and provide stability for these participants, allocations should be adjusted to better reflect historic use by sector. The basis for determining sector allocations will be catch history as well as consideration of socio-economic and community factors. As other fisheries in the BSAI and GOA [Gulf of Alaska] are incrementally rationalized, historical participants in the BSAI Pacific cod fishery may be put at a disadvantage. Each sector in the BSAI Pacific cod fishery currently has different degrees of license requirements and levels of participation. Allocations to the sector level are a necessary step on the path towards comprehensive rationalization. Prompt action is needed to maintain stability in the BSAI Pacific cod fisheries.

In October 2005, the public testified to the Council that new entry into the Pacific cod fishery likely would erode the Pacific cod allocations and associated prohibited species catch amounts available to long-term participants, especially under proposed Amendment 85. On December 11, 2005, the Council recommended that NMFS provide a notice to the public that a control date of December 11, 2005, be set for participation in the BSAI Pacific cod fishery. This notice informs the public that participation in the BSAI Pacific cod commercial fishery after this date may not be considered by the Council for purposes of any future limited entry program developed for this fishery.

NMFS and the Council intend, in making this announcement, to discourage speculative entry into the Pacific cod fishery while potential entry or access control management regimes are considered by the Council. If the Council decides to develop an access or entry control regime, some fishermen who do not currently fish for Pacific cod in the BSAI and never have done so may decide to enter the fishery for the sole purpose of establishing a record of making commercial landings of this species.

A record of making commercial landings generally is considered indicative of economic dependence on a fishery. On this basis, a new entrant may successfully claim access to a fishery that otherwise is limited to traditional participants. New entrants may have to buy the fishing history or a permit from an earlier participant. Hence, initial access to the fishery at little or no entry cost may result in a transfer of wealth to entities with little investment in a fishery and away from those that have substantial investment in the fishery as indicated by their fishing history. Any anticipated increase in the security of an allocation also may encourage speculative entry, which is associated with a rapid and wasteful increase in fishing effort in fisheries already fully or over-exploited. Specification of a control date may communicate helpful investment and operational information to businesses considering entry to a fishery, or those currently operating in a fishery.

This action does not commit the Council or Secretary to a particular management regime or criterion for entry to the Pacific cod fishery. Fishermen are not guaranteed future participation in the fishery before or after the control date. The Council may choose a different control date, or it may choose a management regime that does not make use of such a date. The Council may choose to give variably weighted consideration to fishermen in the fishery before and after the control date. The Council may choose also to take no further action to control entry or access to the fishery.

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

Dated: February 13, 2006.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

[FR Doc. E6–2231 Filed 2–15–06; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register

Vol. 71, No. 32

Thursday, February 16, 2006

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

February 10, 2006.

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),

OIRA_Submission@OMB.EOP.GOV or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments 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 OMB control number.

Foreign Agricultural Service

Title: CCC's Export Credit Guarantee Program (GSA–102) and Supplier Credit Guarantee Program (SCGP).

OMB Control Number: 0551–0004.

Summary of Collection: The Commodity Credit Corporation (CCC) of the U.S. Department of Agriculture administers 7 CFR Part 1493, the Export Credit Guarantee Program (GSM–102) and the Supplier Credit Guarantee Program (SCGP). These programs provide guarantees to exporters in order to maintain and increase overseas importers ability to purchase U.S. agricultural goods. The Export Credit Guarantee Programs are designed to stimulate U.S. private sector financing of foreign purchases of U.S. agricultural commodities on credit terms. Since the Export Credit Guarantee Programs operate off commercial sales, the majority of the information required for program participation, including the guarantee application, evidence of export report, assignment notice, and filing of notices of default. The Foreign Agricultural Service (FAS) will collect information from the guarantee application submitted by the participants in writing (via fax or e-mail) or mail.

Need and Use of the Information: FAS will collect information from participating U.S. exporters in order to determine the exporters eligibility for program benefits. The information is also used in fulfilling CCC obligation under the issued payment guarantee. If the information were not collected CCC would be unable to determine if export sales under the programs would be eligible for coverage or, if coverage conformed to program requirements.

Description of Respondents: Business or other for-profit.

Number of Respondents: 298.

Frequency of Responses: Record keeping, Reporting: On occasion.

Total Burden Hours: 8,458.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. E6–2192 Filed 2–15–06; 8:45 am]

BILLING CODE 3410–10–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request: Request for Administrative Review

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Food and Nutrition Service (FNS) invites comments on this information collection for which FNS intends to request approval from the Office of Management and Budget (OMB). The proposed collection is a revision of a currently approved collection.

DATES: Written comments must be submitted on or before April 17, 2006.

ADDRESSES: Comments are invited on (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions that were 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 the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Courtney L. Wilkerson, Chief, Administrative Review Branch, Benefit Redemption Division, U.S. Department of Agriculture, Food and Nutrition Service, 3101 Park Center Drive, Room 608, Alexandria, Virginia 22302. Comments may also be faxed to the attention of Mr. Wilkerson at (703) 305–2820, or e-mailed to *Courtney.Wilkerson@fns.usda.gov.*

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also be a matter of public record.

FOR FURTHER INFORMATION CONTACT: Request for additional information or copies of the information collection form and instructions should be

directed to Courtney L. Wilkerson on (703) 305–2820.

SUPPLEMENTARY INFORMATION:

Title: Request for Administrative Review.

OMB Number: 0584–0520.

Expiration Date: April 30, 2006.

Type of Request: Revision of a currently approved collection of information.

Abstract: The Food and Nutrition Service (FNS) of the U.S. Department of Agriculture is the Federal agency responsible for administering the Food Stamp Program. The Food Stamp Act of 1977, as amended, (7 U.S.C. 2011–2036) requires that the FNS determine the eligibility of retail food stores and certain food service organizations who apply to participate in the Food Stamp Program. If a food retailer or wholesale food concern is aggrieved by certain administrative action by FNS, that store has the right to file a written request for review of the administrative action with FNS.

The information collection burden for retail food stores and certain food service organizations has slightly increased over the past three fiscal years. The number of respondents reported in the previously approved collection was based on a collective total of three consecutive fiscal years (FY 2001–2003). In accordance with the Paperwork Reduction Act of 1995, this notice reflects an estimated total annual burden on respondents based solely on fiscal year 2005 data. Therefore, while the previously approved collection reflects 1,140 as the total number of respondents for fiscal years 2001–2003, this notice accurately reflects 652 respondents for fiscal year 2005, a slight annual increase over the last three fiscal years.

Estimate of Burden: The public reporting burden for this collection of information is estimated to average 0.17 an hour per response.

Respondents: Retail food stores and wholesale food concerns.

Estimated Number of Respondents: 652.

Number of Responses per Respondent: 1.2.

Estimated Time per Response: 0.17 minutes.

Estimated Total Annual Burden on Respondents: 133 hours.

Dated: February 3, 2006.

Roberto Salazar,

Administrator, Food and Nutrition Service.

[FR Doc. E6–2230 Filed 2–15–06; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Information Collection; Request for Comments; Urgent Removal of Timber

AGENCY: Forest Service, USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Forest Service is seeking comments from all interested individuals and organizations on the extension of an information collection associated with timber sale contract term extensions for urgent removal of salvage timber from other than National Forest system lands. Regulations at 36 CFR 223.53 allow timber sale purchasers to ask for extensions of certain National Forest timber sale contracts when the manufacturing facilities or logging equipment capacity available to purchasers are insufficient to provide for both the rapid harvest of damaged non-National Forest System timber in need of expeditious removal and the continued harvest of undamaged (green) timber under contract with the Forest Service. When requesting an urgent removal extension purchasers are required to provide documentation supporting the need. The collected information is necessary for the contracting officer to make a determination whether the purchaser meets the conditions for receiving an urgent removal extension on one or more National Forest System timber sale contracts.

DATES: Comments must be received in writing on or before April 17, 2006 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Comments concerning this notice should be addressed to Director, Forest Management, 1400 Independence Avenue, SW., Mail Stop 1103, Washington, DC 20250–0003.

Comments also may be submitted via facsimile to (202) 205–1045 or by e-mail to: *urgentremoval@fs.fed.us*. In addition, comments may be submitted via the World Wide Web/Internet Web site at: *http://www.regulations.gov*. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. Conditions that must be met for obtaining an Urgent Removal Contract Term Extension are detailed in Title 36 of the Code of Federal Regulations, section 223.53, and can be viewed on the World Wide Web/Internet site at: *http://www.access.gpo.gov/nara/cfr/waisidx_05/36cfr223_05.html*. Alternatively, these can be viewed in the Office of the Director, Forest Management, Third Floor, Southwest Wing, Yates Building, 201 14th Street, SW., Washington, DC. Visitors are encouraged to call ahead at (202) 205–1496 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Lathrop Smith, Forest Management Staff, at (202) 205–0858, or Richard Fitzgerald, Forest Management Staff, at (202) 205–1753. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 twenty-four hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION:

Title: Urgent Removal of Timber.

OMB Number: 0596–0167.

Expiration Date of Approval: June 30, 2006.

Type of Request: Extension of currently approved collection.

Abstract: In order to facilitate the expeditious removal of timber in other ownerships damaged by catastrophic events beyond the landowner's control, the Forest Service promulgated a final rule at § 223.53 of Title 36 of the Code of Federal Regulations on January 2, 2004 (69 FR 29).

Periodically, catastrophic events such as severe drought conditions, insect and disease outbreaks, wildfires, floods, and windthrow occur on forested lands within, or near, NFS lands. As a result of such catastrophic events, substantial amounts of private and other public timber may be severely damaged. This damaged timber must be harvested within a relatively short time period to avoid substantial losses due to deterioration in both the quantity and quality of the timber. The critical time period for harvesting this damaged timber and avoiding substantial deterioration varies with the season of the year, the species of timber, the damaging agent, and the location of the damaged timber. In most cases, substantial deterioration can be avoided if the damaged timber is harvested within 1 year of the catastrophic event. The number of wildfires, and the extent of damage to public and private forested land experienced in recent years resulted in the Forest Service adjusting its contracting procedures to support the urgent removal of damaged timber on non-NFS lands.

This information collection provides data to permit the discretionary extension of certain National Forest System timber sale contracts by the Contracting Officer. Such extensions will allow purchasers to divert

resources to harvesting damaged timber, located on private or non-NFS public lands, which is in need of urgent removal. Catastrophic events which may result in the need for urgent removal of damaged timber include, but are not limited to, fire, flood, insect and disease infestations, drought, and windthrow.

The intended effects of this information collection is to assure that extensions of the time allowed to harvest National Forest System timber sale contracts are consistent with the requirements of the National Forest Management Act (16 U.S.C. 472a), while minimizing the loss of National Forest System timber adjacent to other timber infested with insects and disease or damaged by fire; reduce the threat to public safety and property resulting from such catastrophic events; and promote the wise use and conservation of the natural resources.

The National Forest Management Act (16 U.S.C. 472a) requires that extensions of contract time shall not be granted unless ''the purchaser has diligently performed in accordance with an approved plan of operation or that the substantial overriding public interest justifies the extension.'' Regulations at 36 CFR 223.115 mirror the National Forest Management Act.

Regulations at 36 CFR 223.53(b) require the Regional Forester to verify in writing that: (1) A specific catastrophe occurred for which urgent removal extensions should be granted; and (2) Failure to harvest the damaged non-National Forest System timber promptly could result in the following: (i) Pose a threat to public safety, (ii) Create a threat of an insect or disease epidemic to National Forest System or other lands or resources, or (iii) Significant private or other public resource loss.

Following such a determination, to obtain an urgent removal extension on a National Forest System timber sale contract, a purchaser must make a written request to the contracting officer which includes the following: (1) An explanation of why the harvest of undamaged (green) National Forest System timber within the term of the existing National Forest System contract(s) will prevent or otherwise impede the removal of damaged non-National Forest System timber in need of expeditious removal; and (2) Documentation that the manufacturing facilities or logging equipment capacity available to the purchaser would be insufficient to provide for both the rapid salvage of damaged non-National Forest System timber in need of expeditious removal and continued harvest of undamaged (green) National Forest System timber under contract with the Forest Service.

The contracting officer must obtain the information provided by the purchaser to verify that there is a legitimate need to grant the request for urgent removal extension(s) in accordance with the regulations at 36 CFR 223.53.

Information will be collected in writing. Electronic technology is not appropriate for collecting site-specific, one-time information. Facsimile extension applications are acceptable. Each request for an urgent removal extension is unique. There is no duplication of information and the information is only available from the timber sale purchaser. Only the minimum amount of information required to make the contracting officer's determination is collected.

The Forest Service cannot assure that it meets its statutory requirements in the National Forest Management Act for extending timber sale contracts if the information collection is not conducted or is conducted less frequently.

Estimate of Annual Burden: The public reporting burden to provide information when requesting a timber sale contract urgent removal extension is estimated to average 6 hours per response.

Type of Respondents: Individuals, large and small businesses, and corporations purchasing National Forest System timber sales.

Estimated Annual Number of Respondents: 25.

Estimated Annual Number of Responses per Respondent: 1 per year.

Estimated Total Annual Burden on Respondents: 150 hours.

Comment is Invited

Comment is invited on: (1) Whether the proposed collection of information is necessary for the stated purposes and the proper performance of the functions of the agency, including whether the information will have practical or scientific utility; (2) 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) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of 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 become a matter of public record. Comments will be summarized and included in the request for Office of Management and Budget approval.

Dated: February 1, 2006.

Frederick Norbury,

Associate Deputy Chief, NFS.

[FR Doc. E6–2281 Filed 2–15–06; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Sanders County Resource Advisory Committee Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106–393) the Lolo and Kootenai National Forests' Sanders County Resource Advisory Committee will meet on February 16 at 7 p.m. in Thompson Falls, Montana for a business meeting. The meeting is open to the public.

DATES: February 16, 2006.

ADDRESSES: The meeting will be held at the Thompson Falls Courthouse, 1111 Main Street, Thompson Falls, MT 59873.

FOR FURTHER INFORMATION CONTACT: Randy Hojem, Designated Federal Official (DFO), District Ranger, Plains Ranger District, Lolo National Forest at (406) 826–3821.

SUPPLEMENTARY INFORMATION: Agenda topics include reviewing progress on current RAC projects, and receiving public comment. If the meeting location is changed, notice will be posted in the local newspapers, including the Clark Fork Valley Press, and Sanders County Ledger.

Dated: February 6, 2006.

Randy Hojem,

DFO, Plains Ranger District, Lolo National Forest.

[FR Doc. 06–1464 Filed 2–15–06; 8:45 am]

BILLING CODE 3910–11–M

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 the following information collections for which RUS intends to request approval from the Office of Management and Budget (OMB).

DATES: Comments on this notice must be received by April 17, 2006.

FOR FURTHER INFORMATION CONTACT: Richard C. Annan, Director, Program Development and Regulatory Analysis, Rural Utilities Service, 1400 Independence Ave., SW., STOP 1522, Room 5181, South Building, Washington, DC 20250–1522. Telephone: (202) 720–0784. Fax: (202) 720–8435.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget's (OMB) regulation (5 CFR part 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [*see* 5 CFR 1320.8(d)]. This notice identifies information collections that RUS is submitting to OMB for extension.

Comments are invited on: (a) Whether this 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 the burden of the collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of appropriate automated, electronic, mechanical or other technological collection techniques or other forms of information technology. Comments may be sent to Richard C. Annan., Director, Program Development and Regulatory Analysis, Rural Utilities Service, U.S. Department of Agriculture, STOP 1522, 1400 Independence Ave., SW., Washington, DC 20250–1522. Fax: (202) 720–8435.

Title: Mergers and Consolidations of Electric Borrowers, 7 CFR 1717, subpart D.

OMB Control Number: 0572–0114.

Type of Request: Extension of a currently approved collection.

Abstract: The RE Act of 1936, as amended (7 U.S.C. 901 *et seq.*), authorizes the RUS to make and guarantee loans for rural electrification. Due to deregulation and restructuring activities in the electric industry, RUS borrowers find it advantageous to merge or consolidate to meet the challenges of industry change. This information collection addresses the requirements of RUS policies and procedures for mergers and consolidations of electric program borrowers.

Estimate of Burden: Public reporting burden for this collection is estimated to average 1.3 hours per response.

Respondents: Not-for-profit institution; business or other for-profit.

Estimated Number of Respondents: 18.

Estimated Number of Responses per Respondent: 7.9.

Estimated Total Annual Burden on Respondents: 184 hours.

Copies of these information collections can be obtained from MaryPat Daskal, Program Development and Regulatory Analysis, at (202) 720–7853. Fax: (202) 720–8435.

All responses to this notice will be summarized and included in the requests for OMB approval. All comments will also become a matter of public record.

Dated: February 6, 2006.

James M. Andrew,

Administrator, Rural Utilities Service.

[FR Doc. E6–2202 Filed 2–15–06; 8:45 am]

BILLING CODE 3410–15–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 April 17, 2006.

FOR FURTHER INFORMATION CONTACT: Richard C. Annan, Director, Program Development and Regulatory Analysis, Rural Utilities Service, 1400 Independence Ave., SW., STOP 1522, Room 5181, South Building, Washington, DC 20250–1522. Telephone: (202) 720–0784. FAX: (202) 720–4120.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget's (OMB) regulation (5 CFR part 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (*see* 5 CFR 1320.8(d)). This notice identifies an information collection that RUS is submitting to OMB for reinstatement.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to: Richard C. Annan, Director, Program Development and Regulatory Analysis, Rural Utilities Service, U.S. Department of Agriculture, STOP 1522, 1400 Independence Ave., SW., Washington, DC 20250–1522. FAX: (202) 720–8435.

Title: Lien Accommodations and Subordinations, 7 CFR Part 1717, Subparts R & S.

OMB Control Number: 0572–0100.

Type of Request: Extension of a currently approved collection.

Abstract: The RE Act of 1936, as amended (7 U.S.C. 901 *et seq.*), authorizes and empowers the Administrator of RUS to make loans in the several United States and Territories of the United States for rural Electrification and the furnishing of electric energy to persons in rural areas who are not receiving central station service. The RE Act also authorizes and empowers the Administrator of RUS to provide financial assistance to borrowers for purposes provided in the RE Act by accommodating or subordinating loans made by the national Rural Utilities Cooperative Finance Corporation, the Federal Financing Bank, and other lending agencies. Title 7 CFR part 1717, subparts R & S sets forth policy and procedures to facilitate and support borrowers' efforts to obtain private sector financing of their capital needs, to allow borrowers greater flexibility in the management of their business affairs without compromising RUS loan

security, and to reduce the cost to borrowers, in terms of time, expenses and paperwork, of obtaining lien accommodations and subordinations.

Estimate of Burden: Public Reporting burden for this collection of information is estimated to average 1.54 hours per response.

Respondents: Not-for-profit institutions; business or other for profit.

Estimated Number of Respondents: 6.

Estimated Number of Responses per Respondent: 2.

Estimated Total Annual Burden on Respondents: 69 hours.

Copies of this information collection can be obtained from MaryPat Daskal, Program Development and Regulatory Analysis, at (202) 720–7853. FAX: (202) 720–8435.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: February 6, 2006.

James M. Andrew,

Administrator, Rural Utilities Service.

[FR Doc. E6–2203 Filed 2–15–06; 8:45 am]

BILLING CODE 3410–15–P

BROADCASTING BOARD OF GOVERNORS

Performance Review Board

AGENCY: Broadcasting Board of Governors (BBG).

SUMMARY: Title 5 United States Code, Section 4314, requires that notice of the appointment of an individual to serve as a member of a performance review board shall be published in the **Federal Register**.

DATES: *Effective Date:* February 9, 2006.

ADDRESSES: Broadcasting Board of Governors, 330 Independence Ave., SW., Washington, DC 20237.

FOR FURTHER INFORMATION CONTACT: John S. Welch, Director; Office of Human Resources: Broadcasting Board of Governors; telephone (202) 619–3763.

The following individuals have been appointed to serve as PRB members for the BBG: Jill M. Crumpacker, George A. Moore, and Christopher Warner.

Dated: February 9, 2006.

Carol Booker,

Legal Counsel.

[FR Doc. 06–1449 Filed 2–15–06; 8:45 am]

BILLING CODE 8230–01–M

DEPARTMENT OF COMMERCE

International Trade Administration

A–122–847

C–122–848

Antidumping Duty Investigation and Countervailing Duty Investigation of Hard Red Spring Wheat from Canada: Notice of Panel Decision, Revocation of Countervailing and Antidumping Duty Orders and Termination of Suspension of Liquidation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On December 12, 2005, the binational panel convened under the North American Free–Trade Agreement (''NAFTA'') issued a decision affirming the International Trade Commission's determination issued pursuant to remand that the domestic industry is neither materially injured by reason of the subject imports nor threatened with such injury. There was no Extraordinary Challenge filed. Therefore, we are revoking the countervailing duty order and antidumping duty order on hard red spring wheat from Canada effective January 2, 2006, and ordering the termination of suspension of liquidation.

EFFECTIVE DATE: February 16, 2006.

FOR FURTHER INFORMATION CONTACT: Brandon Farlander or Audrey Twyman, AD/CVD Operations, Office 1, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–0182 and (202) 482–3534, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 16, 2003, the International Trade Commission (''ITC'') determined that an industry in the United States is materially injured by reason of imports of hard red spring wheat from Canada found to be subsidized and sold in the United States at less than fair value. Hard Red Spring Wheat from Canada, Inv. Nos. 701–TA–430B and 731–TA–1019B (Final), USITC Pub. 3639 (October 2003) (''*Final Injury Determination*''); 68 FR 60707 (October 23, 2003). Respondent parties subsequently challenged the ITC's *Final Injury Determination* before a binational panel, pursuant to Article 1904 of the NAFTA. The parties briefed and argued the case before the panel, and on June 7, 2005, the panel issued its decision, remanding in full the ITC's determination. Hard Red Spring Wheat from Canada, USA–CDA- 2003–1904–06, Decision of the Panel (June 7, 2005).

On October 5, 2005, the ITC determined on remand that the domestic industry is neither materially injured by reason of the subject imports nor threatened with material injury. By decision issued on December 12, 2005, the panel affirmed in full the ITC's determination on remand. Hard Red Spring Wheat from Canada, USA–CDA–2003–1904–06, Decision of the Panel on the Remand Determination of the U.S. International Trade Commission (December 12, 2005). On December 12, 2005, the panel directed the NAFTA Secretariat to issue a Notice of Final Panel Action on the 11th day following the December 12, 2005, panel decision. *Decision of the Panel*, 70 FR 75792 (December 21, 2005). The Notice of Final Panel Action was issued on December 23, 2005. On January 31, 2006, the Department published notice of the adverse decision of the NAFTA panel, 71 FR 5050 (January 31, 2006). The effective date of the notice of the adverse decision was January 2, 2006, 10 days after issuance of the Notice of Final Panel Action. On January 30, 2006, the NAFTA Secretariat published the *North American Free–Trade Agreement, Article 1904 NAFTA Panel Reviews; Completion of Panel Review*, 71 FR 4896 (January 30, 2006).

Therefore, we are revoking the countervailing duty order and antidumping duty order on hard red spring wheat from Canada, effective January 2, 2006.

Termination of Suspension of Liquidation

The U.S. Department of Commerce will instruct U.S. Customs and Border Protection to terminate the suspension of liquidation of hard red spring wheat from Canada, effective January 2, 2006; to cease collection of cash deposits on hard red spring wheat from Canada; and to proceed with liquidation of the subject merchandise which entered the United States on or after January 2, 2006, without regard to countervailing duties and antidumping duties.

This revocation does not affect the liquidation of entries made prior to January 2, 2006. Any entries of subject merchandise entered before January 2, 2006, are subject to administrative review. If no review is requested we will liquidate at the rate in effect at the time of entry pursuant to 19 CFR 351.212(c).

Dated: February 10, 2006.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E6–2282 Filed 2–15–06; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

(A–570–803)

Heavy Forged Hand Tools (*i.e.*, Axes & Adzes, Bars & Wedges, Hammers & Sledges, and Picks & Mattocks) from the People's Republic of China: Continuation of Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the Department of Commerce (''the Department'') and the International Trade Commission (''ITC'') that revocation of the antidumping duty order on Heavy Forged Hand Tools (*i.e.*, Axes & Adzes, Bars & Wedges, Hammers & Sledges, and Picks & Mattocks) (''HFHTs'') from the People's Republic of China (''PRC'') would likely lead to continuation or recurrence of dumping and material injury to an industry in the United States, the Department is publishing this notice of continuation of these antidumping duty orders.

EFFECTIVE DATE: February 16, 2006.

FOR FURTHER INFORMATION CONTACT: Jim Nunno, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0783.

SUPPLEMENTARY INFORMATION:

Background

On July 1, 2005, the Department initiated and the ITC instituted a sunset review of the antidumping duty orders on HFHTs from the PRC pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''). *See Initiation of Five-year (Sunset) Reviews*, 70 FR 38101 (July 1, 2005), and *ITC Investigation Nos. 731–TA–457–A–D (Second Review), Heavy Forged Hand Tools from China*, 70 FR 38197 (July 1, 2005). As a result of its review, the Department found that revocation of the antidumping duty orders would likely lead to continuation or recurrence of dumping and notified the ITC of the magnitude of the margins likely to prevail were the orders to be revoked. *See Heavy Forged Hand Tools (i.e., Axes & Adzes, Bars & Wedges, Hammers & Sledges, and Picks & Mattocks) from the People's Republic of China: Final Results of the Expedited Sunset Review of the Antidumping Duty Orders*, 70 FR 67451 (November 7, 2005). On January 18, 2006, the ITC determined, pursuant to sections 751(c) and 752 of the Act, that revocation of the antidumping duty orders on HFHTs from the PRC would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See ITC Investigation Nos. 731–TA–457–A–D (Second Review), Heavy Forged Hand Tools from China*, 71 FR 6290 (February 7, 2006).

Scope of the Orders

The products covered by these orders are HFHTs comprising the following classes or kinds of merchandise: (1) Hammers and sledges with heads over 1.5 kg (3.33 pounds) (hammers/sledges); (2) bars over 18 inches in length, track tools and wedges (bars/wedges); (3) picks and mattocks (picks/mattocks); and (4) axes, adzes and similar hewing tools (axes/adzes).

HFHTs include heads for drilling hammers, sledges, axes, mauls, picks and mattocks, which may or may not be painted, which may or may not be finished, or which may or may not be imported with handles; assorted bar products and track tools including wrecking bars, digging bars, and tampers; and steel woodsplitting wedges. HFHTs are manufactured through a hot forge operation in which steel is sheared to required length, heated to forging temperature, and formed to final shape on forging equipment using dies specific to the desired product shape and size. Depending on the product, finishing operations may include shot blasting, grinding, polishing and painting, and the insertion of handles for handled products. HFHTs are currently provided for under the following Harmonized Tariff Schedule of the United States (''HTSUS'') subheadings: 8205.20.60, 8205.59.30, 8201.30.00, and 8201.40.60. Specifically excluded from these investigations are hammers and sledges with heads 1.5 kg. (3.33 pounds) in weight and under, hoes and rakes, and bars 18 inches in length and under.

The Department has issued seven conclusive scope rulings regarding the merchandise covered by these orders: (1) On August 16, 1993, the Department found the ''Max Multi–Purpose Axe,'' imported by the Forrest Tool Company, to be within the scope of the axes/adzes order; (2) on March 8, 2001, the Department found ''18–inch'' and ''24–inch'' pry bars, produced without dies, imported by Olympia Industrial, Inc. and SMC Pacific Tools, Inc., to be within the scope of the bars/wedges order; (3) on March 8, 2001, the Department found the ''Pulaski'' tool, produced without dies by TMC, to be within the scope of the axes/adzes order; (4) on March 8, 2001, the Department found the ''skinning axe,'' imported by Import Traders, Inc., to be within the scope of the axes/adzes order; (5) on December 9, 2004, the Department found the ''Scrapek MUTT,'' imported by Olympia Industrial, Inc., under HTSUS 8205.59.5510, to be within the scope of the axes/adzes order; (6) on May 23, 2005, the Department found 8 inch by 8 inch and 10 inch by 10 inch cast tampers, imported by Olympia Industrial, Inc. to be outside the scope of the orders; and (7) on October 14, 2005, the Department found the ''Mean Green Splitting Machine'' imported by Avalanche Industries to be within the scope of the bars/wedges order.[1]

In addition, on September 22, 2005, the Court of International Trade sustained the Department's finding that cast picks are outside the scope of the picks/mattocks order. *See Tianjin Machinery Import & Export Corporation v. United States and Ames True Temper*, Slip Op. 05–127, Court No. 03–00732 (September 22, 2005).

The HTSUS subheadings are provided for convenience and Customs purposes. The written description remains dispositive.

Determination

As a result of the determinations by the Department and the ITC that revocation of the antidumping duty order would likely lead to continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, the Department hereby orders the continuation of the antidumping duty order on heavy forged hand tools from the PRC. U.S. Customs and Border Protection (''CBP'') will continue to collect antidumping duty cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of continuation of this order will be the date of publication in the **Federal Register** of this Notice of Continuation. Pursuant to sections 751(c)(2) and 751(c)(6) of the Act, the Department intends to initiate the next

[1] *See* ''Final Scope Ruling: Antidumping Duty Order on Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China,'' from James C. Doyle, Office Director, Office 9, Import Administration, to Gary Taverman, Acting Deputy Assistant Secretary for Import Administration, dated October 14, 2005.

five-year review of this order not later than January 2011.

This five-year (sunset) review and notice are in accordance with section 751(c) of the Act and published pursuant to section 777(i)(1) of the Act.

Dated: February 10, 2006.

David Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E6–2280 Filed 2–15–06; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–821–817

Silicon Metal From the Russian Federation; Notice of Amended Final Determination Pursuant to Court Decision

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: (February 16, 2006

SUMMARY: On November 28, 2005, the United States Court of International Trade (''CIT'') issued an order affirming the Department of Commerce's (''the Department'') *Second Remand Results. See Final Results of Redetermination Pursuant to Court Remand, Globe Metallurgical, Inc. v. United States*, Consol. Ct. No. 03–00202 (October 21, 2005) (available at http://ia.ita.doc.gov) (''*Second Remand Results*''); *see also Globe Metallurgical, Inc. v. United States*, Slip Op. 05–150, 2005 Ct. Intl. Trade LEXIS 160 (CIT November 28, 2005) (affirming the *Second Remand Results* in their entirety) (''*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. (''SKU'') (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://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*. Because all litigation in this matter has now concluded, the Department is issuing its amended final determination in accordance with the CIT's decision.

FOR FURTHER INFORMATION CONTACT: Carrie Blozy, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5403.

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, 2005 Ct. Intl. Trade LEXIS 98 (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 21, 2005, the Department signed its *Second Remand Results*. On November 28, 2005, the CIT affirmed the Department's *Second Remand Results* in its entirety. *See Globe Metallurgical III*. On December 14, 2005, consistent with the decision of the United States Court of Appeals for the Federal Circuit in *Timken Co. v. United States*, 893 F. 2d 337 (Fed. Cir. 1990), the Department notified the public that the CIT's decision was ''not in harmony'' with the *Final Determination. See Notice of Decision of the Court of International Trade; Silicon Metal from the Russian Federation*, 70 FR 73989 (December 14, 2005) (''*Timken Notice*''). No party has appealed the CIT's decision. Because there is now a final and conclusive decision in the court proceeding, we are issuing an amended final determination to reflect the results of the second remand determination. The recalculated margins are as follows:

Manufacturer/Exporter	Weighted–average margin (percent)
ZAO Kremny or SKU	61.61
Bratsk	87.08

Cash Deposit Requirements

The Department will direct the United States Customs and Border Protection to require the cash deposit rates listed above for the subject merchandise, effective as of December 14, 2005, the publication date of the *Timken Notice*. Because the Russia–wide rate was not challenged in this case, it has not changed and remains at 79.42 percent. These cash deposit requirements, when imposed, shall remain in effect until publication of the final results of an administrative review of this order.

This notice is issued and published in accordance with sections 735(d) and 777(i) of the Tariff Act of 1930, as amended.

Dated: February 9, 2006.

David M. Spooner,

Assistant Secretaryfor Import Administration.

[FR Doc. E6–2283 Filed 2–15–06; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

C–351–829

Certain Hot–Rolled Flat–Rolled Carbon–Quality Steel Flat Products from Brazil: Notice of Rescission of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, U.S. Department of Commerce.

SUMMARY: On October 25, 2005, in response to timely requests from United States Steel Corporation (Petitioner) and Companhia Siderurgica Nacional (CSN), the Department of Commerce (the Department) initiated an administrative review of the countervailing duty order on certain hot–rolled flat–rolled carbon–quality steel flat products from Brazil. *See Notice of Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 70 FR 61601 (October 25, 2005) (*Initiation Notice*). This administrative review covered the period January 1, 2004 through December 31, 2004. We are now rescinding this review as a result of Petitioner's withdrawal of its requests for an administrative review for all four of the Brazilian producers and exporters (Companhia Siderurgica de Tubarao (CST), Usinas Siderurgicas de Minas Gerais (USIMINAS), Companhia Siderurgica Paulista (COSIPA), and CSN), and because CSN, the sole Brazilian company that self–requested a review, also withdrew its request for review.

EFFECTIVE DATE: February 16, 2006.

FOR FURTHER INFORMATION CONTACT: Joshua Reitze or Sean Carey, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, US Department of Commerce, 14th Street and Constitution Avenue, NW, Room 7866, Washington, DC 20230; telephone: (202) 482–0666 and (202) 482–3964, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 6, 1999, the Department entered into a suspension agreement that suspended the countervailing duty investigation involving certain hot–rolled flat–rolled carbon–quality steel products from Brazil. *See Suspension of Countervailing Duty Investigation: Certain Hot–Rolled Flat–Rolled Carbon–Quality Steel Products From Brazil*, 64 FR 38797 (July 19, 1999). After the signing of the suspension agreement, the underlying investigation was completed pursuant to section 704(g) of the Tariff Act of 1930, as amended (the Act), and the Department determined that countervailable subsidies were being provided to producers and exporters of certain hot–rolled flat–rolled carbon–quality steel from Brazil. *See Final Affirmative Countervailing Duty Determination: Certain Hot–Rolled Flat–Rolled Carbon–Quality Steel Products From Brazil*, 64 FR 38742 (July 19, 1999).

On September 17, 2004, the Department terminated the suspension agreement in accordance with the terms of the agreement. *See Agreement Suspending the Countervailing Duty Investigation on Certain Hot–Rolled Flat–Rolled Carbon Quality Steel from Brazil; Termination of Suspension Agreement and Notice of Countervailing Duty Order*, 69 FR 56040 (September 17, 2004). The countervailing duty order was re–instituted effective September 26, 2004. *Id.*

On September 1, 2005, the Department published a notice of ''Opportunity to Request Administrative Review'' of the countervailing duty order for the period of January 1, 2004, through December 31, 2004. *See Notice of Opportunity to Request Administrative Review of Antidumping or Countervailing Duty Order, Finding or Suspended Investigation*, 70 FR 52072 (September 1, 2005). On September 30, 2005, Petitioner requested a review of the following companies: CST, USIMINAS, COSIPA and CSN. In addition, on September 30, 2005, CSN requested an administrative review. In response to these requests, on October 25, 2005, the Department initiated a countervailing duty administrative review on certain hot–rolled carbon steel flat products from Brazil. *See Initiation Notice*.

On December 21, 2005, USIMINAS and COSIPA requested, pursuant to section 351.213(d)(3) of the Department's regulations, a rescission of the administrative review because they had no entries or sales of subject merchandise to the United States during the period of review. On December 23, 2005, pursuant to section 351.213(d)(1) of the Department's regulations, Petitioner withdrew its request for an administrative review with respect to CST, USIMINAS, and COSIPA. On January 23, 2006, Petitioner and CSN jointly withdrew their requests for an administrative review with respect to CSN. No other party requested an administrative review of these companies.

Rescission of the Administrative Review

Pursuant to section 351.213(d)(1) of the Department's regulations, the Secretary will rescind an administrative review, in whole or in part, if a party that requested the review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The initiation notice for this review was published on October 25, 2005. We received Petitioner's withdrawal requests on December 23, 2005, and January 23, 2006, both within 90 days after publication of the initiation notice. Since Petitioner withdrew its request for review of all four producers and exporters (CST, USIMINAS, COSIPA, and CSN) in a timely manner, and since CSN, the only producer/exporter that requested a review, also withdrew its request, we are rescinding this administrative review. The Department will issue appropriate assessment instructions to U.S. Customs and Border Protection within 15 days of publication of this notice.

Administrative Protective Orders

This notice serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with section 351.305(a)(3) of the Department's regulation. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

This notice is issued and published in accordance with section 777(i) of the Act and section 351.213(d)(4) of the Department's regulations.

Dated: February 10, 2006.

Stephen J. Claeys,

Deputy Assistant Secretaryfor Import Administration.

[FR Doc. E6–2284 Filed 2–15–06; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 012506F]

Marine Mammals; File No. 978–1791

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

ACTION: Notice; issuance of permit.

SUMMARY: Notice is hereby given that Paul E. Nachtigall, Ph.D., Marine Mammal Research Program, Hawaii Institute of Marine Biology, P.O. Box 1106, Kailua, Hawaii 96734, has been issued a permit to conduct research on certain cetacean species.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521; and

Pacific Islands Region, NMFS, 1601 Kapiolani Blvd., Rm 1110, Honolulu, HI 96814–4700; phone (808)973–2935; fax (808)973–2941.

FOR FURTHER INFORMATION CONTACT: Andrew Wright or Amy Sloan, (301)713–2289.

SUPPLEMENTARY INFORMATION: On May 19, 2005, notice was published in the **Federal Register** (70 FR 28909) that a request for a scientific research permit to take certain cetacean species had been submitted by the above-named individual. The requested permit has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

This permit authorizes the permit holder to conduct hearing measurements on stranded cetaceans on beaches, in near-shore waters, and in rehabilitation facilities in the U.S.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Issuance of this permit, as required by the ESA, was based on a finding that such permit: (1) was applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: February 9, 2006.

Stephen L. Leathery,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E6–2195 Filed 2–15–06; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 020106C]

International Whaling Commission; Public Meeting; Announcement of Public Meeting

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

ACTION: Notice of meeting.

SUMMARY: This notice announces the date and location of a public meeting being held to discuss International Whaling Commission (IWC) issues, including the outcome of the Revised Management Scheme Working Group meeting held at the end of February.

DATES: The public meeting will be held March 31, 2006, at 10 am.

ADDRESSES: The meeting will be held in the NOAA Science Center Room, 1301 East West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Cheri McCarty, 301–713–9090, Extension 183.

SUPPLEMENTARY INFORMATION: The Secretary of Commerce is charged with the responsibility of discharging the obligations of the United States under the International Convention for the Regulation of Whaling, 1946. The U.S. Commissioner has primary responsibility for the preparation and negotiation of U.S. positions on international issues concerning whaling and for all matters involving the IWC. He is staffed by the Department of Commerce and assisted by the Department of State, the Department of the Interior, Marine Mammal Commission, and by other agencies.

NOAA will hold a meeting to discuss IWC issues, including the outcome of the Revised Management Scheme Working Group meeting held at the end of February. Any U.S. citizen with an identifiable interest in U.S. whale conservation policy may participate, but NOAA reserves the authority to inquire about the interests of any person who appears at a meeting and to determine the appropriateness of that person's participation. Persons who represent foreign interests may not attend. These stringent measures are necessary to protect the confidentiality of U.S. negotiating positions.

The meeting will be held at 10 am in the NOAA Science Center Room, 1301 East West Highway, Silver Spring, MD 20910. Please bring identification for admission into the building.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Cheri McCarty, 301–713–9090 extension 183, by March 20, 2006.

Dated: February 9, 2006.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. E6–2194 Filed 2–15–06; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 020806F]

National Marine Fisheries Service, Pacific Fishery Management Council; March 5–10, 2006 Council Meeting

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

ACTION: Notice of public meetings.

SUMMARY: The Pacific Fishery Management Council (Council) and its advisory entities will hold public meetings.

DATES: The Council and its advisory entities will meet March 5–10, 2006. The Council meeting will begin on Monday, March 6, at 1 p.m., reconvening at 8 a.m. each day Tuesday through Friday. All meetings are open to the public, except a closed session will be held from 1 p.m. until 2 p.m. on Monday, March 6 to address litigation and personnel matters. The Council will meet as late as necessary each day to complete its scheduled business.

ADDRESSES: The meetings will be held at the Seattle Marriott Hotel Sea-Tac, 3201 South 176th Street, Seattle, WA 98188; telephone: 206–241–2000.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 200, Portland, Oregon 97220.

FOR FURTHER INFORMATION CONTACT: Dr. Donald O. McIsaac, Executive Director; telephone: (503) 820–2280 or (866) 806–7204.

SUPPLEMENTARY INFORMATION: The following items are on the Council agenda, but not necessarily in this order:

A. Call to Order
1. Opening Remarks and Introductions
2. Roll Call
3. Executive Director's Report
4. Approve Agenda

B. Administrative Matters
1. Approval of Council Meeting Minutes
2. Council Meeting Agenda Planning
3. Legislative Matters
4. Appointments to Advisory Bodies, Standing Committees, and Other Forums
5. April 2006 Council Meeting Agenda and Three Meeting Outlook

C. Salmon Management
1. Mass Marking and Coded-Wire Tagging
2. Fort Bragg March 15, 2006 Commercial Fishery Opening
3. Review of 2005 Fisheries and Summary of 2006 Stock Abundance Estimates
4. Identification of Management Objectives and Preliminary Definition of 2006 Salmon Management Options
5. Council Recommendations for 2006 Management Option Analysis
6. Council Direction for 2006 Management Options (If Necessary)
7. Fishery Management Plan (FMP) Amendment Scoping for the Klamath River Fall Chinook Conservation Objective
8. Adoption of 2006 Management Options for Public Review
9. Salmon Hearings Officers

D. Enforcement Issues
1. Fishery Enforcement Activity Report

E. Pacific Halibut Management
1. Report on International Pacific Halibut Commission Annual Meeting
2. Incidental Catch Regulations in the Salmon Troll and Fixed Gear Sablefish Fisheries

F. Groundfish Management
1. National Marine Fisheries Service (NMFS) Report
2. Stock Assessment Planning for the 2009–2010 Fishing Season
3. Yelloweye Stock Assessment
4. Pacific Whiting Management for 2006
5. Consideration of Inseason Adjustments

G. Habitat
1. Current Habitat Issues

H. Coastal Pelagic Species Management
1. NMFS Report
2. FMP Amendment - Krill Management

I. Marine Protected Areas (MPAs)
1. Fishery Regulation in MPAs within of the Channel Islands National Marine Sanctuary through Magnuson-Stevens Act and State Management Authority

J. Highly Migratory Species Management
1. NMFS Report
2. Bigeye Tuna Overfishing Response
3. Drift Gillnet Management
4. Exempted Fishing Permit Applications for Highly Migratory Species

SCHEDULE OF ANCILLARY MEETINGS

SUNDAY, MARCH 5, 2006

Klamath Fishery Management Council, 3 p.m., Spokane Room

MONDAY, MARCH 6, 2006

Council Secretariat, 8 a.m., Washington Ballroom E
Groundfish Advisory Subpanel, 8 a.m., Seattle Ballroom 2 and 3
Groundfish Management Team, 8 a.m., Seattle Ballroom 1
Klamath Fishery Management Council, 8 a.m., Spokane Room
Salmon Advisory Subpanel, 8 a.m., Washington Ballroom B
Salmon Technical Team, 8 a.m., Washington Ballroom A
Scientific and Statistical Committee, 8 a.m., Washington Ballroom C
Legislative Committee, 8:30 a.m., Aberdeen Room
Habitat Committee, 10 a.m., Washington Ballroom D
Enforcement Consultants, 5:30 p.m., Aberdeen Room
Tribal Policy Group, As necessary, Olympia Room
Tribal and Washington Technical Groups, As necessary, Bellevue Room
Washington State Delegation, As necessary, Yakima Room

TUESDAY, MARCH 7, 2006

Council Secretariat, 7 a.m., Washington Ballroom E
California State Delegation, 7 a.m., Washington Ballroom D
Oregon State Delegation, 7 a.m., Washington Ballroom B
Groundfish Advisory Subpanel, 8 a.m., Seattle Ballroom 2 and 3
Groundfish Management Team, 8 a.m., Seattle Ballroom 1
Highly Migratory Species Management Team, 8 a.m., Washington Ballroom D
Salmon Advisory Subpanel, 8 a.m., Washington Ballroom B
Salmon Technical Team, 8 a.m., Washington Ballroom A
Scientific and Statistical Committee, 8 a.m., Washington Ballroom C
Enforcement Consultants, As necessary, Aberdeen Room
Klamath Fishery Management Council, As necessary, Spokane Room
Tribal Policy Group, As necessary, Olympia Room
Tribal and Washington Technical Groups, As necessary, Bellevue Room
Washington State Delegation, As necessary, Yakima Room

WEDNESDAY, MARCH 8, 2006

Council Secretariat, 7 a.m., Washington Ballroom E
California State Delegation, 7 a.m., Washington Ballroom D
Oregon State Delegation, 7 a.m., Washington Ballroom B
Groundfish Advisory Subpanel, 8 a.m., Seattle Ballroom 2 and 3
Groundfish Management Team, 8 a.m., Seattle Ballroom 1
Highly Migratory Species Advisory Subpanel, 8 a.m., Washington Ballroom C
Highly Migratory Species Management Team, 8 a.m., Washington Ballroom D
Salmon Advisory Subpanel, 8 a.m., Washington Ballroom B
Salmon Technical Team, 8 a.m., Washington Ballroom A
Enforcement Consultants, As necessary, Aberdeen Room
Klamath Fishery Management Council, As necessary, Spokane Room
Tribal Policy Group, As necessary, Olympia Room
Tribal and Washington Technical Groups, As necessary, Bellevue Room
Washington State Delegation, As necessary, Yakima Room
NMFS Whiting EFP Coordination Meeting, 7 p.m., Seattle Ballroom 2 and 3

THURSDAY, MARCH 9, 2006

Council Secretariat, 7 a.m., Washington Ballroom E
California State Delegation, 7 a.m., Washington Ballroom D
Oregon State Delegation, 7 a.m., Washington Ballroom B
Groundfish Advisory Subpanel, 8 a.m., Seattle Ballroom 2 and 3
Groundfish Management Team, 8 a.m., Seattle Ballroom 1
Highly Migratory Species Advisory Subpanel, 8 a.m., Washington Ballroom C

Highly Migratory Species Management Team, 8 a.m., Washington Ballroom D

Salmon Advisory Subpanel, 8 a.m., Washington Ballroom B

Salmon Technical Team, 8 a.m., Washington Ballroom A

Enforcement Consultants, As necessary, Aberdeen Room

Klamath Fishery Management Council, As necessary, Seattle Ballroom 2 and 3

Tribal Policy Group, As necessary, Olympia Room

Tribal and Washington Technical Groups, As necessary, Bellevue Room

Washington State Delegation, As necessary, Yakima Room

FRIDAY, MARCH 10, 2006

Council Secretariat, 7 a.m., Washington Ballroom E

California State Delegation, 7 a.m., Washington Ballroom D

Oregon State Delegation, 7 a.m., Washington Ballroom B

Salmon Advisory Subpanel, 8 a.m., Washington Ballroom B

Salmon Technical Team, 8 a.m., Washington Ballroom A

Enforcement Consultants, As necessary, Aberdeen Room

Groundfish Advisory Subpanel, As necessary, Washington Ballroom D

Groundfish Management Team, As necessary, Washington Ballroom C

Klamath Fishery Management Council, As necessary, Spokane Room

Tribal Policy Group, As necessary, Olympia Room

Tribal and Washington Technical Groups, As necessary, Bellevue Room

Washington State Delegation, As necessary, Yakima Room

Although non-emergency issues not contained in this agenda may come before this Council for discussion, those issues may not be the subject of formal Council action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at 503–820–2280 at least five days prior to the meeting date.

Dated: February 13, 2006.

Tracey L. Thompson,

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

[FR Doc. E6–2225 Filed 2–15–06; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

Department of the Air Force

Local Redevelopment Authority and Available Surplus Buildings and Land at Davis Communications Site, Located in Yolo County, CA

AGENCY: Department of the Air Force, Air Force Real Property Agency, DoD.

ACTION: Notice.

SUMMARY: This notice provides information regarding the surplus property at Davis Communications Site in Yolo County, California and information about the local redevelopment authority that has been established to plan the reuse of the Davis Communications Site. The property is located approximately 3 miles southeast of Davis, California. The site is accessible from Mace Boulevard, south of Interstate Highway 80.

FOR FURTHER INFORMATION CONTACT: For further information regarding the property, contact Mr. Dexter Cochnauer, Senior Representative, or Ms. Linda Brophy, Real Estate Specialist, Air Force Real Property Agency, 3411 Olson Street, McClellan, CA 95652–1003, telephone (916) 643–6420.

SUPPLEMENTARY INFORMATION: This surplus property is available under the provisions of the Federal Property and Administrative Services Act of 1949 as amended (40 U.S.C. 501 *et seq.*) and the Base Closure Community Redevelopment and Assistance Act of 1994.

Notice of Surplus Property: Pursuant to paragraph (7)(B) of section 2905(b) of the Defense Base Closure and Realignment Act of 1990, as amended by the Base Closure Community Redevelopment and Homeless Assistance Act of 1994 (Pub. L. 103–421), the following information regarding the surplus property is described herein.

Local Redevelopment Authority: The local redevelopment authority for the Davis Communications Site, Davis, CA for purposes of implementing the provisions of the Defense Base Closure and Realignment Act of 1990 as amended, is the Yolo County Board of Supervisors. All inquiries should be addressed to Ms. Holly Malcolm, Yolo County Planning and Public Works Department, 292 West Beamer Street, Woodland, CA 95695, telephone 530–666–8029.

Surplus Property Description: Land: The property consists of approximately 311 acres of land.

Buildings/Structures: Consists of a communication building (approximately 26,064 sq. ft.) with associated utility facilities and associated communication antenna pads.

Expressions of Interest: Pursuant to paragraph 7(C) of Section 2905(b) of the Defense Base Closure and Realignment Act of 1990, as amended by the Base Closure and Community Redevelopment and Homeless Assistance Act of 1994, state and local governments, representatives of the homeless, and other interested parties located in the vicinity of Davis Communications Site, Davis, CA shall submit to the Yolo County Planning and Public Works Department, 292 West Beamer Street, Woodland, CA 95695, a notice of interest, of such governments, representatives, and parties in the above described surplus property, or any portion thereof. A notice shall describe the need of the government, representative, or party concerned, for the desired surplus property. Pursuant to paragraph 7(C) of Section 2905(b), the Yolo County Department of Planning and Public Works shall assist interested parties in evaluating the surplus property for the intended use, and publish in a newspaper of general circulation within California, the date by which expressions of interest must be submitted, which shall be ninety (90) days from the date of publication of this notice.

Bao-Ahn Trinh,

Air Force Federal Register Liaison Officer.

[FR Doc. E6–2212 Filed 2–15–06; 8:45 am]

BILLING CODE 5001–05–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before March 20, 2006.

ADDRESSES: Written comments should be addressed to the Office of

Information and Regulatory Affairs, Attention: Rachel Potter, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: February 10, 2006.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of the Chief Information Officer.

Office of Postsecondary Education

Type of Review: Reinstatement.

Title: Performance Report for the Child Care Access Means Parents in School Program—18-month/36-month reports.

Frequency: 18 months and 36 months.

Affected Public: Not-for-profit institutions; State, local, or tribal government, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 88.

Burden Hours: 704.

Abstract: The Child Care Access Means Parents in School provides grants to institutions of higher education to enable institutions to provide child care to low-income students. Grantees are required to file reports 18 months and 36 months after they first receive funding. The reports are used to evaluate grantees' performance.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 2954. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to IC *DocketMgr@ed.gov* or faxed to 202–245–6623. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to the e-mail address IC *DocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E6–2213 Filed 2–15–06; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Assessment Governing Board; Meeting

AGENCY: National Assessment Governing Board; Education.

ACTION: Notice of open meeting and partially closed meeting.

SUMMARY: The notice sets forth the schedule and proposed agenda of a forthcoming meeting of the National Assessment Governing Board. This notice also describes the functions of the Board. Notice of this meeting is required under Section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify members of the general public of their opportunity to attend. Individuals who will need special accommodations in order to attend the meeting (*i.e.,* interpreting services, assistive listening devices, materials in alternative format) should notify Munira Mwalimu at 202–357–6938 or at *Munira.Mwalimu@ed.gov* no later than February 25, 2006. We will attempt to meet requests after this date, but cannot guarantee availability of the requested accommodation. The meeting site is accessible to individuals with disabilities.

DATES: March 2–4, 2006.

Times

March 2

Committee Meetings: Ad Hoc Committee on Planning for NAEP 12th Grade Assessments in 2009: Open Session—12 p.m. to 2 p.m.;

Reporting and Dissemination Committee: Open Session—2 p.m. to 4 p.m.;

Executive Committee: Open Session—4:30 p.m. to 5:15 p.m.; Closed Session 5:15 p.m. to 6:15 p.m.

March 3

Full Board: Open Session—8:30 a.m. to 4:15 p.m.

Committee Meetings: Assessment Development Committee: Open Session—10 a.m. to 12:30 p.m.;

Committee on Standards, Design, and Methodology: Open Session—10 a.m. to 12:30 p.m.;

Reporting and Dissemination Committee: Open Session—10 a.m. to 12:30 p.m.;

March 4

Nominations Committee: Closed Session—7:45 a.m to 8:45 a.m.

Full Board: Open Session—9 a.m. to 12 p.m.

Location: St. Regis Hotel San Francisco, 125 Third Street, San Francisco, CA 94103.

FOR FURTHER INFORMATION CONTACT: Munira Mwalimu, Operations Officer, National Assessment Governing Board, 800 North Capitol Street, NW., Suite 825, Washington, DC 20002–4233, Telephone: (202) 357–6938.

SUPPLEMENTARY INFORMATION: The National Assessment Governing Board is established under section 412 of the National Education Statistics Act of 1994, as amended.

The Board is established to formulate policy guidelines for the National Assessment of Educational Progress (NAEP). The Board's responsibilities include selecting subject areas to be assessed, developing assessment objectives, developing appropriate student achievement levels for each grade and subject tested, developing guidelines for reporting and disseminating results, and developing standards and procedures for interstate and national comparisons.

The Ad Hoc Committee on Planning for NAEP 12th Grade Assessments in 2009 will meet in open session on March 2 from 12 p.m. to 2 p.m. and the Reporting and Dissemination Committee will meet in open session from 2 p.m. to 4 p.m. Thereafter, the Executive Committee will meeting open session on from 4:30 p.m. to 5:15 p.m.

The Executive Committee will meet in closed session on March 2, 2006, from 5:15 p.m. to 6:15 p.m. From 5:15 p.m. to 5:45 p.m., the Committee will receive independent government cost estimates from the Associate Commissioner, National Center for Education Statistics, for options affecting current and planned operations under current contracts due to the one percent reduction in the NAEP budget in FY 2006. From 5:45 p.m. to 6:15 p.m. the Associate Commissioner will present additional independent cost estimates for newly proposed activities under current contracts including item development for the science assessment, bridge studies, and validity research. The discussion of independent government cost estimates prior to decision making on which projects to approve is necessary so that NAEP contracts meet congressionally mandated goals and adhere to Board policies on NAEP assessments. This part of the meeting must be conducted in closed session because public disclosure of this information would likely have an adverse financial effect on the NAEP program and will provide an advantage to potential bidders attending the meeting. The discussion of this information would be likely to significantly impede implementation of a proposed agency action if conducted in open session. Such matters are protected by exemption 9(B) of section 552b(c) of Title 5 U.S.C.

On March 3, the full Board will meet in open session from 8:30 a.m. to 4:15 p.m. From 8:30 a.m. to 9:45 a.m. the Board will approve the agenda, introduce and administer the oath of office to a new Board member, receive the Executive Director's report, and hear an update on the work of the National Center for Education Statistics (NCES).

From 10 a.m. to 12:30 p.m. on March 3, the Board's standing committees—the Assessment Development Committee; the Committee on Standards, Design, and Methodology; and the Reporting and Dissemination Committee—will meet in open session.

From 12:30 p.m. to 1:45 p.m., the full Board will discuss inclusion and accommodations in NAEP, followed by discussion and action on the NAEP 2009 Science Specifications from 1:45 p.m. to 3 p.m.

On March 3, from 3:15 p.m. to 4:15 p.m. the Board will hear a presentation on revisions to the NAEP 12th Grade Mathematics Objectives upon which the March 3 session of the Board meeting will conclude.

On March 4, 2006 the Nomination Committee will meet in closed session from 7:45 a.m. to 8:45 a.m. to discuss nominations for Board vacancies. This discussion pertains solely to internal personnel rules and practices of an agency and will disclose information of a personal nature where disclosure would constitute an unwarranted invasion of personal privacy. As such, the discussions are protected by exemptions 2 and 6 of section 552b(c) of Title 5 U.S.C.

The full Board will convene in open session from 9 a.m. to 12 p.m. At 9 a.m., the Board will receive a briefing on the National Assessment of Adult Literacy with a discussion on lessons for NAEP. Board actions on policies and Committee reports are scheduled to take place between 10:15 a.m. and 12 p.m., upon which the March 4, 2006 session of the Board meeting will adjourn.

Detailed minutes of the meeting, including summaries of the activities of the closed sessions and related matters that are informative to the public and consistent with the policy of section 5 U.S.C. 552b(c) will be available to the public within 14 days of the meeting. Records are kept of all Board proceedings and are available for public inspection at the U.S. Department of Education, National Assessment Governing Board, Suite #825, 800 North Capitol Street, NW., Washington, DC, from 9 a.m. to 5 p.m. eastern standard time.

Dated: February 13, 2006.

Charles E. Smith,

Executive Director, National Assessment Governing Board.

[FR Doc. 06–1445 Filed 2–15–06; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Advance Notice of Intent To Prepare an Environmental Impact Statement for Implementation of the FutureGen Project

AGENCY: Department of Energy.

ACTION: Advance Notice of Intent to Prepare an Environmental Impact Statement.

SUMMARY: The U.S. Department of Energy (DOE) is announcing in advance its intent to prepare an Environmental Impact Statement (EIS), pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), for the proposed action of providing Federal funding (up to $700 million) for the FutureGen Project. FutureGen would comprise the planning, design, construction and operation by a private-sector organization of a coal-fired electric power and hydrogen gas (H_2) production plant integrated with carbon dioxide (CO_2) capture and geologic sequestration of the captured gas. DOE has prepared this Advance Notice of Intent (ANOI) in accordance with DOE's NEPA regulations [(10 CFR 1021.311(b)] to inform interested parties of a pending EIS and to invite early public comments on the proposed action, including: (1) The proposed plans for implementing the FutureGen Project, (2) the potential range of environmental issues and alternatives to be analyzed, and (3) the nature of the impact analyses to be considered in the EIS. DOE will later issue a Notice of Intent (NOI) and initiate a public scoping process during which DOE will conduct public meetings and invite the public to comment on the scope, proposed action, and alternatives to be considered in the EIS.

Following President George W. Bush's announcement that the United States would sponsor a $1 billion, 10-year FutureGen initiative to build the world's first coal-based, near-zero emissions power plant that produces both electricity and H_2, the DOE signed, on December 2, 2005, a Cooperative Agreement (DE–FC26–06NT42073) that provides financial assistance to the FutureGen Industrial Alliance, Inc. (Alliance), which will undertake the planning, design, construction and operation of the project facilities. The FutureGen initiative would establish the technical and economic feasibility of co-producing electricity and H_2 from coal while capturing and sequestering the CO_2 generated in the process.

The Alliance is a consortium led by the coal-fueled electric power industry and the coal production industry. Members of the Alliance collectively own and produce over 40 percent of the Nation's coal and about 20 percent of its coal-fueled electricity. The Alliance would plan, design, construct and operate the FutureGen power plant and the sequestration facility. The Alliance would also monitor, measure, and verify geologic sequestration of CO_2. DOE will provide technical and programmatic guidance to the Alliance, retain certain review and approval rights as defined in the Cooperative Agreement, and oversee Alliance activities for compliance with the terms of the Cooperative Agreement. DOE will be responsible for NEPA compliance activities. Both DOE and the Alliance would consider ways for state and local agencies, local communities, the environmental community, international stakeholders, and research organizations to participate in the Project, including involvement in testing, monitoring and verification protocols for CO_2 sequestration.

DATES: DOE invites Federal agencies, Native American Tribes, state and local governments, other organizations and members of the public to provide early assistance in environmental planning for the FutureGen Project and to identify significant environmental issues and alternatives to be analyzed in the forthcoming FutureGen Project EIS. DOE will consider public comments and other relevant information relating to environmental planning for the FutureGen Project. Comments in response to this ANOI are requested by March 20, 2006. DOE anticipates issuing a NOI to prepare an EIS for the FutureGen Project after DOE makes a preliminary determination regarding the alternative sites to be evaluated. After the NOI is issued, DOE will conduct public scoping meetings to assist in defining the scope of the EIS, including alternative sites and issues to be addressed. The dates and locations of the scoping meetings will be announced in the NOI or subsequent **Federal Register** notices and in local media before the meetings.

ADDRESSES: Written comments or suggestions on the scope of the EIS should be submitted to Mark L. McKoy, NEPA Document Manager for the FutureGen Project, U.S. Department of Energy, National Energy Technology Laboratory P.O. Box 880, Morgantown, West Virginia, 26507–0880. Comments also may be submitted by telephone: 304–285–4426, fax: 304–285–4403, electronic mail: *mmckoy@netl.doe.gov,* or toll-free telephone number: 800–432–8330 (ext. 4426).

FOR FURTHER INFORMATION, CONTACT: For information on the FutureGen Project or to receive a copy of the Draft EIS for review when it is issued, contact Mark L. McKoy as described in **ADDRESSES** above. For general information on the DOE NEPA process, contact: Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance (EH–42), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0119, telephone: 202–586–4600, fax: 202–586–7031, or leave a toll-free message at 800–472–2756. Additional NEPA information is available at the DOE NEPA Web site: *http://www.eh.doe.gov/nepa/.* Additional information on the FutureGen Project can be found at the following Web site: *http://www.fossil.energy.gov/programs/powersystems/futuregen.* Information from the Alliance, including the draft Request for Proposals discussed below, can be found at *http://www.FutureGenAlliance.org.* Comments on the draft Request for Proposals are to be sent to the Alliance in accordance with the instructions provided by the Alliance. While comments related to the NEPA process are due to DOE by March 20, 2006, comments on the draft Request for Proposals are due to the Alliance by February 28, 2006.

SUPPLEMENTARY INFORMATION:

Background

President Bush announced during 2003 that the United States has committed to proceed with a $1 billion, 10-year project to build the world's first coal-fueled plant to produce electricity and H_2 with near-zero emissions. In response to this announcement, the U.S. Department of Energy unveiled plans for a FutureGen plant that would establish the technical and economic feasibility of producing electricity and H_2 from coal—a low-cost and abundant energy resource—while capturing and geologically storing the CO_2 generated in the process.

The FutureGen Project would showcase cutting-edge technologies that could address environmental concerns associated with the use of coal. DOE plans to implement the FutureGen Project through a cooperative agreement that provides financial assistance to the FutureGen Industrial Alliance, Inc., which is a non-profit corporation that represents a global coalition of coal and energy companies. Members of the Alliance are expected to provide an estimated $250 million to help fund project development. The Alliance members are: American Electric Power; BHP Billiton; the China Huaneng Group; CONSOL Energy Inc.; Foundation Coal; Kennecott Energy, a member of the Rio Tinto Group; Peabody Energy; and Southern Company. The U.S. government and foreign governments would invest about $700 million in the project.

The Alliance is a consortium of industrial companies that collectively own and produce over 40 percent of the Nation's coal and about 20 percent of the Nation's coal-fueled electricity. The Alliance is: (a) Geographically diverse by including both eastern and western domestic coal producers and coal-fueled electricity generators; and (b) resource diverse by including producers and users of the full range of coal types.

Purpose and Need for Agency Action

In pursuing its goal of providing safe, affordable and clean energy for the citizens of the United States, DOE has determined that coal, as the Nation's most abundant fossil fuel resource, must play an important role in the Nation's efforts to increase its energy independence. DOE has identified a need for a near-zero emissions, coal-to-energy option that would produce electric power and H_2 from coal while permanently sequestering CO_2 in deep geological formations. The technical, economic, and environmental feasibility of producing electric power and H_2 from coal, when coupled with geologic sequestration technology, must be proven.

The electricity and transportation sectors are responsible for nearly three-fourths of the country's anthropogenic greenhouse gas emissions. The continued use of coal entails the need to address environmental and greenhouse gas mitigation challenges. A key DOE mission is to ensure that fossil fuels—particularly coal—are available components of the future energy mix. An alternative source of fuel for the transportation sector, such as coal-derived H_2, could also reduce our dependence on fuel imports.

In the absence of proven operations of a large, integrated, near-zero emissions power plant, the contribution of coal to the energy mix could be reduced if environmental regulations continue to tighten. This could cause an imbalance in the diversity of the domestic energy portfolio, which would impact energy security. Accordingly, DOE needs to promote development of such a facility to address the environmental concerns over the use of coal, thus protecting both energy diversity and security.

Proposed Action

DOE proposes to provide financial assistance (up to $700 million) for the Alliance to plan, design, construct, and operate the FutureGen facility, an advanced integrated coal gasification combined cycle power plant and CO_2 sequestration facility sized nominally at 275 MW (equivalent output). The goal of this initiative would be to prove the technical and economic feasibility of a near-zero emissions, coal-to-energy option that could be deployed by 2020. During the first phase of the project, the Alliance and DOE will quantify the specific emissions objectives of the project. The facility would co-produce electric power and H_2 in an industrial/utility setting while capturing and geologically sequestering approximately one to two million metric tons of CO_2 per year. As discussed further below, the FutureGen Project would incorporate both cutting-edge research and demonstrations of emerging technologies ready for testing at a large scale to achieve its goal of validating the technical and economic feasibility of an integrated near-zero emissions plant.

Establishing the technical feasibility and projected economic viability of a

near-zero emissions, coal-based system that integrates advanced technologies at a large scale through the FutureGen Project would contribute to DOE's goals by:

- Addressing environmental issues and barriers to fossil fuel use, while maintaining the availability and affordability of fossil-fuel-derived energy;
- improving energy efficiency;
- developing technologies that foster a diverse supply of reliable, affordable, and environmentally sound energy;
- providing scientific and technological information and analysis to assist policymakers and regulators in their decision-making on control of greenhouse gas emissions and use of fossil fuels; and
- focusing on public benefits-driven investment in high-risk, high-return technology that private companies alone cannot undertake.

The FutureGen facility is intended to be a near-zero emissions facility that would be the cleanest fossil-fuel-based power system in the world. The project would require approximately 10 years for completion, not including post-project monitoring. Performance and economic tests results would be shared among all participants, industry, the environmental community, and the public. DOE intends to invite participation from international organizations to maximize the global applicability and acceptance of FutureGen's results, helping to support an international consensus on the role of coal and geological sequestration in addressing global greenhouse gas emissions and energy security. Broad engagement of stakeholders early in the FutureGen effort is critical to the successful achievement of understanding and acceptance of geologic sequestration as part of a near-zero emissions, coal-based energy option.

FutureGen Project Processes

The FutureGen Project would employ advanced coal gasification technology integrated with combined cycle electricity generation, H_2 production, CO_2 capture and CO_2 sequestration in geologic repositories. The gasification process would combine coal, oxygen (O_2), and steam to produce a H_2-rich ''synthesis gas.'' After exiting the conversion reactor, the composition of the synthesis gas would be ''shifted'' to produce additional H_2. The product stream would consist mostly of H_2, steam, and CO_2. Following separation of these three gas components, the H_2 would be used to generate electricity in a gas turbine and/or fuel cell. Some of the H_2 could be used as a feedstock for chemical plants or petroleum refineries or as a transportation fuel. Steam from the process could be condensed, treated, and recycled into the gasifier or added to the plant's cooling water circuit. CO_2 from the process would be sequestered in deep underground geologic formations that would be monitored to verify the permanence of CO_2 storage.

Overall Project Objectives

- Establish technical and economic feasibility of producing electricity and H_2 from coal with near-zero emissions (including CO_2);
- Verify sustained, integrated operation of coal conversion system with geologic sequestration of CO_2;
- Verify effectiveness, safety, and permanence of geologic sequestration of CO_2;
- Establish standardized technologies and protocols for CO_2 measuring, monitoring, and verification;
- Confirm the potential of the FutureGen concept to achieve economic competitiveness with other near-zero emissions approaches through advances in technology by 2020; and
- Gain acceptance by the coal and electricity industries, environmental community, international community, and public-at-large for the concept of coal-based systems with near-zero emissions through the successful operation of FutureGen.

Power Plant Performance Objectives

- Sequester CO_2 at an operational rate of approximately one to two million metric tons per year;
- Produce electricity and H_2 at ratios (may be variable) consistent with market needs (equivalent to plant capacity of 275 MW electricity output);
- Sequester at least 90 percent of CO_2 initially with the eventual potential for up to 100 percent sequestration;
- Locate plant consistent with, inter alia, adequate coal feedstock availability, proximity to market for products (especially electricity) as part of proving potential economic viability, and proximity to geologic formations for sequestration (*e.g.*, deep saline reservoirs, unmineable coal seams, depleted oil and natural gas reservoirs, basalt formations);
- Achieve environmental (near-zero emissions) requirements;
- Provide a design database for subsequent, near-zero emissions, commercial demonstrations and/or deployments; and
- Design capability for full-flow testing of advanced technologies and advanced technology modules, and design incorporation of loosely integrated units that increase flexibility and enhance operability and reliability.

CO_2 Sequestration Monitoring and Verification Performance Objectives

- Accurately quantify storage potential of the geologic formation(s);
- Detect and monitor surface and subsurface leakage, if it occurs (capability to measure CO_2 slightly above atmospheric concentration of 370 ppm), and demonstrate effectiveness of mitigation;
- Provide the scientific basis for carbon accounting and assurance of permanent storage;
- Account for co-sequestration of CO_2 impurities; and
- Develop information necessary to estimate costs of future CO_2 management systems.

Technology Alternatives

The FutureGen Project would incorporate both cutting-edge research and demonstrations of emerging technologies ready for testing at a large scale to achieve its goal of validating the technical and economic feasibility of an integrated near-zero emissions plant. The FutureGen power plant would be designed to provide a capability for full-scale testing of new technologies prior to their commercial demonstration and deployment. The FutureGen facility may integrate some combination of new technologies for gasification, O_2 production, H_2 production, combustion gas cleanup, H_2 turbines, fuel cells and fuel cell/turbine hybrids, CO_2 sequestration, advanced materials, instrumentation, sensors and controls, and byproduct utilization. Decisions on incorporation of specific technologies would be made by the Alliance keeping in mind the ability to achieve the overall project goal of proving the technical and economic feasibility of the near-zero emissions concept.

Alternatives, Including the Proposed Action

Under the proposed action, DOE would implement the FutureGen Project to achieve the President's goals. The EIS will analyze the reasonable alternatives for implementing the FutureGen Project. Once a list of best qualified sites is delivered by the Alliance to DOE, DOE will consider all of the available alternatives in ascertaining which ones are reasonable. The EIS also may analyze technologies and strategies for implementing important elements of the Project.

Under the no-action alternative, DOE would not fund the proposed Project. In the absence of DOE funding, it would be unlikely that the Alliance, or industry in

general, would soon undertake the utility-scale integration of CO_2 capture and geologic sequestration with a coal-fired power plant. Absent DOE's investment in a utility-scale facility, the development of integrated CO_2 capture and sequestration with power plant operations could occur more slowly through a series of small steps, and only then in the presence of a regulatory requirement. Given a regulatory requirement for the curtailment of greenhouse gas emissions, the no-action alternative could result in higher costs of electricity due to the use of more expensive, commercially available technology and due to a reduction in plant availability as a result of the lack of integrated test operations data and experience that would have otherwise been available from a FutureGen-type facility.

DOE may consider other reasonable alternatives that are suggested during the public scoping period.

Preliminary Identification of Environmental Issues

DOE intends to address the issues listed below when considering the potential impacts resulting from the siting, construction and operation of the FutureGen power plant. This list is neither intended to be all-inclusive nor a predetermined set of potential impacts. DOE invites comments on these and any other issues that should be considered in the EIS. The environmental issues include:

- *Air quality impacts:* potential for air emissions during construction and operation of the power plant and appurtenant facilities to impact local sensitive receptors, local environmental conditions, and special-use areas, including impacts to smog and haze and impacts from dust and any significant vapor plumes;
- *Noise and light impacts:* potential impacts from construction, transportation of materials, and facility operations;
- *Traffic issues:* potential impacts from the construction and operation of the facilities, including changes in local traffic patterns, deterioration of roads, traffic hazards, and traffic controls;
- *Floodplains:* potential impacts to flood flow resulting from earthen fills, access roads, and dikes that might be needed in a floodplain;
- *Wetlands:* potential impacts resulting from fill, sediment deposition, vegetation clearing and facility erection that might be needed in a wetland;
- *Visual impacts associated with facility structures:* views from neighborhoods, impacts to scenic views (*e.g.*, impacts from water vapor plumes, power transmission lines, pipelines), internal and external perception of the community or locality;
- *Historic and cultural resources:* potential impacts from the site selection, design, construction and operation of the facilities;
- *Water quality impacts:* potential impacts from water utilization and consumption, plus potential impacts from wastewater discharges;
- *Infrastructure and land use impacts:* potential environmental and socioeconomic impacts of project site selection, construction, delivery of feed materials, and distribution of products (*e.g.*, power transmission lines, pipelines);
- Marketability of products and market access to feed stocks;
- *Solid wastes:* pollution prevention plans and waste management strategies, including the handling of ash, slag, water treatment sludge, and hazardous materials;
- Disproportionate impacts on minority and low-income populations;
- *Connected actions:* potential development of support facilities or supporting infrastructure;
- *Ecological:* potential on-site and off-site impacts to vegetation, terrestrial wildlife, aquatic wildlife, threatened or endangered species, and ecologically sensitive habitats;
- *Geologic impacts:* potential impacts from the sequestration of CO_2 and other captured gases on underground resources such as potable water supplies, mineral resources, and fossil fuel resources;
- Ground surface impacts from CO_2 sequestration: potential impacts from leakage of injected CO_2, potential impacts from induced flows of native fluids to the ground surface or near the ground surface, and the potential for induced ground heave and/or microseisms;
- Fate and stability of sequestered CO_2 and other captured gases;
- Health and safety issues associated with CO_2 capture and sequestration;
- Cumulative effects that result from the incremental impacts of the proposed project when added to the other past, present, and reasonably foreseeable future projects;
- Compliance with regulatory requirements and environmental permitting;
- Environmental monitoring plans associated with the power plant and with the CO_2 sequestration site; and
- Ultimate closure plans for the CO_2 sequestration site and reservoirs.

Host Site Selection

The Alliance will conduct a site competition to identify one or more candidate sites suitable for the FutureGen facility. The process will be an open competition in which States, tribes, private organizations and other interested parties can offer sites to the Alliance for consideration.

The selection process will include the use of both qualification criteria and scoring criteria. Qualification criteria will be used to initially screen proposals and thereby identify qualified sites meriting further evaluation for the FutureGen Project. Scoring criteria will be used by the Alliance to distinguish among the initial set of qualified sites to identify the candidates (proposals and sites) that merit evaluation under the NEPA process. Categories of criteria that will be considered by the Alliance include: Suitability of the proposed site for construction of the power plant, suitability of the proposed sequestration reservoir for permanently sequestering CO_2, availability of necessary infrastructure and resources (*e.g.* railroads, roads, natural gas lines, power transmission lines, and water), access, environmental factors, and costs.

Following the development of a site selection plan and the site screening criteria and subsequent to DOE approval of these items, the Alliance is issuing a draft Request for Proposals (RFP) for a two-week comment period. Following the public comment period, the Alliance will issue the final RFP (proposed for March 2006) seeking proposals for a host site. The draft RFP and other information provided by the Alliance will be available at *http://www.FutureGenAlliance.org.*

Site proponents will be required to submit information that the Alliance will use to determine how, and the extent to which, each of the screening criteria would be met at each site. Proponents of each site will be required to submit sufficient acceptable technical, environmental and economic information. The RFP will also state that, for those sites that will be analyzed in the EIS, additional information may be requested from site proponents. Such information may require some field work, but will not require drilling of exploratory wells or conducting seismic surveys, because the EIS will be based on readily available information.

The Alliance will review the proposals received to identify those sites that are reasonable from a technical, environmental, and economic perspective. At the conclusion of the review of proposals, the Alliance will provide DOE with a report that describes the screening process and findings and identifies the sites that the Alliance concludes are candidates (*i.e.*, those believed by the Alliance to be

reasonable alternatives). DOE will review the Alliance's selection process for fairness, openness and compliance with the established approach.

Based on its review of the Alliance's identification of candidate sites and other relevant information, DOE will then preliminarily determine the reasonable alternatives to be addressed in the EIS. DOE's NOI to prepare an EIS for the FutureGen Project will identify the proposed reasonable alternative sites.

The Alliance may assist the DOE and DOE contractors in gathering additional information to support completion of the EIS. However, the DOE and DOE contractors will develop the EIS. Following the completion of the EIS and the public involvement process, the DOE will announce in a Record of Decision (ROD) either the no-action alternative or those sites, if any, that are acceptable to the DOE for the project. If the action alternative is selected, the Alliance will subsequently select a host site from among those, if any, that are listed in the ROD as being acceptable to the DOE. Following the tentative selection of a host site, the Alliance will conduct extensive site characterization work on the chosen site. Information obtained from the characterization will be reviewed by the DOE and will support the completion of a supplement analysis by DOE to determine whether the newly gained information would have altered in a significant way the findings in the EIS. The supplement analysis will be used to determine whether a Supplemental EIS must be prepared.

Future Public Involvement

This ANOI does not serve as a substitute for the Notice of Intent that will initiate the public scoping process for the FutureGen Project EIS. Following publication of the Notice of Intent, DOE will hold scoping meetings, prepare and distribute the Draft EIS for public review, hold public hearings to solicit public comment on the Draft EIS, and publish a Final EIS. Not less than 30 days after publication of the U.S. Environmental Protection Agency's Notice of Availability of the Final EIS, DOE may issue a Record of Decision documenting its decision concerning the proposed action.

Preliminary EIS Schedule

DOE anticipates issuance of a NOI to prepare an EIS in July 2006. The NOI or subsequent notices published in the **Federal Register** will announce the dates for public scoping meetings and the target date for completion of a Draft EIS.

A Notice of Availability of the Draft EIS will be published in the **Federal Register** upon completion of the Draft EIS and will announce the locations and dates for public hearings on the Draft EIS and the means for providing comments. DOE will hold public hearings at locations comparable to those for the scoping meetings. DOE will consider all comments received at public hearings or otherwise during preparation of the Final EIS.

Issued in Washington, DC, on February 13, 2006.

John Spitaleri Shaw,

Assistant Secretary for Environment, Safety and Health.

[FR Doc. E6–2222 Filed 2–15–06; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Science; DOE/NSF Nuclear Science Advisory Committee

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the DOE/NSF Nuclear Science Advisory Committee (NSAC). Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, March 2, 2006, 10 a.m. to 6 p.m.; Friday, March 3, 2006, 8 a.m. to 3:15 p.m.

ADDRESSES: Doubletree Hotel, 1750 Rockville Pike, Rockville, Maryland 20852–1699.

FOR FURTHER INFORMATION CONTACT: Brenda L. May, U.S. Department of Energy; SC–26/Germantown Building, 1000 Independence Avenue, SW., Washington, D.C. 20585–1290; Telephone: 301–903–0536.

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: To provide advice and guidance on a continuing basis to the Department of Energy and the National Science Foundation on scientific priorities within the field of basic nuclear science research.

Tentative Agenda: Agenda will include discussions of the following:

Thursday, March 2, 2006

- Perspectives from Department of Energy and National Science Foundation.
- Presentation of the Neutrino Scientific Assessment Group Subcommittee Report.
- Public Comment (10-minute rule).

Friday, March 3, 2006

- Discussion of NuSAG Report.
- Preparation of Transmittal Letter.
- Possible Future Charges.
- Public Comment (10-minute rule).

Public Participation: The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of these items on the agenda, you should contact Brenda L. May, 301–903–0536 or *Brenda.May@science.doe.gov* (e-mail). You must make your request for an oral statement at least 5 business days before the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of the meeting will be available for public review and copying within 30 days at the Freedom of Information Public Reading Room; Room 1E–190; Forrestal Building; 1000 Independence Avenue, SW.; Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC, on February 9, 2006.

Carol Matthews,

Acting Advisory Committee Management Officer.

[FR Doc. E6–2228 Filed 2–15–06; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Oak Ridge Reservation

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Oak Ridge Reservation. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, March 8, 2006, 6 p.m.

ADDRESSES: DOE Information Center, 475 Oak Ridge Turnpike, Oak Ridge, Tennessee.

FOR FURTHER INFORMATION CONTACT: Pat Halsey, Federal Coordinator, Department of Energy Oak Ridge Operations Office, P.O. Box 2001, EM–90, Oak Ridge, TN 37831. Phone (865)

576–4025; Fax (865) 576–5333 or e-mail: *halseypj@oro.doe.gov* or check the Web site at *www.oakridge.doe.gov/em/ssab.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda: Update on the Molten Salt Reactor Experiment.

Public Participation: The meeting is open to the public. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to the agenda item should contact Pat Halsey at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comment will be provided a maximum of five minutes to present their comments.

Minutes: Minutes of this meeting will be available for public review and copying at the Department of Energy's Information Center at 475 Oak Ridge Turnpike, Oak Ridge, TN between 8 a.m. and 5 p.m., Monday through Friday, or by writing to Pat Halsey, Department of Energy Oak Ridge Operations Office, P.O. Box 2001, EM–90, Oak Ridge, TN 37831, or by calling her at (865) 576–4025.

Issued at Washington, DC, on February 10, 2006.

Carol Matthews,

Acting Advisory Committee Management Officer.

[FR Doc. E6–2219 Filed 2–15–06; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Science; High Energy Physics Advisory Panel

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the High Energy Physics Advisory Panel (HEPAP). Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Friday, March 3, 2006, 10 a.m. to 6 p.m. and Saturday, March 4, 2006, 9 a.m. to 5 p.m.

ADDRESSES: The Latham Hotel, Georgetown, 3000 M Street, NW., Washington, DC 20007.

FOR FURTHER INFORMATION CONTACT: John Kogut, Executive Secretary; High Energy Physics Advisory Panel; U.S. Department of Energy; SC–25/ Germantown Building, 1000 Independence Avenue, SW., Washington, DC 20585–1290; Telephone: 301–903–1298.

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: To provide advice and guidance on a continuing basis with respect to the high energy physics research program.

Tentative Agenda: Agenda will include discussions of the following:

Friday, March 3, 2006, and Saturday, March 4, 2006

1. Discussion of Department of Energy High Energy Physics Programs.

2. Discussion of National Science Foundation Elementary Particle Physics Program.

3. Reports on and Discussions of Topics of General Interest in High Energy.

Physics

4. Public Comment (10-minute rule).

Public Participation: The meeting is open to the public. If you would like to file a written statement with the Panel, you may do so either before or after the meeting. If you would like to make oral statements regarding any of these items on the agenda, you should contact John Kogut, 301–903–1298 or *John.Kogut@science.doe.gov* (e-mail). You must make your request for an oral statement at least 5 business days before the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Panel will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of the meeting will be available for public review and copying within 90 days at the Freedom of Information Public Reading Room; Room 1E–190; Forrestal Building; 1000 Independence Avenue, SW.; Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC, on February 10, 2006.

Carol Matthews,

Acting Advisory Committee Management Officer.

[FR Doc. E6–2224 Filed 2–15–06; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Fossil Energy; National Coal Council

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the National Coal Council. Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, March 9, 2006, 9:30 a.m. to 12 Noon.

ADDRESSES: St. Louis Pavilion Hotel Downtown, One South Broadway, St. Louis, MO.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Kane, Phone: (202) 586–4753, or Ms. Estelle W. Hebron, Phone: (202) 586–6837, U.S. Department of Energy, Office of Fossil Energy, Washington, DC 20585.

SUPPLEMENTARY INFORMATION: *Purpose of the Committee:* The purpose of the National Coal Council is to provide advice, information, and recommendations to the Secretary of Energy on matters relating to coal and coal industry issues:

Tentative Agenda:

- Call to Order and Opening Remarks by the Chair
- Approval of Draft Agenda
- Discussion of Draft Study Requested by Secretary Samuel Bodman by Letter Dated April 7, 2005
- Action on Draft Study
- Other Business
- Adjourn

Public Participation: The meeting is open to the public. The Chairman of the NCC will conduct the meeting to facility orderly business. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Mr. Robert Kane or Ms. Estelle Hebron at the address and telephone numbers listed above. You must make your request for an oral statement at lease five business days prior to the meeting, and reasonable provisions will be made to include the presentation on the agenda. Public comment will follow the 10 minute rule.

Minutes: The minutes will be available for public review and copying within 30 days at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC, between 9 a.m. and 4

p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, on February 10, 2006.

Carol Matthews,

Acting Advisory Committee Management Officer.

[FR Doc. E6–2221 Filed 2–15–06; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER06–200–000; ER06–200–002]

Big Horn Wind Project LLC; Notice of Issuance of Order

February 9, 2006.

Big Horn Wind Project LLC (Big Horn) filed an application for market-based rate authority, with an accompanying rate tariff. The proposed rate tariff provides for the sales of energy, capacity and ancillary services at market-based rates. Big Horn also requested waiver of various Commission regulations. In particular, Big Horn requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liability by Big Horn.

On February 8, 2006, pursuant to delegated authority, the Director, Division of Tariffs and Market Development—West, granted the request for blanket approval under Part 34. The Director's order also stated that the Commission would publish a separate notice in the **Federal Register** establishing a period of time for the filing of protests. Accordingly, any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Big Horn should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2004).

Notice is hereby given that the deadline for filing motions to intervene or protests is March 10, 2006.

Absent a request to be heard in opposition by the deadline above, Big Horn is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of Big Horn, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of Big Horn's issuances of securities or assumptions of liability.

Copies of the full text of the Director's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov,* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. *See,* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E6–2241 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AC06–26–000]

BP Pipelines (Alaska) Inc.; Notice of Filing

February 9, 2006.

Take notice that on November 17, 2005, BP Pipelines (Alaska) Inc. submitted an application pursuant to 18 CFR 352 1–6(d) and (g) to record a prior period adjustment for the correction of accounting errors. The accounting adjustment is to correct the annual calculation of depreciation expense for undivided joint interest property for the years beginning in 1994, to align with the methodology set forth in the 1982 TAPS depreciation stipulation (Docket No. P–18–1).

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, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on February 24, 2006.

Magalie R. Salas,

Secretary.

[FR Doc. E6–2256 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–215–000]

Canyon Creek Compression Company; Notice of Penalty Revenue Report

February 9, 2006.

Take notice that on February 6, 2006, Canyon Creek Compression Company (Canyon) tendered for filing its revenue crediting report for the calendar year 2005 pursuant to section 36 of the general terms and conditions of its FERC Gas Tariff, Third Revised Volume No. 1.

Canyon states that copies of the filing are being mailed to 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 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.

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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 on February 16, 2006 .

Magalie R. Salas,

Secretary.

[FR Doc. E6–2255 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–208–000]

Columbia Gas Transmission Corporation; Notice of Tariff Filing and Service Agreements

February 9, 2006.

Take notice that on February 2, 2006, Columbia Gas Transmission Corporation (Columbia) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, Thirteenth Revised Sheet No. 500B, and the following Service Agreements for consideration and approval:

FTS Service Agreement No. 85892 between Columbia Gas Transmission Corporation and Amerada Hess Corporation dated January 23, 2006.

FTS Service Agreement No. 85893 between Columbia Gas Transmission Corporation and Amerada Hess Corporation dated January 23, 2006.

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.

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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. E6–2248 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–210–000]

Columbia Gulf Transmission Company; Notice of Proposed Changes in FERC Gas Tariff

February 9, 2006.

Take notice that on February 3, 2006, Columbia Gulf Transmission Company (Columbia Gulf) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, Fourth Revised Sheet No. 220, with a proposed effective date of March 5, 2006.

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. E6–2250 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–212–000]

Crossroads Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff

February 9, 2006.

Take notice that on February 3, 2006, Crossroads Pipeline Company (Crossroads) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, Second Revised Sheet No. 240, with a proposed effective date of March 5, 2006.

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. E6–2252 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR06–9–000]

Crosstex Mississippi Pipeline, L.P.; Notice of Petition for Approval of Rates

February 9, 2006.

Take notice that on February 1, 2006, Crosstex Mississippi Pipeline, L.P. (CMP) filed a petition for approval of rates pursuant to section 284.123 of the Commission's regulations. CMP requests approval of an increase in its maximum system-wide rate for the interruptible transportation of natural gas from $0.2549 per MMBtu to $0.3115 per MMBtu, effective February 1, 2006. In addition, CMP states that it proposes to retain the actual amount of gas used, on a pro rata basis, for compressor fuel, company use, and lost and unaccounted for gas.

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: February 28, 2006.

Magalie R. Salas,

Secretary.

[FR Doc. E6–2243 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–211–000]

Dominion Cove Point LNG, LP; Notice of Proposed Changes in FERC Gas Tariff

February 9, 2006.

Take notice that on February 3, 2006, Dominion Cove Point LNG, LP (Cove Point) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, Second Revised Sheet No. 283, to become effective March 6, 2006.

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. E6–2251 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–209–000]

Entrega Gas Pipeline LLC; Notice of Tariff Filing

February 9, 2006.

Take notice that on January 31, 2006, Entrega Gas Pipeline LLC (Entrega) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheets, to be effective December 17, 2005:

First Revised Sheet No. 20
First Revised Sheet No. 20A
First Revised Sheet No. 20B
Original Sheet No. 21A

Entrega proposes to revise these tariff sheets in order to implement a Facility Reimbursement Fee for installation of new facilities required to provide an interconnect with TransColorado Gas Transmission Company.

Entrega states that a copy of this filing has been served upon Entrega's customers and affected 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. E6–2249 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–518–083]

Gas Transmission Northwest Corporation; Notice of Negotiated Rates

February 9, 2006.

Take notice that on January 31, 2006, Gas Transmission Northwest Corporation (GTN) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1–A, Thirtieth Revised Sheet No. 15, to become effective February 1, 2006.

GTN further states that a copy of this filing has been served on GTN's jurisdictional customers and interested 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.

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Magalie R. Salas,

Secretary.

[FR Doc. E6–2239 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–213–000]

Granite State Gas Transmission, Inc.; Notice of Proposed Changes in FERC Gas Tariff

February 9, 2006.

Take notice that on February 3, 2006, Granite State Gas Transmission, Inc. (Granite State) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, the following revised

tariff sheets, with a proposed effective date of March 5, 2006:

Fifth Revised Sheet No. 200A,
Sixth Revised Sheet No. 341.

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.

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Magalie R. Salas,

Secretary.

[FR Doc. E6–2253 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–214–000]

Great Lakes Gas Transmission Limited Partnership; Notice of Proposed Changes in FERC Gas Tariff

February 9, 2006.

Take notice that on February 3, 2006, Great Lakes Gas Transmission Limited Partnership (Great Lakes) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, First Revised Sheet No. 37, to become effective March 6, 2006.

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.

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Magalie R. Salas,

Secretary.

[FR Doc. E6–2254 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–405–003]

Northern Natural Gas Company; Notice of Compliance Filing

February 9, 2006.

Take notice that on January 31, 2006, Northern Natural Gas Company (Northern) tendered for filing a summary operations report with the Commission in compliance with the Commission's August 19, 2004 order in this proceeding.

Northern states that copies of the filing have been mailed to each of its customers and interested state commissions.

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 on February 16, 2006.

Magalie R. Salas,

Secretary.

[FR Doc. E6–2245 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–183–000]

Northern Natural Gas Company; Notice of Limited Waiver

February 9, 2006.

Take notice that on January 24, 2006, Northern Natural Gas Company (Northern) tendered for filing a limited waiver of its FERC Gas Tariff in order to allow Northern to resolve a prior-period measurement error by applying the low monthly index price rather than the average monthly index price.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the 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.

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Comment Date: 5 p.m. Eastern Time on February 16, 2006.

Magalie R. Salas,

Secretary.

[FR Doc. E6–2246 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–207–000]

Ozark Gas Transmission, L.L.C.; Notice of Proposed Changes in FERC Gas Tariff

February 9, 2006.

Take notice that on February 2, 2006, Ozark Gas Transmission L.L.C. (Ozark) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the following revised tariff sheet to be effective February 15, 2006:

Second Revised Sheet No. 0
Third Revised Sheet No. 19
First Revised Sheet No. 33
Second Revised Sheet No. 43
First Revised Sheet No. 59A
First Revised Sheet No. 60B
Second Revised Sheet No. 97
Second Revised Sheet No. 125
First Revised Sheet No. 135
Second Revised Sheet No. 144
First Revised Sheet No. 152
First Revised Sheet No. 155D

Ozark states that the filing is being made to reflect the correct contact personnel and addresses for Ozark in the tariff in light of the recent change in ownership of Ozark's parent company.

Ozark further states that it has served copies of this filing upon the company's jurisdictional 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.

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Magalie R. Salas,

Secretary.

[FR Doc. E6–2247 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP06–58–000]

Southern Natural Gas Company; Notice of Application

February 9, 2006.

Take notice that on February 1, 2006, Southern Natural Gas Company (Southern), Post Office Box 2563, Birmingham, Alabama 35202–2563, filed in Docket No. CP06–58–000 an application pursuant to sections 7(b) and 7(c) of the Natural Gas Act (NGA) for: (1) Permission and approval to abandon certain pipeline and appurtenant facilities in Tuscaloosa County, Alabama, and certain compression facilities in St Clair County, Alabama; and (2) construct, install, and operate certain pipeline facilities in Tuscaloosa County, Alabama, all as more fully set forth in the application which is on file with the Commission and open to public inspection. This filing may also be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link, select ''Docket #'' and

follow the instructions (call 202–502–8222 or for TTY, 202–502–8659).

Southern proposes to abandon in place approximately 4.55 miles of 22-inch diameter pipeline and to abandon and remove approximately 6.36 miles of 22-inch diameter pipeline on its McConnells North Main Loop in Tuscaloosa County. Southern also proposes to construct, install, and operate approximately 6.1 miles of 24-inch diameter pipeline on its 2nd North Main Loop to replace the abandoned 6.36 miles of 22-inch diameter pipeline on the North Main Loop. Southern states that it no longer needs the Pell City Unit No. 3 at the Pell City compressor station in St. Clair County to meet peak demands because of capacity turnbacks on the Gadsden Lateral Line. Southern proposes to abandon the Pell City Unit No. 3 in place by disconnecting it from all existing gas piping system connections, including fuel gas and installing blind flanges at these points. Additionally, Southern states that electric power will be disconnected from the unit such that all control systems will be inoperable.

Southern estimates that it will spend $8,422,474 for this proposal with funds on hand and cash from future operations. Southern states that its existing customers would not lose any service because of the proposed abandonment.

Any questions regarding this application should be directed to Patricia S. Francis, Senior Counsel, Southern Natural Gas Company, Post Office Box 2563, Birmingham, Alabama 35202–2563 at (205) 325–7696.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Comment Date: March 2, 2006.

Magalie R. Salas,

Secretary.

[FR Doc. E6–2240 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

February 8, 2006.

Take notice that the Commission received the following electric rate filings.

Docket Numbers: ER04–520–004.

Applicants: Florida Power & Light Company.

Description: Florida Power & Light Co submits Service Agreement for Network Integration Transmission Service with Seminole Electric Coop, Inc in compliance with FERC's 5/21/04 Order.

File Date: 01/27/2006.

Accession Number: 20060201–0122.

Comment Date: 5 p.m. Eastern Time on Friday, February 17, 2006.

Docket Numbers: ER05–6–035; EL04–135–037; EL02–111–055; EL03–212–051.

Applicants: American Electric Power Service, Corporation et al.

Description: American Electric Power Service Corp et al submits a filing to revise the SECA charges under Attachment X of the PJM Interconnection, LLC OATT, effective 1/1/06.

File Date: 01/31/2006.

Accession Number: 20060203–0415.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER05–941–004.

Applicants: New York Independent System Operator, Inc.

Description: New York Independent System Operator, Inc submits compliance filing discussing financial risks.

File Date: 01/31/2006.

Accession Number: 20060131–5067.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER06–449–001.

Applicants: Florida Power Corporation.

Description: Florida Power Corp submits First Revised Sheet No. 20 to the Interchange Agreement with Orlando Utilities Commission.

File Date: 01/31/2006.

Accession Number: 20060202–0199.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER06–577–000.

Applicants: San Diego Gas & Electric Company.

Description: San Diego Gas & Electric Co submits an executed Reliability Must-Run Service Agreement with California Independent System Operator Corp.

File Date: 01/30/2006.

Accession Number: 20060207–0011.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER06–578–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwestern Power Pool, Inc submits a revised unexecuted service agreement of Network Integration Transmission Service with Southwestern Public Service Co.

File Date: 01/31/2006.

Accession Number: 20060202–0194.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER06–579–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits revised pages to its OATT intended to implement a rate change for pricing zone under the SFPP tariff.

File Date: 01/31/2006.

Accession Number: 20060202–0108.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER06–580–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Oper, Inc submits a First Revised Network Integration Service Agreement with the City of Chelsea, Michigan.

File Date: 01/31/2006.

Accession Number: 20060202–0109.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER06–581–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc submits First Revised Network Integration Service Agreement with the City of Portland, Michigan.

File Date: 01/31/2006.

Accession Number: 20060202–0110.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER06–582–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator Inc submits Second Revised Network Integration Service Agreement with the City of St Louis, MI.

File Date: 01/31/2006.

Accession Number: 20060202–0111.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER06–583–000.

Applicants: Wolverine Power Supply Cooperative, Inc.

Description: Wolverine Power Supply Cooperative, Inc submits proposed changes to its Third Revised FERC Electric Rate Schedule No. 4 in compliance with Order 663.

File Date: 01/31/2006.

Accession Number: 20060202–0107.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER06–584–000.

Applicants: Central Maine Power Company.

Description: Central Maine Power Co submits an Unexecuted Large Generator Interconnection Agreement with NewPage Corp.

File Date: 01/31/2006.

Accession Number: 20060202–0106.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER06–585–000.

Applicants: Pacific Gas and Electric Company.

Description: Pacific Gas and Electric Co submits its twelfth quarterly filing of facilities agreements.

File Date: 01/31/2006.

Accession Number: 20060203–0468.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER06–586–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: The Midwest Independent Transmission System Operator, Inc and the Southern Minnesota Municipal Power Agency submit a revised formula rate template to Attachment O.

File Date: 01/31/2006.

Accession Number: 20060203–0019.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER06–587–000.

Applicants: Interstate Power and Light Company.

Description: Interstate Power and Light Co submits a request to change rates charged to its jurisdictional customers in Iowa, Illinois and Minnesota.

File Date: 01/31/2006.

Accession Number: 20060206–0033.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER06–588–000.

Applicants: Kansas City Power & Light Company.

Description: Kansas City Power & Light Co submits a proposed amendment to the Interim Load Regulation & Displacement Energy Service Schedule with the City of Marshall, Missouri.

File Date: 01/31/2006.

Accession Number: 20060202–0193.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER06–589–000.

Applicants: American Electric Power Company.

Description: American Electric Power Service Corp on behalf of AEP Operating Companies submits an interconnection and local delivery service agreement with the Village of Sycamore, Ohio.

File Date: 01/31/2006.

Accession Number: 20060202–0186.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER06–592–000.

Applicants: ISO New England, Inc.

Description: ISO New England Inc and New England Power Pool Participants Committee, submit transmittal letter and the revisions to Market Rule 1.

Filed Date: 01/31/2006.

Accession Number: 20060202–0195.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER94–1188–038; ER98–4540–007; ER99–1623–007; ER98–1279–009; EL05–99–002.

Applicants: LG&E Energy Marketing Inc.; Louisville Gas & Electric Company; Kentucky Utilities Company; Western Kentucky Energy Corporation; LG&E Energy Marketing, Inc., et al.

Description: LG&E Energy Marketing Inc et al submit an updated market power analysis in compliance with FERC's 12/1/05 Order.

Filed Date: 01/30/2006.

Accession Number: 20060206–0185.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER98–411–013.

Applicants: Wolverine Power Supply Cooperative, Inc.

Description: Wolverine Power Supply Cooperative, Inc submits information of a change in status that may reflect a departure from the characteristics the Commission relied upon in granting its market-based rate authority.

Filed Date: 01/31/2006.

Accession Number: 20060202–0201.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER98–3760–012.

Applicants: California Independent System Operator Corporation.

Description: California Independent System Operator Corp submits plans for the implementation of competitive procurement of Voltage Support & Black Start services in compliance with FERC's 9/30/05 Order.

Filed Date: 01/30/2006.

Accession Number: 20060206–0170.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER99–2774–010.

Applicants: Duke Energy Trading and Marketing, L.L.C.

Description: Duke Energy Trading and Marketing, LLC submits revisions to its market-based rate tariff FERC Electric Tariff, Original Volume No. 1.

Filed Date: 01/31/2006.

Accession Number: 20060202–0185.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER99–3426–005.

Applicants: San Diego Gas & Electric Company.

Description: San Diego Gas & Electric Co submits an updated market power analysis related to its market-based rate authorization pursuant to Order 652.

Filed Date: 01/31/2006.
Accession Number: 20060203–0049.
Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER99–2948–007; ER00–2918–006; ER00–2917–006; ER05–261–003; ER01–556–005; ER01–557–005; ER01–558–005; ER01–559–005; ER01–560–005; ER01–1654–008; ER01–2641–006; ER05–728–003; ER01–1949–006; ER04–485–003.
Applicants: Baltimore Gas & Electric Company.
Description: Baltimore Gas & Electric Co et al. submits a notice of change in status with respect to transaction entered into by the Constellation Energy Commodities Group.
Filed Date: 01/30/2006.
Accession Number: 20060206–0182.
Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

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 than 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. E6–2187 Filed 2–15–06; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

February 8, 2006.

Take notice that the Commission received the following electric rate filings.

Docket Numbers: ER01–316–019.
Applicants: ISO New England Inc.
Description: ISO New England submits its Index of Customers for the fourth quarter of 2005 under the ISO's FERC Tariff for Transmission Dispatch & Power Administration Services.
Filed Date: 01/31/2006.
Accession Number: 20060203–0413.
Comment Date: 5 p.m. Eastern Time on Tuesday, February 21, 2006.

Docket Numbers: ER02–1884–003.
Applicants: Waterside Power, L.L.C.
Description: Waterside Power, LLC submits a compliance filing to conform its tariff to market behavior rule 2(b) pursuant to order issued on 1/19/06.
Filed Date: 02/01/2006.
Accession Number: 20060206–0168.
Comment Date: 5 p.m. Eastern Time on Wednesday, February 22, 2006.

Docket Numbers: ER05–205–001.
Applicants: Southern California Edison Company.
Description: Southern California Edison Co submits an unexecuted Large Generator Interconnection Agreement with the City of Corona, California.
Filed Date: 02/01/2006.
Accession Number: 20060202–0200.
Comment Date: 5 p.m. Eastern Time on Wednesday, February 22, 2006.

Docket Numbers: ER06–357–001.
Applicants: Cleco Marketing & Trading LLC.
Description: Cleco Marketing and Trading LLC submits a Notice of Termination of its Market Based wholesale sales, Rate Schedule FERC No. 1.
Filed Date: 02/01/2006.
Accession Number: 20060206–0169.
Comment Date: 5 p.m. Eastern Time on Wednesday, February 22, 2006.

Docket Numbers: ER06–461–001.
Applicants: Velocity Futures, L.P.
Description: Velocity Futures amends its pending Rate Schedule FERC No. 1.
Filed Date: 02/01/2006.
Accession Number: 20060206–0166.
Comment Date: 5 p.m. Eastern Time on Wednesday, February 22, 2006.

Docket Numbers: ER06–590–000.
Applicants: New England Power Pool.
Description: New England Power Pool Participants Committee submits transmittal letter along with counterpart signature pages of the New England Power Pool Agreement dated 9/1/71.
Filed Date: 02/01/2006.
Accession Number: 20060202–0197.
Comment Date: 5 p.m. Eastern Time on Wednesday, February 22, 2006.

Docket Numbers: ER06–591–000.
Applicants: Carolina Power & Light Company.
Description: Carolina Power & Light Co dba Progress Energy Carolinas, Inc submits a Large Generator Interconnection Agreement with Craven County Wood Energy Limited Partnership.
Filed Date: 02/01/2006.
Accession Number: 20060202–0196.
Comment Date: 5 p.m. Eastern Time on Wednesday, February 22, 2006.

Docket Numbers: ER06–593–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc's executed agreement to Sponsor Facilities Upgrades with SPP, Redbud Energy, LP & Oklahoma Gas & Electric Co.
Filed Date: 02/01/2006.
Accession Number: 20060203–0424.
Comment Date: 5 p.m. Eastern Time on Wednesday, February 22, 2006.

Docket Numbers: ER06–594–000.
Applicants: PJM Interconnection L.L.C.
Description: PJM Interconnection, LLC submits revision to Attachment Q, PJM Credit Policy, of the PJM OATT.
Filed Date: 02/01/2006.
Accession Number: 20060203–0425.
Comment Date: 5 p.m. Eastern Time on Wednesday, February 22, 2006.

Docket Numbers: ER06–595–000.
Applicants: American Electric Power Service Corporation.
Description: The American Electric Power Service Corp, as designated agent for AEP Operating Companies submits for filing & requests acceptance of an interconnection & local delivery service agreement with City of ST Clairsville, OH.

Filed Date: 02/01/2006.

Accession Number: 20060203–0426.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 22, 2006.

Docket Numbers: ER06–596–000.

Applicants: American Electric Power Service Corporation.

Description: The American Electric Power Service Corp as designated agent for AEP Operating Companies submits for filing and requests acceptance of an interconnection and local delivery service agreement with Bryan, OH.

Filed Date: 02/01/2006.

Accession Number: 20060203–0427.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 22, 2006.

Docket Numbers: ER06–597–000.

Applicants: American Electric Power Services Corporation.

Description: The American Electric Power Service Corp as designated agent for AEP Operating Companies submits for filing & requests acceptance of an interconnection & local delivery service agreement with Village of Ohio City, OH.

Filed Date: 02/01/2006.

Accession Number: 20060203–0428.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 22, 2006.

Docket Numbers: ER06–598–000.

Applicants: American Electric Power Services Corporation.

Description: The American Electric Power Service Corp as designated agent for AEP Operating Companies submits for filing & requests acceptance of an interconnection & local delivery service agreement with Village of Arcadia, OH.

Filed Date: 02/01/2006.

Accession Number: 20060203–0429.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 22, 2006.

Docket Numbers: ER06–603–000; ER06–466–000.

Applicants: El Paso Electric Company.

Description: El Paso Electric Co submits executed non-conforming service agreements with Tucson Electric Power Co.

Filed Date: 02/01/2006.

Accession Number: 20060206–0177.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 22, 2006.

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 than 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. E6–2188 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER05–103–000, et al.]

Midwest Independent Transmission System Operator, Inc. et al.; Electric Rate and Corporate Filings

February 8, 2006.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Midwest Independent Transmission System Operator, Inc.

[Docket No. EL05–103–000]

Take notice that on January 31, 2006, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) and PJM Interconnection, L.L.C. (PJM) submitted a redacted version of it Final Report. Midwest ISO states that on January 17, 2006, it filed a CEII protected Final Report and recommendations in compliance with Commission's Order issued June 27, 2005.

Comment Date: 5 p.m. Eastern Time on February 17, 2006.

2. Midwest Generation, LLC, EME Homer City Generation, L.P., Edison Mission Marketing & Trading, Inc., Midwest Generation Energy Services, LLC, CP Power Sales Twelve, L.L.C., CP Power Sales Seventeen, L.L.C., CP Power Sales Nineteen, L.L.C., CP Power Sales Twenty, L.L.C., CL Power Sales One, L.L.C., CL Power Sales Two, L.L.C., CL Power Sales Seven, L.L.C., Sunrise Power Company, LLC, and San Juan Mesa Wind Project, LLC

[Docket Nos. ER99–3693–005, ER99–666–006, ER99–852–010, ER99–893–0011, ER03–30–004, ER99–4229–009, ER99–4231–008, ER95–892–061, ER95–892–062, ER96–2652–056, ER01–2217–004 and ER05–1389–002]

Take notice that on January 26, 2006, the above referenced wholly- and partially-owned, indirect subsidiaries of Edison International tendered for filing a notice of change in status to inform the Commission of their recent indirect affiliation with San Juan Mesa Wind Project, LLC and DeGreeffpa, LLC, Bendwind, LLC, Sierra Wind, LLC, Groen Wind, LLC, Larswind, LLC, TAIR Windfarm, LLC and Hillcrest Wind, LLC, the reported change in status does not reflect a departure from the characteristics the Commission relied upon in granting market-based rate authorization to each of the Edison Entities.

Comment Date: 5 p.m. Eastern Time on February 16, 2006.

3. Public Service Company of New Mexico and Texas-New Mexico Power Company

[Docket No. ER06–367–000]

Take notice that on December 23, 2005, Public Service Company of New Mexico (PNM) tendered for filing on behalf of itself and Texas-New Mexico Power Company (TBNP) an entirely revised Interconnection Agreement of February 28, 1974 between Community Public Service Company and PNM as PNM Rate Schedule No. 46 and TNMP Rate Schedule No. 4.

Comment Date: 5 p.m. Eastern Time on February 15, 2006.

4. American Electric Power Service Corporation

[Docket No. ER06–553–000]

Take notice that on January 27, 2005, as supplemented on January 30, 2006, American Electric Power Service Corporation (AEPSC), tendered for filing an executed Letter Agreement between AEPSC and Cinergy Services, Inc., dated December 1, 2005.

Comment Date: 5 p.m. Eastern Time on February 21, 2006.

Standard Paragraph

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E6–2189 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER01–1265–008, et al.]

Mirant Americas Energy Marketing, L.P. et al.; Electric Rate and Corporate Filings

February 9, 2006.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Mirant Americas Energy Marketing, LP, Mirant California, LLC, Mirant Delta, LLC, Mirant Potrero, LLC, Mirant Canal, LLC, Mirant Kendall, LLC, Mirant Bowline, LLC, Mirant Lovett, LLC, Mirant NY-Gen. LLC, Mirant Chalk Point, LLC, Mirant Mid-Atlantic, LLC, Mirant Potomac River, LLC, Mirant Zeeland, LLC, West Georgia Generating Company, LLC, Mirant Sugar Creek, LLC, Shady Hills Power Company, LLC, Mirant Energy Trading, LLC, Mirant Oregon, LLC, Mirant Las Vegas, LLC

[Docket Nos. ER01–1265–008; ER01–1267–009; ER01–1270–009; ER01–1278–009; ER01–1268–008; ER01–1271–008; ER01–1266–007; ER01–1272–007; ER01–1275–007; ER01–1269–007; ER01–1273–008; ER01–1277–007; ER01–1263–007; ER02–1052–006; ER02–900–006; ER02–537–007; ER02–1213–006; ER02–1331–008; ER03–160–001]

Take notice that on January 31, 2006, the above reference Mirant Entities tendered for filing a non-material change in status to reflect certain departures from the facts the Commission relied upon in granting market-based rate authority.

Comment Date: 5 p.m. Eastern Time on February 21, 2006.

2. CalBear Energy LP, Mohawk River Funding IV, L.L.C., Utility Contract Funding, L.L.C., Cedar Brakes I, L.L.C., Cedar Brakes II, L.L.C.

[Docket Nos. ER06–352–001; ER02–1582–006; ER02–2102–007; ER00–2885–008; ER01–2765–007]

Take notice that on February 1, 2006, CalBear Energy LP, Mohawk River Funding IV, L.L.C., Utility Contract Funding, L.L.C., Cedar Brakes I, L.L.C. and Cedar Brakes II, L.L.C. tendered for filing a revised market-based rate schedules that were in the Amended Notice of Succession to Rate Schedule and Ministerial Revisions filed on December 14, 2005.

Comment Date: 5 p.m. Eastern Time on February 15, 2006.

3. Entergy Louisiana, LLC

[Docket No. ER06–559–000]

Take notice that on January 31, 2006, Entergy Louisiana, LLC a Notice of Succession adopting all applicable rate schedules, service agreements and tariffs previously filed with the Commission.

Comment Date: 5 p.m. Eastern Time on February 21, 2006.

4. Entergy Gulf States, Inc.

[Docket No. ES06–23–000]

Take notice that on January 31, 2006, Entergy Gulf States, Inc. filed an application, pursuant to section 204(a) of the Federal Power Act, seeking authorization to issue the following securities:

(i) First mortgage bonds (First Mortgage Bonds), including First Mortgage Bonds of the medium term note series (MTNs), preferred stock, preference stock, secured or unsecured long-term indebtedness (Long-term Debt) and, directly or indirectly through one or more financing subsidiaries (Financing Subsidiaries), other forms of preferred or equity-linked securities (Equity Interests), in a combined aggregate amount of up to $2 billion;

(ii) In connection with the issuance of secured Long-term Debt, to issue and pledge First Mortgage Bonds, including MTNs, as collateral security for such secured Long-term Debt, in an aggregate principal amount of $250 million;

(iii) In connection with the issuance of Equity Interests, issue promissory notes or other unsecured debt instruments to Financing Subsidiaries to the extent of (a) the related issuance of Equity Interests and Entergy Gulf States' direct or indirect equity investments in such Financing Subsidiaries and (b) the proceeds derived by such Financing Subsidiaries from the sale of Equity Interests; and

(iv) Tax-exempt bonds (''Tax-exempt Bonds'') in an aggregate principal amount of up to $600 million; and, in connection with the issuance and sale of such Tax-exempt Bonds to issue and pledge First Mortgage Bonds, including MTNs, issued as collateral security for such Tax-exempt Bonds, in an aggregate principal amount of up to $720 million and/or to arrange for bond insurance or one or more bank letters of credit, or enter into other arrangements, as more particularly described below, to support such Tax-exempt Bonds.

In addition, in connection with the formation of Financing Subsidiaries, authorization is requested for Entergy Gulf States to guarantee certain obligations of such Financing

Subsidiaries in respect of such Equity Interests.

Entergy Gulf States also requests a waiver from the Commission's competitive bidding and negotiated placement requirements at 18 CFR 34.2.

Comment Date: 5 p.m. Eastern Time on February 24, 2006.

5. Aquila, Inc.

[Docket No. ES06–24–000]

Take notice that on February 2, 2006, Aquila, Inc. (Aquila) submitted an application pursuant to section 204 of the Federal Power Act to authorize Aquila to issue up to and including $500 million of secured and unsecured notes and other evidences of short-term indebtedness.

Aquila also requests a waiver from the Commission's competitive bidding and negotiated placement requirements at 18 CFR 34.2.

Comment Date: 5 p.m. Eastern Time on March 1, 2006.

Standard Paragraph

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E6–2238 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

February 10, 2006.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER06–602–000.
Applicants: Louisville Gas and Electric Company; Kentucky Utilities Company.
Description: Louisville Gas & Electric Co. & Kentucky Utilities Company submit agreement with the Kentucky Municipals.
Filed Date: 02/02/2006.
Accession Number: 20060206–0178.
Comment Date: 5 p.m. Eastern Time on Thursday, February 23, 2006.

Docket Numbers: ER06–608–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator Inc. submits proposed revisions to the Midwest ISO's Open Access Transmission and Energy Markets Tariff.
Filed Date: 02/03/2006.
Accession Number: 20060208–0175.
Comment Date: 5 p.m. Eastern Time on Friday, February 24, 2006.

Docket Numbers: ER06–609–000.
Applicants: Puget Sound Energy, Inc.
Description: Puget Sound Energy, Inc. submits an amended & restated Network Integration Transmission Service Agreement with the Port of Seattle.
Filed Date: 02/03/2006.
Accession Number: 20060208–0176.
Comment Date: 5 p.m. Eastern Time on Friday, February 24, 2006.

Docket Numbers: ER06–610–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits an executed Amended & Restated Interconnection, Operation & Maintenance Agreement with Indiana Municipal Power Agency.
Filed Date: 02/03/2006.
Accession Number: 20060208–0178.
Comment Date: 5 p.m. Eastern Time on Friday, February 24, 2006.

Docket Numbers: ER97–1481–009.
Applicants: Idaho Power Company.
Description: Idaho Power Co. submits the addition of a new generation facility to its system, the Bennett Mountain power plant.
Filed Date: 02/03/2006.
Accession Number: 20060208–0234.
Comment Date: 5 p.m. Eastern Time on Friday, February 24, 2006.

Docket Numbers: ER98–1150–006; EL05–87–000.
Applicants: Tucson Electric Power Company.
Description: Tucson Electric Power Co. submits an amendment to its 6/13/05 compliance filing as evidence that it lacks generation market power in its home control area.
Filed Date: 01/24/2006.
Accession Number: 20060126–0190.
Comment Date: 5 p.m. Eastern Time on Friday, March 3, 2006.

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 than 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. E6–2257 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 2692–032, 2603–012, and 2619–012]

Duke Power North Carolina; Notice of Availability of Draft Environmental Assessment

February 9, 2006.

In accordance with the National Environmental Policy Act of 1969, as amended, and Federal Energy Regulatory Commission (Commission) regulations (18 CFR Part 380), Commission staff reviewed the applications for licenses for the Nantahala, Franklin, and Mission projects (Nantahala West Projects) and prepared a draft combined environmental assessment (EA). The projects are located on the Nantahala, Little Tennessee, and Hiwassee rivers, respectively, in Macon and Clay counties, North Carolina.

In this draft EA, Commission staff analyze the probable environmental effects of implementing the projects and conclude that approval of the projects, with appropriate staff-recommended environmental measures, would not constitute a major Federal action significantly affecting the quality of the human environment.

Copies of the draft EA are available for review in Public Reference Room 2–A of the Commission's offices at 888 First Street, NE., Washington, DC. The draft EA also may be viewed on the Commission's Internet Web site (*http://www.ferc.gov*) using the ''eLibrary'' link. Additional information about the projects is available from the Commission's Office of External Affairs at (202) 502–6088, or on the Commission's Web site using the ''eLibrary'' link. For assistance, contact *FERCOnlineSupport@ferc.gov* or call toll-free (866) 208–3676; for TTY, call (202) 502–8659.

Any comments on the draft EA should be filed within 45 days of the date of this notice and should be addressed to Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please reference the specific project and FERC Project No. on all comments. Comments may be filed electronically via the Internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

For further information, please contact Carolyn Holsopple at (202) 502–6407 or at *carolyn.holsopple@ferc.gov.*

Magalie R. Salas,

Secretary.

[FR Doc. E6–2242 Filed 2–15–06; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–RCRA–2006–0069, FRL–8033–7]

Agency Information Collection Activities: Proposed Collection; Comment Request; Part B Permit Application, Permit Modifications, and Special Permits, EPA ICR Number 1573.11, OMB Control Number 2050–0009

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a continuing Information Collection Request (ICR) to the Office of Management and Budget (OMB). This is a request for an existing approved collection. This ICR is scheduled to expire on July 31, 2006. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before April 17, 2006.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–RCRA–2006–0069, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- E-mail: *rcra–docket@epa.gov.*
- Fax: 202–566–0272.
- Mail: RCRA Docket (5305T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.
- Hand Delivery: 1301 Constitution Ave., NW., Room B102, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–RCRA–2006–0069. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

FOR FURTHER INFORMATION CONTACT: Toshia King, Office of Solid Waste, mailcode 5303W, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 703–308–7033; fax number: 703–308–8617; e-mail address: *king.toshia@epa.gov.*

SUPPLEMENTARY INFORMATION:

How Can I Access the Docket and/or Submit Comments?

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–RCRA–2006–0069, which is

available for online viewing at http://www.regulations.gov, or in person viewing at the RCRA Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for RCRA Docket is (202) 566–0270.

Use *http://www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified in this document.

What Information Is EPA Particularly Interested In?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) 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;

(ii) 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;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) 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. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

What Should I Consider When 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 and provide specific examples.
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. Offer alternative ways to improve the collection activity.
6. Make sure to submit your comments by the deadline identified under **DATES**.
7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

What Information Collection Activity or ICR Does This Apply to?

Affected entities: Entities potentially affected by this action are business or other for-profit.

Title: Part B Permit Application, Permit Modifications, and Special Permits

ICR numbers: EPA ICR No. 1573.11, OMB Control No. 2050–0009.

ICR status: This ICR is currently scheduled to expire on July 31, 2006. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: Section 3005 of Subtitle C of RCRA requires treatment, storage or disposal facilities (TSDFs) to obtain a permit. To obtain the permit, the TSDFs must submit an application describing the facility's operation. There are two parts to the RCRA permit application—Part A and Part B. Part A defines the processes to be used for treatment, storage, and disposal of hazardous wastes; the design capacity of such processes; and the specific hazardous wastes to be handled at the facility. Part B requires detailed site-specific information such as geologic, hydrologic, and engineering data. In the event that permit modifications are proposed by the applicant or EPA, modifications must conform to the requirements under Sections 3004 and 3005.

This ICR provides a comprehensive discussion of the requirements for owner/operators of TSDFs submitting applications for a Part B permit or permit modification. The information collections contained in this ICR are divided into three sections: demonstrations and exemptions from requirements (40 CFR part 264), contents of the part B application (40 CFR part 270), and permit modifications and special permits (40 CFR part 270).

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 165 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 74.

Frequency of response: On occasion.

Estimated total average number of responses for each respondent: 74.

Estimated total annual burden hours: 12,209.

Estimated total annual costs: $3,251,920. This includes an estimated burden cost of $783,682 and an estimated cost of $2,468,238 for capital investment and maintenance and operational costs.

What Is the Next Step in the Process for This ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT.**

Dated: January 31, 2006.

Matthew Hale,

Director, Office of Solid Waste.

[FR Doc. E6–2276 Filed 2–15–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8033–8]

Proposed Agreement for Recovery of Past Costs and Covenant Not To Sue for the Grand Junction Anti-Freeze Site, Grand Junction, CO

ACENCY: Environmental Protection Agency.

ACTION: Notice of proposed agreement; request for public comment.

SUMMARY: In accordance with the requirements of section 122(h)(1) of the Comprehensive Environmental Response Compensation, and Liability Act of 1980, as amended (''CERCLA''), 42 U.S.C. 9622(h)(1), notice is hereby given of the proposed administrative settlement under section 122(h) of CERCLA, 42 U.S.C. 9622(h) between the U.S. Environmental Protection Agency (''EPA'') and Chemical Specialties Incorporated (Chemical Specialties) (collectively, ''Settling Parties''). Chemical Specialties consents to and will not contest EPA's authority to enter into this Agreement or to implement or enforce its terms. By entering into this Agreement, the mutual objective of the Settling Parties is to avoid difficult and prolonged litigation by Chemical Specialties making a monetary payment to address its alleged civil liability for the Site.

In return, the Chemical Specialties receives a Covenant Not to Sue by the EPA. The EPA has incurred response costs, starting in January 2003 and extending through June 2004, totaling approximately $239,636.70, and additional response costs from June 2004 to the present. EPA alleges that Chemical Specialties is a responsible party pursuant to Section 107(a) of CERCLA, 42 U.S.C. 9607(a), and is jointly and severally liable for response costs incurred and to be incurred at or in connection with the Site. EPA has reviewed the Financial Information submitted by the Chemical Specialties to determine whether the Chemical Specialties is financially able to pay response costs incurred and to be incurred at the Site. Based upon this Financial Information, and its review completed July 13, 2005, EPA has determined that Chemical Specialties has limited financial ability to pay for response costs incurred and to be incurred at and in connection with the Site.

Chemical Specialties has agreed to pay to the EPA Hazardous Substance Superfund $22,000.00, plus an additional amount for interest. The Settling Parties recognize that this Agreement has been negotiated in good faith and that this Agreement is entered into without the admission or adjudication of any issue of fact or law.

DATES: Comments must be submitted on or before March 20, 2006. For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the agreement. The Agency will consider all comments received and may modify or withdraw its consent to the agreement if comments received disclose facts or considerations that indicate that the agreement is inappropriate, improper, or inadequate.

ADDRESSES: The Agency's response to any comments, the proposed agreement and additional background information relating to the agreement are available for public inspection at the EPA Superfund Record Center, 999 18th Street, Suite 300, 5th Floor, in Denver, Colorado. Comments and requests for a copy of the proposed agreement should be addressed to Michael Rudy, Enforcement Specialist, Environmental Protection Agency—Region 8, Mail Code 8ENF–RC, 999 18th Street, Suite 300, Denver, Colorado 80202–2466, and should reference the Grand Junction Anti-Freeze Site, Grand Junction, Colorado.

FOR FURTHER INFORMATION CONTACT: James Stearns, Legal Enforcement Attorney, Legal Enforcement Program, Environmental Protection Agency—Region 8, Mail Code 8ENF–L, 999 18th Street, Suite 300, Denver, Colorado 80202–2466, (303) 312–6912.

Dated: February 3, 2006.

David Janik,

Acting Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice, Region VIII.

[FR Doc. E6–2278 Filed 2–15–06; 8:45 am]

BILLING CODE 6560–50–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 March 13, 2006.

A. Federal Reserve Bank of Philadelphia (Michael E. Collins, Senior Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105-1521:

1. Tower Bancorp, Inc., Greencastle, Pennsylvania; to merge with FNB Financial Corporation, McConnellsburg, Pennsylvania, and thereby indirectly acquire voting shares of The First National Bank of McConnellsburg, McConnellsburg, Pennsylvania.

In connection with this application, applicant also has applied to acquire FNB Mortgage Brokers, Inc., McConnellsburg, Pennsylvania, and thereby engage in mortgage lending activities, pursuant to section 225.28(b)(1) of Regulation Y.

B. Federal Reserve Bank of Cleveland (Cindy West, Manager) 1455 East Sixth Street, Cleveland, Ohio 44101-2566:

1. Seed Money Limited Partnership, Allison Park, Pennsylvania; to acquire 100 percent of the voting shares of Enterprise Financial Services Group, Inc., Allison Park, Pennsylvania, and thereby indirectly acquire voting shares of Enterprise Bank, Allison Park, Pennsylvania. Comments on this application must be received by March 10, 2006.

C. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 2200

North Pearl Street, Dallas, Texas 75201-2272:

1. Frontier Bancshares, Inc., Austin, Texas; to become a bank holding company by acquiring 100 percent of the voting shares of Frontier BN, Inc., Henderson, Nevada, and The First National Bank of Holland, Holland, Texas.

In addition, Frontier BN, Inc. Henderson, Nevada, also has applied to become a bank holding company by acquiring 100 percent of the voting shares of First National Bank of Holland, Holland, Texas.

Board of Governors of the Federal Reserve System, February 13, 2006.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E6–2236 Filed 2–15–06; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Scientific Misconduct

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Office of Research Integrity (ORI), the Assistant Secretary for Health, and another Federal agency have taken final action in the following case:

Amy Beth Goldring, University of California at Los Angeles: Based on an investigation conducted by the University of California at Los Angeles (UCLA) and additional analysis conducted by the Office of Research Integrity (ORI) in its oversight review, ORI found that Ms. Goldring, former graduate student, Department of Psychology, UCLA, engaged in scientific misconduct by falsifying or fabricating data and statistical results for up to nine pilot studies on the impact of vulnerability on decision-making from Fall 2000 to Winter 2002 as a basis for her doctoral thesis research. The falsified or fabricated data was included in a manuscript submitted to Psychological Science, in National Institutes of Mental Health (NIMH), National Institutes of Health (NIH), grant application 1 R01 MH65238–01A1, and in NIMH, NIH, pre-doctoral training grant T32 MH15750.

Ms. Goldring has been debarred by another agency with joint jurisdiction for a period of three (3) years, beginning on May 13, 2005, and ending on May 13, 2008. On December 16, 2005, Ms. Goldring received a detailed explanation of ORI's proposed finding and was given thirty (30) days to contest the finding and the proposed administrative action. The thirty-day period has elapsed and ORI has not received a response. Accordingly, the following administrative action has been implemented for a period of three (3) years, beginning on January 18, 2006:

(1) Ms. Goldring is prohibited from serving in any advisory capacity to PHS, including but not limited to service on any PHS advisory committee, board, and/or peer review committee, or as a consultant.

FOR FURTHER INFORMATION CONTACT: Director, Division of Research Investigations, Office of Research Integrity, 1101 Wootton Parkway, Suite 750, Rockville, MD 20852, (240) 453–8800.

Chris B. Pascal,

Director, Office of Research Integrity.

[FR Doc. E6–2234 Filed 2–15–06; 8:45 am]

BILLING CODE 4160–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Research Misconduct

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Notice is hereby given that on January 13, 2006, the Department of Health and Human Services (HHS) Debarring Official, on behalf of the Secretary of HHS, issued a final notice of debarment based on the research misconduct findings of the U.S. Public Health Service (PHS) in the following case:

April Swe, University of Wisconsin-Madison: Based on the report of an investigation conducted by the University of Wisconsin-Madison (UWM) and additional analysis conducted by the Office of Research Integrity (ORI) in its oversight review, PHS found that Ms. Swe, former graduate student at UWM, engaged in research misconduct by fabricating data on thirty-nine (39) questionnaires of sibling human subjects associated with an autism study. The research was supported by National Institute on Aging, National Institutes of Health (NIH), grant R01 AG08768.

In a final decision dated January 13, 2006, the HHS Debarring Official, on behalf of the Secretary of HHS, issued the final debarment notice based on the PHS findings of research misconduct. The following administrative actions have been implemented for a period of three (3) years, beginning on January 13, 2006:

(1) Ms. Swe has been debarred from eligibility for or involvement as a principal in nonprocurement transactions (e.g., grants and cooperative agreements) of the Federal Government and from contracting or subcontracting with any Federal Government agency, except as provided in 45 CFR 76.120. This action is being taken pursuant to the debarment regulations at 45 CFR part 76.

(2) Ms. Swe has been prohibited from serving in any advisory capacity to PHS including but not limited to service on any PHS advisory committee, board, and/or peer review committee, or as consultant.

FOR FURTHER INFORMATION CONTACT: Director, Division of Research Investigations, Office of Research Integrity, 1101 Wootton Parkway, Suite 750, Rockville, MD 20852, (240) 453–8800.

Chris B. Pascal,

Director, Office of Research Integrity.

[FR Doc. E6–2235 Filed 2–15–06; 8:45 am]

BILLING CODE 4160–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–06–05AY]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–4766 or send an e-mail to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project

Economic Evaluation Of Walking Behavior In Sedentary Adults Age 50 Years And Older—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The CDC is requesting approval of a pilot test to better understand the barriers to increased physical activity and the potential impact of modest financial incentives to promote walking among sedentary adults aged 50 years and older. The Behavioral Risk Factor Surveillance System (BRFSS) data reveal that Americans in general and older adults in particular do not meet minimum recommendations for levels of physical activity. Moderate increases in physical activity would decrease the incidence of diseases promoted by inactivity, including several types of cancer, diabetes, and heart disease. However, strategies that effectively motivate sedentary people to increase and maintain levels of regular physical activity have yet to be identified. CDC proposes to use this effort to investigate the impact of one type of intervention (financial incentives) on levels of physical activity.

CDC will conduct a stated preference (SP) survey to identify the barriers to leisure time physical activity and the size of the incentives necessary to overcome these barriers among sedentary adults age 50 and older. A pilot test of the impact of specific amounts of financial incentives on levels of walking among this population will also be conducted via a reveled preference (RP) pedometer experiment in the Raleigh, North Carolina, metropolitan area.

The SP survey will be a one-time effort in which respondents belonging to an online survey panel will complete a computer survey over the Internet. In the RP portion of the project, a local sample of respondents will complete an identical survey on paper. The RP respondents will also wear a pedometer for 4 weeks and record the number of steps walked in a diary. Data will be collected from the diaries and from the 7-day history in each pedometer unit. Respondents will receive a modest incentive payment for the number of steps they walk above a predetermined floor and below a predetermined ceiling.

The results of the survey will be used to gauge the size of the incentives necessary to motivate behavior change in a real world setting. The results of the pilot test will provide initial evidence of the magnitude of the incentives necessary to increase levels of physical activity among a specific sample of older adults. The total costs and effectiveness (changes in physical activity) can then be compared to similar data emanating from other interventions designed to increase levels of physical activity. Statistical analysis of the SP survey and RP data will be used. Since neither form of data collection is based on a random sample, conclusions will be preliminary and not generalizable. The analysis will be used to evaluate whether further comprehensive research on this subject should be undertaken. There are no costs to the respondents other than their time. The total estimated annualized burden hours are 1058.

Estimated Annualized Burden Hours:

Respondents	Form/activity	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
SP survey participants	SP survey (online)	500	1	25/60
RP survey participants	Informed consent	300	1	5/60
	Initial meeting	300	1	1
	SP survey (paper)	300	1	25/60
	Daily steps diary	300	4	20/60

Dated: February 9, 2006.

Betsey Dunaway,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E6–2208 Filed 2–15–06; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–06–05AB]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–4766 or send an e-mail to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project

Public Health Injury Surveillance and Prevention Program—Traumatic Brain Injuries (0920–05AB)—New—The National Center for Injury Prevention and Control (NCIPC), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Injury is the leading cause of death and disability among children and young adults. In 2000, more than 148,000 people died from injuries. Among them: 43,354 died from motor-vehicle crashes; 29,350 died from suicide; 16,765 died from homicide; 13,322 died from unintentional falls; 12,757 from unintentional poisonings; 3,482 died from unintentional drowning; 3,377 died from fires. These external causes often result in Traumatic Brain Injury (TBI). Each year, an estimated 1.5 million Americans sustain a TBI. As a consequence of these TBI injuries: 230,000 people are hospitalized and survive; 50,000 people die; 80,000 to 90,000 people experience the onset of long-term disability. An estimated 5.3 million Americans live with a permanent TBI-related disability. However, this estimate does not include people with ''mild'' TBI who are seen in emergency departments or outpatient encounters, nor those who do not receive medical care. The annual economic burden of TBI in the United States has been estimated at $56.3 billion in 1995 however, human costs of the long-term impairments and disabilities associated with TBI are incalculable. Because many TBI related disabilities are not conspicuous deficits, they are referred to as the invisible or silent epidemic. These disabilities, arising from cognitive, emotional, sensory, and motor impairments, often permanently alter a person's ability to maximize daily life experiences and have profound effects on social and family relationships. To implement more effective programs to prevent these injuries, we need reliable data on their

causes and risk factors. State surveillance data can be used to: Identify trends in TBI incidence; enable the development of cause-specific prevention strategies focused on populations at greatest risk and monitor the effectiveness of such programs.

This project will develop and sustain injury surveillance programs including those with a focus on TBI and emergency department surveillance for mild TBI. The goal of this program is to produce data of demonstrated quality that will (a) be useful to State injury prevention and control programs, (b) enable states to produce injury indicators, (c) enable estimates of TBI incidence and public health consequences and (d) facilitate the use of TBI surveillance data to link individuals with information about TBI services.

Program recipients will collect information from pre-existing state data sets to calculate injury indicators in their state. In addition a small group of states will review and abstract medical records to obtain data for variables that address severity of injury, circumstances and etiology of injury, and early outcome of injury, in a large representative sample of reported cases of TBI-related hospitalization and mild TBI-related emergency department visits. The abstracted data will be stripped of all identifying information before submitting to CDC. States will use standardized data elements. The number of state health departments to be funded for data abstraction may be as high as 12. The only cost to the respondents is the time involved to complete the data abstraction. The estimated total burden hours are 12000.

Estimated annualized burden table

Respondents	Number of respondents	Number of responses/ respondent	Average burden/response (in hours)
State Health Departments	12	1000	60/60

Dated: February 9, 2006.

Betsey Dunaway,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E6–2209 Filed 2–15–06; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–06–06AU]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–4766 and send comments to Seleda Perryman, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Issues Related to the Use of Mass Media in African-American Women: Phase II—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Coordinating Center for Health Promotion (CoCHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Women's health programs, including the National Breast and Cervical Cancer Early Detection Program (NBCCEDP), offer low-cost or free breast cancer screening to uninsured, low-income women. In 1991, CDC established the NBCCEDP to increase breast and cervical cancer screening among uninsured, underserved, low-income women. To date, over 1.5 million women have received services from NBCCEDP-sponsored programs. Yet NBCCEDP-sponsored programs are estimated to reach only 18% of women 50 years old and older who are eligible for screening services. A research priority for the NBCCEDP is to identify effective strategies to increase enrollment among eligible women who have never received breast or cervical cancer screening. Why women do not participate in this screening is not well understood.

As part of an ongoing study, the purpose of this task is to (1) test consumer response to concepts that arose in the Phase I formative research related to breast cancer screening and (2) test a series of radio health messages aimed at increasing mammography screening among low-income African American women for cultural appropriateness.

There are no costs to respondents except their time to participate in the survey.

Estimated annualized burden table:

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hrs.)	Total burden (in hours)
Black women, aged 40–64, GA residents	80	1	90/60	120
Total	80			120

Dated: February 10, 2006.

Joan F. Karr,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E6–2210 Filed 2–15–06; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Manufacturing Subcommittee of the Advisory Committee for Pharmaceutical Science; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Manufacturing Subcommittee of the Advisory Committee for Pharmaceutical Science.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on April 18 and 19, 2006, from 8:30 a.m. to 5 p.m.

Location: Food and Drug Administration, Center for Drug Evaluation and Research Advisory Committee Conference Room, rm. 1066, 5630 Fishers Lane, Rockville, MD.

Contact Person: Mimi T. Phan, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane (for express delivery, 5630 Fishers Lane, rm. 1093), Rockville, MD 20857, 301–827–7001, FAX: 301–827–6778, e-mail: *PHANM@cder.fda.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572) in the Washington, DC area), code 3014512539. Please call the Information Line for up-to-date information on this meeting.

Agenda: On April 18, 2006, the subcommittee will: (1) Receive topic updates for ongoing activities pertaining to the International Conference on Harmonisation (ICH) Q8, Q9, Q10, and future ICH quality topics; and (2) discuss and provide comments on modernized Current Good Manufacturing Practice (CGMP) approaches to process validation that encourage continuous improvement over the product life-cycle. On April 19, 2006, the subcommittee will: (1) Discuss and provide comments on the agency's new approaches to Chemistry, Manufacturing, and Control (CMC) guidance development, as illustrated by the comparability protocol guidance; (2) discuss and provide comments on the CMC Pilot Program; and (3) receive an update on the Cooperative Research and Development Agreement (CRADA) with Conformia Software, Inc., to obtain information on factors influencing pharmaceutical development. The background material will become available no later than the day before the meeting and will be posted on FDA's Web site at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*. (Click on the year 2006 and scroll down to the Advisory Committee for Pharmaceutical Science meetings.)

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the subcommittee. Written submissions may be made to the contact person by April 11, 2006. Oral presentations from the public will be scheduled between approximately 1 p.m. and 1:30 p.m. on April 18, 2006, and between approximately 11:30 a.m. and 12 noon on April 19, 2006. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should notify the contact person before April 11, 2006, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Mimi Phan at least 7 days in advance of the meeting.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: February 9, 2006.

Jason Brodsky,

Acting Associate Commissioner for External Relations.

[FR Doc. E6–2237 Filed 2–15–06; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 1999N–1852] (formerly 99N–1852)

Guidance for Industry on Reports on the Status of Postmarketing Study Commitments—Implementation of Section 130 of the Food and Drug Administration Modernization Act of 1997; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry entitled ''Reports on the Status of Postmarketing Study Commitments—Implementation of Section 130 of the Food and Drug Administration Modernization Act of 1997.'' This guidance provides recommendations on procedures, content, and format for submitting a postmarketing study status report for an approved human drug or licensed biological product; timeframes for FDA's review of postmarketing study commitments; and information about postmarketing study commitments that will be available to the public. The guidance is intended to assist applicants in meeting the requirements of section 130 of the Food and Drug Administration Modernization Act of 1997.

DATES: Submit written or electronic comments on agency guidances at any time.

ADDRESSES: Submit written requests for single copies of this guidance to the Division of Drug Information (HFD–240), Center for Drug Evaluation and Research (CDER), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, or the Office of Communication, Training, and Manufacturers Assistance (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist that office in processing your requests. The document may also be obtained by mail by calling CBER at 1–800–835–4709 or 301–827–1800.

Submit written comments on the guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. See

the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT:

Beth Duvall-Miller (CDER), Center for Drug Evaluation and Research (6411), Food and Drug Administration, 10903 New Hampshire Ave., bldg. 22, rm. 6466, Silver Spring, MD 20993, 301–796–0700; or

Robert Yetter (CBER), Center for Biologics Evaluation and Research (HFM–25), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852, 301–827–0373.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry entitled ''Reports on the Status of Postmarketing Study Commitments—Implementation of Section 130 of the Food and Drug Administration Modernization Act of 1997.'' Section 506B (''Reports of Postmarketing Studies'') of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 356b) provides FDA with additional authority for monitoring the progress of postmarketing studies that drug and biological applicants have made a commitment to conduct. Postmarketing studies are those studies conducted after approval to gather additional information about the safety, efficacy, or optimal use of the approved drug or biological product.

Under section 506B(a) of the act, an applicant who has entered into an agreement with FDA to conduct a postmarketing study is required to provide the agency with an annual report on the status of the study until FDA notifies the applicant, in writing, that all postmarketing study commitments established under the application(s) have either been fulfilled or have been released. The annual report must address the progress of the study or the reasons for the failure of the applicant to conduct the study. Section 506B(c) of the act directs FDA to develop and publish annually in the **Federal Register** a report on the status of postmarketing studies that applicants have made a commitment to conduct and for which status reports have been submitted. In the **Federal Register** of October 30, 2000 (65 FR 64607), the agency published a final rule to implement section 506B of the act. The final rule makes several changes to the existing regulations for approved human drugs and licensed biological products.

In the **Federal Register** of April 4, 2001 (66 FR 17912), FDA published a notice announcing the availability of a draft guidance for industry entitled ''Reports on the Status of Postmarketing Studies—Implementation of Section 130 of the Food and Drug Administration Modernization Act of 1997.'' The notice gave interested persons an opportunity to submit comments by July 3, 2001. A number of comments were received in the docket for the 2001 draft guidance. After careful consideration of the comments, the draft guidance was revised. In addition to edits to improve clarity, the substantive changes made to the draft guidance included an update of the types of postmarketing studies currently required by FDA and an improved explanation of the procedures for establishing and revising study schedules.

This guidance is intended to provide information on the following: (1) Procedures concerning the submission of postmarketing study commitment status reports; (2) the content and format of a postmarketing study commitment status report; (3) timeframes for FDA's review of postmarketing study commitment final study reports; and (4) information about postmarketing study commitments that will be available to the public. This guidance applies to postmarketing study commitments for approved human drug products and licensed biological products that meet the definition of ''drug'' under the act. It does not apply to biological products that meet the definition of medical ''device'' under the act; or to veterinary drug products, which will be addressed separately.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the agency's current thinking on the submission of postmarketing study commitment reports for approved human drug or licensed biological products. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information 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 collections of information in 21 CFR 314.81 and 601.70 have been approved under OMB control numbers 0910–0001 and 0910–0433.

III. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of 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 document at either *http://www.fda.gov/cder/guidance/index.htm*, *http://www.fda.gov/cber/guidelines.htm*, or *http://www.fda.gov/ohrms/dockets/default.htm*.

Dated: February 7, 2006.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. E6–2184 Filed 2–15–06; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5041–N–03]

Notice of Proposed Information Collection: Comment Request; Builder's Certification of Plans, Specifications, and Site

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* April 17, 2006.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Lillian Deitzer, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, SW., L'Enfant Plaza Building, Room 8001, Washington, DC 20410 or *Lillian_Deitzer@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Margaret Burns, Director, Office of

Single Family Program Development, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708–2121 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. This Notice also lists the following information:

Title of Proposal: Builder's Certification of Plans, Specifications, and Site.

OMB Control Number, if applicable: 2502–0496.

Description of the need for the information and proposed use: HUD requires the builder to complete the certification (form HUD–92541) noting adverse site/location factor(s) of the property, including Floodplains. This certification is necessary so that HUD does not insure a mortgage on property that poses a risk to health or safety of the occupant.

Agency form numbers, if applicable: HUD–92541.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The estimated total number of hours needed to prepare the information collection is 15,744; the number of respondents is approximately 1,600 generating approximately 65,600 annual responses; the frequency of response is on occasion; and the estimated time needed to prepare the response varies from 5 minutes to 10 minutes.

Status of the proposed information collection: This is an extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: February 9, 2006.

Frank L. Davis,

General Deputy Assistant Secretary for Housing-Deputy Federal Housing Commissioner.

[FR Doc. E6–2183 Filed 2–15–06; 8:45 am]

BILLING CODE 4210–27–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Draft National Bald Eagle Management Guidelines

AGENCY: Fish and Wildlife Service, Interior

ACTION: Notice of availability.

SUMMARY: This notice advises the public that draft National Bald Eagle Management Guidelines are available for public review. Comments and suggestions are requested.

DATES: We will accept written comments on the Draft National Bald Eagle Management Guidelines until May 17, 2006.

ADDRESSES: Copies of the Draft National Bald Eagle Management Guidelines can be obtained by writing to U.S. Fish and Wildlife Service, Division of Migratory Bird Management, 4401 North Fairfax Drive, Mail Stop MBSP–4107, Arlington, VA 22203. The draft guidelines may also be obtained via the Internet at: *http://www.fws.gov/migratorybirds/BaldEagle.htm.* Written comments can be sent to the mailing address above, or e-mailed to *BaldEagle_Management Guidelines@fws.gov.* All comments must include the name and full mailing address of the person submitting the comments. All comments received, including names and addresses, will become part of the public record. You may inspect comments by appointment during normal business hours at the address above.

FOR FURTHER INFORMATION CONTACT: Eliza Savage, Division of Migratory Bird Management, (see **ADDRESSES** section); or via e-mail at: *Eliza_Savage@fws.gov;* telephone: (703) 358–2329; or facsimile: (703) 358–2217.

SUPPLEMENTARY INFORMATION: The U.S. Fish and Wildlife Service has proposed to remove the bald eagle from the list of threatened species under the Endangered Species Act (16 U.S.C. 1531 *et seq.*) (see our re-opening of the public comment period on the proposed rule to delist the bald eagle, published separately in this part of today's **Federal Register**). If the bald eagle is delisted, the Bald and Golden Eagle Protection Act (BGEPA) (16 U.S.C. 668–668d) will become the primary law protecting bald eagles. BGEPA prohibits take of bald and golden eagles and provides a statutory definition of ''take'' that includes ''disturb.''

To provide guidance to land managers, landowners, and others, the Service has developed draft National Bald Eagle Management Guidelines. In the event the bald eagle is delisted, the guidelines will provide the public with information on how to avoid disturbing bald eagles. Secondly, the guidelines include recommended additional practices that can benefit bald eagles. The draft guidelines are based on the definition of ''disturb'' that we are making available for public comment in a proposed rule published separately in this part of today's **Federal Register**.

Dated: October 31, 2005.

H. Dale Hall,

Director.

[FR Doc. 06–1441 Filed 2–15–06; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Advisory Board for Exceptional Children

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the Bureau of Indian Affairs announces that the Advisory Board for Exceptional Children will hold its next meeting in Casa Blanca, Arizona. The purpose of the meeting is to discuss the impact of the Individuals with Disabilities Education Improvement Act Amendments of 2004 on Indian children with disabilities.

DATES: The Board will meet Sunday, March 19, 2006, from 6 p.m. to 9 p.m.; Monday, March 20, 2006, from 7:30 a.m. to 4:30p.m.; and, Tuesday, March 21, 2006, from 8 a.m. to 4 p.m. (MST).

ADDRESSES: The meetings will be held at the Francisco Grande Hotel and Golf Resort, 26000 West Gila Bend Highway, Casa Blanca, Arizona. Written statements may be submitted to Mr. Edward F. Parisian, Director, Office of Indian Education Programs, Bureau of Indian Affairs, 1849 C Street, NW., Mail Stop 3609–MIB, Washington, DC 20240; Telephone (202) 208–6123; Fax (202) 208–3312.

FOR FURTHER INFORMATION CONTACT: Gloria Yepa, Supervisory Education Specialist, Special Education, Bureau of Indian Affairs, Office of Indian Education Programs, Center for School Improvement, P.O. Box 1088, Albuquerque, New Mexico 87103; Telephone (505) 248–7541.

SUPPLEMENTARY INFORMATION: The Advisory Board for Exceptional Children was established to advise the Secretary of the Interior, through the Assistant Secretary—Indian Affairs, on the needs of Indian children with disabilities, as mandated by the Individuals with Disabilities Education Improvement Act Amendments of 2004, Public Law 108–446.

The agenda for this meeting will cover public comments, and new business: (1) State Performance Plan, (2) Office of Special Education Program (OSEP) verification visit/results, (3) the Annual Report, (4) Special Education Supervisor Report Service, (5) Special Education Budget, (6) Parent Involvement Activities, (7) Office of Special Education new organizational information, (8) Procedures for complaint investigations, (9) Monitoring results from the Office of Elementary and Secondary Education, and (10) the Coordinated Service Plan. Meetings are open to the public.

Dated: February 10, 2006.

Michael D. Olsen,

Acting Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. E6–2279 Filed 2–15–06; 8:45 am]

BILLING CODE 4310–6W–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA–190–0777–XG]

Notice of Public Meeting

AGENCY: Bureau of Land Management.

ACTION: Notice of Public Meeting: Central California Resource Advisory Council.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Central California Resource Advisory Council will meet as indicated below.

DATES: The meeting will be held Friday and Saturday, March 24 and 25, 2006. On Friday, the RAC will meet at the Best Western Seacliff Inn, 7500 Old Dominion Court, Aptos, California from 8 a.m. to 5 p.m. There will be a public comment period on Friday, March 24 from 3 p.m. until 4 p.m. at the Markey Community Center which is next door to the Seacliff Inn. Directions: Hwy 1 (traveling North)—Exit State Park Drive, turn right, then an immediate left on Old Dominion Ct. Hwy 1 (traveling South)—Exit State Park Drive, turn left on State Park Drive, cross freeway and turn left on Old Dominion Ct. On Saturday, the RAC is scheduled for a field trip to portions of the Coast Dairies property. Details of the field trip will be announced at the meeting.

SUPPLEMENTARY INFORMATION: The twelve-member Central California Resource Advisory Council advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of public land issues associated with public land management in Central California. At this meeting, agenda topics include an introduction of new RAC members and BLM personnel, regional resource management planning efforts, discussion of a proposed fee collection program for the Clear Creek OHV Management Area, recreation, grazing, cultural resources, and land access issues. The RAC will also hear status reports from the Bakersfield, Bishop, Folsom, and Hollister Field Office Managers.

The meeting is open to the public. The public may present written comments to the Council, and time will be allocated for hearing public comments. Depending on the number of persons wishing to comment and the time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance such as sign language interpretation or other reasonable accommodations should contact the BLM as indicated above.

FOR FURTHER INFORMATION CONTACT: George E. Hill, Field Manager, Hollister Field Office, 20 Hamilton Ct., Hollister, CA 95023. (831) 630–5000. E-mail: *George_Hill@ca.blm.gov.*

Dated: February 10, 2006.

George E. Hill,

Field Office Manager, Hollister Field Office.

[FR Doc. E6–2207 Filed 2–15–06; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces that the Bureau of Reclamation (Reclamation) intends to seek approval of the following proposed new information collection: Yakima Basin Recreation Survey. Reclamation will use two separate forms to collect this information. Form No. 7–2570, Yakima Basin Reservoir Recreation Survey, and Form No. 7–2571, Yakima Basin River Recreation Survey. Before submitting the information collection request to the Office of Management and Budget for approval, Reclamation is soliciting comments on specific aspects of the information collection.

DATES: Comments on this notice must be received by April 17, 2006.

ADDRESSES: Address all comments concerning this notice to Bureau of Reclamation, Denver Federal Center, Attention: Darrell Welch, D–8580, PO Box 25007, Denver, Colorado, 80225–0007.

FOR FURTHER INFORMATION CONTACT: For further information or a copy of the proposed collection of information forms, contact Mr. Darrell Welch at 303–445–2711.

SUPPLEMENTARY INFORMATION: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of Reclamation's functions, including whether the information will have practical use; (b) the accuracy of Reclamation's estimated time and cost burdens of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, use, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including increased use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Title: Yakima Basin Recreation Survey.

Abstract: The Yakima River Basin is located in south central Washington State in the counties of Benton, Franklin, Yakima, and Kittitas. The seven major reservoirs in the Yakima River Basin are Bumping Lake, Clear Lake, Cle Elum, Kachess, Keechelus, Easton, and Rimrock. The five major rivers in the Yakima River Basin are the Yakima, Nachess, Cle Elum, Bumping and Tieton. Reclamation is in the process of preparing a Yakima River

Basin Water Storage Feasibility Study and associated Environmental Impact Statement that will address options for supplying additional water storage for the Yakima River Basin. Currently, site-specific recreation-related information is unavailable for the primary reservoirs and rivers. In order to accurately assess the current recreation and recreation-related economic environment within the Yakima River Basin, additional information must be collected from the recreationists who visit the reservoirs and rivers within the basin. Further, the survey information will allow Reclamation to adequately assess the recreation impacts that different options may have on the environment and the local economy.

Description of Respondents: Yakima River Basin reservoir and river recreationists come from the cities of Yakima and Ellensburg, Washington, as well as the smaller communities within the basin. A large number of visitors also come from western Washington, in particular the Puget Sound communities of Seattle and Tacoma. A smaller portion of recreationists within the basin are out-of-state visitors.

Frequency: This is a one-time voluntary survey.

Estimated Completion Time: An average of 20 minutes per respondent.

Estimated Total Annual Responses: 3,216.

Number of Responses per Respondent: 1.0.

Estimated Total Annual Burden Hours: 1,072.

Estimate of Burden for Each Form:

Form No.	Burden estimate per form (in minutes)	Number of respondents	Annual burden on respondents (in hours)
(Rivers)	20	1,340	447
(Reservoirs)	20	1,876	625

Our practice is to make comments, including names and home addresses of respondents, available for public review. Individual respondents may request that we withhold their home address from public disclosure, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold a respondent's identity from public disclosure, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public disclosure in their entirety.

Dated: February 7, 2006.

Jerry Kelso,

Area Manager, Upper Columbia Area Office, Pacific Northwest Region.

[FR Doc. E6–2211 Filed 2–15–06; 8:45 am]

BILLING CODE 4310–MN–P

INTERNATIONAL TRADE COMMISSION

[Inv. Nos. 731–TA–846–850 (Review)]

Carbon and Alloy Seamless Standard, Line, and Pressure Pipe From the Czech Republic, Japan, Mexico, Romania, and South Africa

AGENCY: United States International Trade Commission.

ACTION: Revised schedule for the subject reviews.

DATES: *Effective Date:* February 10, 2006.

FOR FURTHER INFORMATION CONTACT: Christopher J. Cassise (202–708–5408 or e-mail at *chris.cassise@usitc.gov*), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION: On September 12, 2005, the Commission established a schedule for the conduct of the full five-year reviews on carbon and alloy seamless standard, line, and pressure pipe from the Czech Republic, Japan, Mexico, Romania, and South Africa (70 FR 55917, September 23, 2005). The Commission is revising its schedule.

The Commission's new schedule for the subject reviews is as follows: The closing of the record and the Commission's final release of information is scheduled for March 31, 2006 and final party comments are due on April 4, 2006.

For further information concerning these reviews see the Commission's notice cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

Issued: February 13, 2006.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E6–2277 Filed 2–15–06; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–540 and 541 (Second Review)]

Certain Welded Stainless Steel Pipe From Korea and Taiwan

AGENCY: International Trade Commission.

ACTION: Scheduling of full five-year reviews concerning the antidumping duty orders on certain welded stainless steel pipe from Korea and Taiwan.

SUMMARY: The Commission hereby gives notice of the scheduling of full reviews pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) (the Act) to determine whether revocation of the antidumping duty orders on certain welded stainless steel pipe from Korea and Taiwan would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

DATES: *Effective Date:* February 8, 2006.

FOR FURTHER INFORMATION CONTACT: Eric Land (202–205–3349), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION: Background. On December 5, 2005, the Commission determined that responses to its notice of institution of the subject five-year reviews were such that full reviews pursuant to section 751(c)(5) of the Act should proceed (70 FR 73452, December 12, 2005). A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements are available from the Office of the Secretary and at the Commission's Web site.

Participation in the reviews and public service list. Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in these reviews as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, by 45 days after publication of this notice. A party that filed a notice of appearance following publication of the Commission's notice of institution of the reviews need not file an additional notice of appearance. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the reviews.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list. Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these reviews available to authorized applicants under the APO issued in the reviews, provided that the application is made by 45 days after publication of this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the reviews. A party granted access to BPI following publication of the Commission's notice of institution of the reviews need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report. The prehearing staff report in the reviews will be placed in the nonpublic record on May 25, 2006, and a public version will be issued thereafter, pursuant to section 207.64 of the Commission's rules.

Hearing. The Commission will hold a hearing in connection with the reviews beginning at 9:30 a.m. on June 20, 2006, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before June 12, 2006. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on June 14, 2006, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), 207.24, and 207.66 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 business days prior to the date of the hearing.

Written submissions. Each party to the reviews may submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.65 of the Commission's rules; the deadline for filing is June 7, 2006. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.67 of the Commission's rules. The deadline for filing posthearing briefs is June 29, 2006; witness testimony must be filed no later than three days before the hearing. In addition, any person who has not entered an appearance as a party to the reviews may submit a written statement of information pertinent to the subject of the reviews on or before June 29, 2006. On July 25, 2006, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before July 27, 2006, but such final comments must not contain new factual information and must otherwise comply with section 207.68 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Even where electronic filing of a document is permitted, certain documents must also be filed in paper form, as specified in II (C) of the Commission's Handbook on Electronic Filing Procedures, 67 FR 68168, 68173 (November 8, 2002).

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

Issued: February 13, 2006.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E6–2262 Filed 2–15–06; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Open Mobile Alliance

Notice is hereby given that, on January 25, 2006, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), the

Open Mobile Alliance (''OMA'') filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, ACE*COMM, Gaithersburg, MD; ASmobile Communications Inc., Taipei, Taiwan; BenQ Mobile, Munich, Germany; BND Co., Ltd., Buk-gu, Daegu, Republic of Korea; Celltick Technologies Ltd., Herzliya, Israel; Coretrust, Inc., Gangnam-gu, Seoul, Republic of Korea; Critical Path Inc., San Francisco, CA; DigiCAPS, Seocho-gu, Seoul, Republic of Korea, Edge Technologies, Inc., Fairfax, VA; Emtruce Technologies, Inc., Gangnam-Gu, Seoul, Republic of Korea; Fangtek, Ltd., Cpuertino, CA; Fenestrae BV, The Hague, Netherlands; Fraunhofer, IIS, Erlangen, Germany; KT Corporation, Seocho-gu, Seoul, Republic of Korea, Leadtone Wireless Ltd., Chaoyang District, Beijing, People's Republic of China; Linkuall-Alcomia, Bordeaux, France; Miengine Corp., Daechi-dong, Seoul, Republic of Korea, NETS, Gangnam-gu, Seoul, Republic of Korea; Newbay Software, Dublin, Ireland; Novarra, Itasca, IL; NTT Software Corporation, Mitaka-shi, Tokyo, Japan; Pacific DataVision, Inc., San Diego, CA; Plurimedia, Paris, France; PrismTech, Gagteshead, United Kingdom; Reigncom Ltd., Gangnam-gu, Seoul, Republic of Korea; RFI Global Services Ltd., Basingstoke, Hampshire, United Kingdom; SIPquest Inc., Kananta, Ontario, Canada, Smart Internet Technology, Eveleigh, Sydney, Australia; Softhis SP. z o.o., Krakow, Poland; Sonus Networks, Chelmsford, MA; Susteen Inc., Irvine, CA; Synapsy Mobile Network GmbH, Himmelstadt, Germany; Telespree Communications, San Francisco, CA; Tira Wireless, Toronto, Ontario, Canada; Trio Network Solutions Oy, Helsinki, Finland; Websync, Buk-gu, Daegu, Republic of Korea; and Yahoo! Inc., Sunnyvale, CA, have been added as parties to this venture.

Also, CAMEO InfoTech Inc., Hsinchu, Taiwan; Darts Technologies Corporation, Chung Ho, Taiwan; Finjurdata, Rotkreuz, Switzerland; Freescale Semiconductor, Austin, TX; Infocom, Tokyo, Japan; Integreat, Bergen op Zoom, Netherlands; InterOP Technologies, LLC, Fort Myers, FL; Intrado, Longmont, CO; LocatioNet, Netanya, Israel, Mobtime Inc., Chengdu, People's Republic of China; MontaVista Software, Sunnyvale, CA; Nextel Communications Inc., Rensteon, VA; Push Messenger, Courbevoie, France; Quasar Innovations Pvt. Ltd., Kormangala, Bangalore, India; SafeNet, Inc., Belcamp, MD; SGS Japan Inc., Hodogaya-ku, Yokahama, Japan; tcl & Alcatel Mobile Phones, Colombes Cedex, France; and Visto Corporation, Seattle, WA, have withdrawn as parties to this venture.

Also, Locus Technologies has changed its name to Inticube Corp., Seoul, Republic of Korea.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and OMA intends to file additional written notifications disclosing all changes in membership.

On March 18, 1998, OMA filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act of December 31, 1998 (63 FR 72333).

The last notification was filed with the Department on May 12, 2005. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on August 30, 2005 (70 FR 51366).

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 06–1453 Filed 2–15–06; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Web Sling & Tie Down Association

Notice is hereby given that, on January 3, 2006, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Web Sling & Tie Down Association (''WSTDA'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and principal place of business of the standards development organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the name and principal place of business of the standards development organization is: Web Sling & Tie Down Association, Bel Air, MD. The nature and scope of WSTDA's standards development activities are: The development and promotion of voluntary recommended standards and associated reference materials for synthetic web slings and tie downs, polyester roundslings, synthetic webbing, fibers, thread and related components.

Additional information about WSTDA may be obtained by visiting its Web site *http://www.wstda.com.*

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 06–1452 Filed 2–15–06; 8:45 am]

BILLING CODE 4419–11–M

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

February 10, 2006.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of this ICR, with applicable supporting documentation, may be obtained by contacting Darrin King on 202–693–4129 (this is not a toll-free number) or e-mail: *king.darrin@dol.gov*.

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Employee Benefits Security Administration (EBSA), Office of Management and Budget, Room 10235, Washington, DC 20503, 202–395–7316 (this is not a toll-free number), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Agency: Employee Benefits Security Administration.

Type of Review: Extension of currently approved collection.

Title: ERISA Technical Release 91–1.

OMB Number: 1210–0084.

Frequency: On occasion.

Type of Response: Reporting and third party disclosure.

Affected Public: Business or other for-profit; not-for-profit institutions; and individuals or households.

Number of Respondents: 42.

Number of Annual Responses: 135,513.

Estimated Time per Respondent: 1 hour and 52 minutes (includes preparation and distribution of notices).

Total Burden Hours: 4,577.

Total Annualized Capital/Startup Costs: $0.

Total Annual Costs (operating/maintaining systems or purchasing services): $26,539.

Description: Technical Release 91–1 alerts the public to amendments to section 101(e) of ERISA that requires a plan to provide advanced notification to the Secretaries of Labor and the Treasury, as well as participants and beneficiaries, of an intended transfer of excess assets from a defined benefit plan to a retiree health account.

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. E6–2229 Filed 2–15–06; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employment Standards Administration

Assignment of President's Reporting Function Contained Within Section 401(c) of the National Emergencies Act (50 U.S.C. 1641(c))

February 10, 2006.

AGENCY: Employment Standards Administration; Department of Labor.

SUMMARY: The President has assigned to the Secretary of Labor the function of the President contained within section 401(c) of the National Emergencies Act (50 U.S.C. 1641(c)), to provide the specified final report to the Congress in relation to Proclamation 7959 of November 3, 2005. Proclamation 7959 revoked Proclamation 7924 that was issued September 8, 2005, and which suspended the provisions of the Davis-Bacon Act (40 U.S.C. 3141–3148) relating to prevailing-wage determinations by the Secretary of Labor within specified geographic areas affected by Hurricane Katrina.

DATES: *Effective Date:* February 16, 2006.

FOR FURTHER INFORMATION CONTACT: William W. Gross, Director, Office of Wage Determinations, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3028, 200 Constitution Avenue, NW., Washington, DC 20210, telephone (202) 693–0569. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: On September 8, 2005, pursuant to authority given to him in 40 U.S.C. 3147 to ''suspend the provisions of this subchapter during a national emergency,'' President George W. Bush issued Proclamation 7924 (70 FR 54227, September 13, 2005) suspending Subchapter IV of Chapter 31 of Title 40, United States Code, within a limited geographical area, as specified in the Proclamation, in response to the national emergency caused by Hurricane Katrina. The Proclamation suspended as to all contracts, as described in 40 U.S.C. 3142(a), entered on or after the date of the Proclamation the provisions of that Subchapter, commonly known as the Davis-Bacon Act, in the specified jurisdictions, and the provisions of ''any Executive Order, proclamation, rule, regulation, or other directive providing for the payment of wages, which provisions are dependent upon determinations by the Secretary of Labor under section 3142 of title 40, United States Code,'' until otherwise provided. On November 3, 2005, pursuant to authority vested in him by the Constitution and the laws of the United States, including 50 U.S.C. 1622 (the National Emergencies Act), the President issued Proclamation 7959 (70 FR 67899, November 8, 2005) revoking Proclamation 7924 ''as to all contracts for which bids are opened or negotiations concluded on or after November 8, 2005.''

On February 3, 2006, by a Memorandum for the Secretary of Labor, the President stated as follows:

> By the authority vested in me as President by the Constitution and laws of the United States, including section 301 of title 3, United States Code, I hereby assign to you the function of the President contained within section 401(c) of the National Emergencies Act (50 U.S.C. 1641(c)), to provide the specified final report to the Congress in relation to Proclamation 7959 of November 3, 2005.

This function may be further delegated to the Deputy Secretary of Labor. The Memorandum further authorized and directed the Secretary to publish the final report in the **Federal Register**. Therefore, notice of this assignment of the National Emergencies reporting function in relation to Proclamation 7959 is hereby being published in the **Federal Register**.

Signed at Washington, DC this 9th day of February, 2006.

Victoria A. Lipnic,

Assistant Secretary for Employment Standards.

Signed at Washington, DC, this 9th day of February, 2006.

Alfred B. Robinson, Jr.,

Acting Wage and Hour Administrator.

Final Report on the National Emergency With Respect to the Suspension of Davis-Bacon Act Requirements in a Limited Geographical Area in Response to Hurricane Katrina

I hereby report to the Congress on final developments concerning the suspension of Davis-Bacon Act requirements in response to the national emergency caused by Hurricane Katrina, that was declared in Proclamation 7924 of September 8, 2005. This report is submitted pursuant to section 401(c) of the National Emergencies Act, 50 U.S.C. 1641(c) (''NEA'').

1. On November 3, 2005, the President issued Proclamation 7959 revoking Proclamation 7924 as of November 8, 2005. Copies of the Proclamations are attached.

2. Proclamation 7924 was issued in response to the devastation caused by Hurricane Katrina and invoked the power given to the President in 40 U.S.C. 3147 ''to suspend the provisions of subchapter IV of chapter 31 of title 40, United States Code, 40 U.S.C. 3141–3148 during a national emergency.'' Subchapter IV of chapter 31 of title 40 (''subchapter IV'') provides that federal contracts in excess of $2000 for ''construction, alteration, or repair, including painting and decorating, of public buildings and public works'' must contain ''a provision stating the minimum wages to be paid various classes of laborers and mechanics,'' *id.* § 3142(a), and also provides that the minimum wages must be based on the prevailing wages ''in the civil subdivision of the State in which the work is to be performed,'' as determined by the Secretary of Labor, *id.* § 3142(b). The Proclamation suspended, as to all contracts entered on or after September 8, 2005, subchapter IV and provisions in other acts dependent upon wage determinations by the Secretary of Labor under that subchapter, that were to be performed in specified jurisdictions in Alabama, Florida, Louisiana, and Mississippi.

3. As a result of the Proclamation, during the period September 8, 2005 through

November 8, 2005, when the revocation of Proclamation went into effect (see Proclamation 7959), the Federal Government, through the Secretary of Labor, incurred modest expenses issuing internal and public guidance documents explaining the effect of suspending subchapter IV. Expenses were also incurred in preparing the revocation of the Proclamation. The expenses incurred by the Federal Government that are directly attributable to the exercise of powers and authorities conferred by the declaration of a national emergency with respect to Hurricane Katrina, as they relate to the two-month suspension of subchapter IV's wage-determination provisions in the specified jurisdictions, are reported to be about $30,000, which represent wage and salary costs for Federal personnel. Personnel costs were largely centered in the Department of Labor (particularly in the Office of the Wage-Hour Administrator and the Office of the Solicitor).

4. Because the proclamation and revocation occurred within this reporting period, I am submitting this report pursuant to section 401(c) of the NEA as the final report to the Congress on the total expenses incurred by the Federal Government that are directly attributable to the exercise of powers and authorities conferred by the declaration of a national emergency with respect to Hurricane Katrina, as they related to the suspension of subchapter IV's wage-determination provisions in the specified jurisdictions.

Dated: February 6, 2006.

Department of Labor.

Steven J. Law,

Deputy Secretary.

[FR Doc. 06–1466 Filed 2–15–06; 8:45 am]

BILLING CODE 4510–27–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 030–00873]

Notice of Availability of Environmental Assessment and Finding of No Significant Impact for License Amendment for Carroll College, Helena, MT

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability.

FOR FURTHER INFORMATION CONTACT: Rachel Browder, Project Manager, Nuclear Materials Licensing Branch, Division of Nuclear Materials Safety, Region IV, U.S. Nuclear Regulatory Commission, 611 Ryan Plaza Drive, Suite 400, Arlington, TX 76011. Telephone: (817) 274–6552; fax number: (817) 860–8188; e-mail: *rsb3@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The Nuclear Regulatory Commission (NRC) is issuing a license amendment to Material License No. 25–07093–01, issued to Carroll College, to authorize release of its site located in Helena, Montana, for unrestricted use and license termination. In support of the license amendment, the NRC has prepared an Environmental Assessment (EA) 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. This license amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended, and NRC's rules and regulations for license termination as set forth in 10 CFR Part 20, Subpart E, ''Radiological Criteria for License Termination.'' Accordingly, this license amendment was issued on January 17, 2006, and is effective immediately.

II. EA Summary

The purpose of the license amendment is to allow for the release of the licensee's facility at Carroll College, Helena, Montana, for unrestricted use and license termination.

Carroll College was authorized by the U.S. Atomic Energy Commission (AEC) in the 1960's to use radioactive materials for training purposes in biology and chemistry courses. By letter dated October 10, 2005, with enclosed NRC Form 314, Carroll College requested that NRC release the facility for unrestricted use. The licensee submitted 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 staff has prepared an EA in support of the proposed license amendment. The Carroll College site did not require any remediation of the land, buildings or water. The majority of radionuclides authorized were small quantities of beta emitters with short half-lives, less than 162 days, with the exception of tritium, cobalt-60, strontium-90, and carbon-14. The licensee's renewal application dated June 20, 1984, states in part that the licensee was using only phosphorus-32 and sulfur-35, which are considered low-beta emitters with short half-lives. Historical records indicate that the radioisotopes were used during four months of the year for laboratory instruction in the handling and use of radioisotopes and chemistry courses.

The licensee disposed of the remaining unsealed radioactive materials at the facility in accordance with the regulations for disposal by release into sanitary sewerage under 10 CFR 20.2003. NRC regulations in 10 CFR Part 20 specify the maximum amount of radioactive materials that a licensee may release from a site in the form of liquid effluents. Additionally, the licensee disposed of the sealed sources by transfer to an authorized recipient in accordance with 10 CFR 30.41. The sealed source inventory was either exempt material under 10 CFR 30.70 or non-NRC licensed material. The historical site assessment did not identify any short or long-term impacts to human health and the environment due to radiological exposures.

During the historical site assessment, the license identified one onsite burial of carbon-14, iodine-131, and gold-198 on June 30, 1961. Carbon-14 was the only isotope evaluated because the other two isotopes have short half-lives and have since decayed. The burial site was adjacent to the U.S. Geological Survey marker located on the northeast part of the campus near the gate in the fence that leads to the City of Helena Transfer Station. The burial site was within six feet of the marker and approximately four feet deep. Burial of certain quantities of radioactive waste in soil by licensees without prior NRC approval was authorized on January 29, 1959 (22 FR 548). Originally, this authorization was codified in former 10 CFR 20.304. On January 28, 1981, the NRC concluded that it was inappropriate to continue generic authorizations of burials pursuant to 10 CFR 20.304 without regard to factors such as location of burial, concentrations of radioactive material, form of packaging, and notification of NRC, and therefore NRC rescinded 10 CFR 20.304 (45 FR 71761).

Carbon-14 is a low-energy beta emitter with an average energy of 50 keV and a half-life of 5,730 years. Carbon-14 has a transport value of 0.0 in RESRAD, which is indicative of its high mobility such that it essentially moves with ground water; therefore, it is considered readily transportable. The licensee submitted a dose modeling evaluation based on RESRAD Version 6.22 using the default parameters, for the carbon-14 burial site. The licensee calculated the radioactivity concentration of carbon-14 to be 0.25 μCi/g, based on: 1) the log book record of 50 μCi, and 2) interview with the professor who stated that a ''coffee can size'' was buried, which was assumed to be 200 grams. This conservative approach utilizes the resident farmer scenario, which is summed over all pathways. The model projected a peak dose of 30 mrem, due to water consumption pathway, to occur in 1965 with a sharp decline to less than 1 mrem in 1971, which is approximately 10 years. The NRC staff recognizes that

the licensee's projected dose for the burial of carbon-14 is conservative based on the volume of the animal containing the carbon-14 from the study, which was noted as being a ''coffee can'' size (which is variable.) The NRC staff performed a dose modeling evaluation based on a buried volume of 500 grams and using the default parameters in RESRAD, Version 6.22. The model projected a peak dose of 14 mrem to occur in 1965, with a sharp decline to less than 1 mrem in 1971. In either scenario, the calculated value beyond year seven (1968) is below the current 25 millirem limit for unrestricted use of the site as stipulated in 10 CFR 20.1402.

The NRC staff considered the potential impacts of leaching of radioactive material into the shallow groundwater due to the burial of carbon-14 in 1961. In 1965, the shallow surface groundwater on the Carroll College campus was not used as a drinking water source. Additionally, local members of the public obtained their drinking water from the city, whose source was several miles away. There were only two wells identified on the Montana Bureau of Mines and Geology Web site which were installed prior to 1965. The impact of potentially contaminated groundwater was considered as part of the RESRAD dose modeling evaluation and the primary pathway of concern was the direct consumption of water by the resident farmer scenario. Based on the evaluations, there was no impact to groundwater as a result of the one-time burial of carbon-14. The areas of the site where radioactive material had been stored and handled were surveyed on April 9, 2005, by the radiation safety officer from Montana State University. The surveys were performed using Ludlum survey meter with a GM probe and a low energy gamma (NaI) probe. In addition, survey wipes were taken and analyzed on a Packard Liquid Scintillation Counter. The results were less than twice background and adequately meet the criteria for unrestricted use.

The NRC has the option, depending on the licensee's survey and extent of radioactive material that was used at the facility, to perform a close out inspection of the facility. Based on the low-energy beta emitting radioisotopes and the length of time since the last use of radioactive material at the facility, the NRC staff determined that a close-out inspection of the facility was not justified. The licensee's independent survey was sufficient to demonstrate that the facility was suitable for unrestricted use in accordance with 10 CFR Part 20. The environmental impacts resulting from the release of this site for unrestricted use are insignificant. There were no additional activities that resulted in cumulative impacts to the environment.

III. Finding of No Significant Impact

The NRC staff concludes that the proposed action complies with the radiological criteria for unrestricted use as stipulated in 10 CFR 20.1402. The licensee demonstrated that any remaining residual radioactivity will not result in radiological exposures in excess of the 25 millirem total effective dose equivalent limit specified in § 20.1402. Dose modeling indicates that current and future members of the public will not receive any radiological dose from the burial site. The NRC staff prepared an Environmental Assessment (EA) in support of the requested license amendment. On the basis of this EA, the NRC has concluded that there are no significant environmental impacts and the license amendment does not warrant the preparation of an Environmental Impact Statement. Accordingly, it has been determined that a Finding of No Significant Impact (FONSI) is appropriate.

IV. Further Information

Documents related to this action, including the application for 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 may 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: Carroll College letter and NRC Form 314, dated October 10, 2005, (ML053040347); Carroll College letter dose modeling submittal, dated January 17, 2005 (ML050540533); NRC Environmental Assessment (ML060170746). If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.*

These documents may also be viewed electronically on the public computers located at the NRC's PDR, O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Arlington, Texas this 8th day of February 2006.

For the Nuclear Regulatory Commission.

Jack E. Whitten,

Chief, Nuclear Materials Licensing Branch, Division of Nuclear Materials Safety, Region IV.

[FR Doc. E6–2214 Filed 2–15–06; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

Sunshine Act Meeting; Notification of Item Added to Meeting Agenda

DATE OF MEETING: February 7, 2006.

STATUS: Closed.

PREVIOUS ANNOUNCEMENT: 71 FR 5384, February 1, 2006.

ADDITION: Proposal to File Request for Postal Rate Commission Advisory Opinion on Service Changes.

At its closed meeting on February 7, 2006, the Board of Governors of the United States Postal Service voted unanimously to add this item to the agenda of its closed meeting and that no earlier announcement was possible. The General Counsel of the United States Postal Service certified that in her opinion discussion of this item could be properly closed to public observation.

CONTACT PERSON FOR MORE INFORMATION: Wendy A. Hocking, Secretary of the Board, U.S. Postal Service, 475 L'Enfant Plaza, SW., Washington, DC 20260–1000.

Wendy A. Hocking,

Secretary.

[FR Doc. 06–1530 Filed 2–14–06; 3:25 pm]

BILLING CODE 7710–12–M

SECURITIES AND EXCHANGE COMMISSION

[File No. 1–01063]

Issuer Delisting; Notice of Application of Dana Corporation, To Withdraw Its Common Stock, $1.00 Par Value, From Listing and Registration on the Pacific Exchange, Inc.

February 10, 2006.

On January 30, 2006, Dana Corporation, a Virginia corporation (''Issuer''), filed an application with the Securities and Exchange Commission (''Commission''), pursuant to Section 12(d) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 12d2–2(d) thereunder,[2] to withdraw its common stock, $1.00 par value (''Security''), from

[1] 15 U.S.C. 78*l*(d).

[2] 17 CFR 240.12d2–2(d).

listing and registration on the Pacific Exchange, Inc. (''PCX'').

The Board of Directors (''Board'') of the Issuer approved resolutions on December 1, 2005 to withdraw the Security from PCX. The Issuer stated that the Board determined that delisting the Security from PCX is in the Issuer's best interest because delisting the Security will have no impact on the trading volume of the Security, given the low volume of trading on PCX, and the costs of complying with the regulatory and administrative requirements associated with PCX listing are no longer justified. The Issuer stated that the Security is listed on the New York Stock Exchange, Inc. (''NYSE'') and the Issuer will continue to comply with the rules and regulations of NYSE.

The Issuer stated in its application that it has complied with applicable rules of PCX by providing PCX with the required documents governing the withdrawal of securities from listing and registration on PCX. The Issuer's application relates solely to the withdrawal of the Security from listing on PCX and shall not affect its continued listing on NYSE or its obligation to be registered under Section 12(b) of the Act.[3]

Any interested person may, on or before March 9, 2006, comment on the facts bearing upon whether the application has been made in accordance with the rules of PCX, and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters may be submitted by either of the following methods:

Electronic Comments

- Send an e-mail to *rule-comments@sec.gov.* Please include the File Number 1–01063 or;

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number 1–01063. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/delist.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

Nancy M. Morris,

Secretary.

[FR Doc. E6–2216 Filed 2–15–06; 8:45 am]

BILLING CODE 8010–01–P

[3] 15 U.S.C. 78*l*(b).

[4] 17 CFR 200.30–3(a)(1).

SECURITIES AND EXCHANGE COMMISSION

[File No. 1–08962]

Issuer Delisting; Notice of Application of Pinnacle West Capital Corporation To Withdraw Its Common Stock, No Par Value, From Listing and Registration on the Pacific Exchange, Inc.

February 10, 2006.

On January 27, 2006, Pinnacle West Capital Corporation, an Arizona corporation (''Issuer''), filed an application with the Securities and Exchange Commission (''Commission''), pursuant to Section 12(d) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 12d2–2(d) thereunder,[2] to withdraw its common stock, no par value (''Security''), from listing and registration on the Pacific Exchange, Inc. (''PCX'').

The Board of Directors (''Board'') of the Issuer approved resolutions on December 14, 2005 to withdraw the Security from PCX. The Issuer stated that the Board considered the following factors in making the decision to withdraw the Security from PCX: (i) Listing the Security on PCX is no longer in the Issuer best interests because the Issuer is subject to dual regulation by PCX and the New York Stock Exchange, Inc. (''NYSE''); (ii) the benefits associated with listing on PCX do not outweigh the costs and additional regulatory obligations, and no longer favor continued listing on PCX; and (iii) the Security is listed on the NYSE and will continue to list on NYSE.

The Issuer stated in its application that it has complied with applicable rules of PCX by complying with all applicable laws in the State of Arizona, the state in which the Issuer is incorporated, and by providing PCX with the required documents governing the withdrawal of securities from listing and registration on PCX. The Issuer's application relates solely to the withdrawal of the Security from listing on PCX and shall not affect its continued listing on NYSE or its obligation to be registered under Section 12(b) of the Act.[3]

Any interested person may, on or before March 9, 2006, comment on the facts bearing upon whether the application has been made in accordance with the rules of PCX, and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters may be submitted by either of the following methods:

Electronic Comments

- Send an e-mail to *rule-comments@sec.gov.* Please include the File Number 1–08962

or;

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number 1–08962. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/delist.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

[1] 15 U.S.C. 78*l*(d).

[2] 17 CFR 240.12d2–2(d).

[3] 15 U.S.C. 78*l*(b).

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

Nancy M. Morris,

Secretary.

[FR Doc. E6–2217 Filed 2–15–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: [71 FR 6799, February 9, 2006].

STATUS: Closed meeting.

PLACE: 100 F Street, NW., Washington, DC.

DATE AND TIME OF PREVIOUSLY ANNOUNCED MEETING: Wednesday, February 15, 2006 at 10 a.m.

CHANGE IN THE MEETING: Deletion of item.

The following item will not be considered during the Closed Meeting on February 15, 2006: Report of an Investigation.

Commissioner Glassman, as duty officer, determined that no earlier notice thereof was possible.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact the Office of the Secretary at (202) 551–5400.

Dated: February 13, 2006.

Nancy M. Morris,

Secretary.

[FR Doc. 06–1492 Filed 2–13–06; 4:07 pm]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–53263; File No. SR–Amex–2005–130]

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 Specialist Transaction Fee

February 9, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934,[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 19, 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 and II below, which Items have been prepared by the Amex. On February 1, 2006, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to approve the amended proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to rebate the increase in the Specialist Transaction Fee that the Amex implemented on October 3, 2005 and which the Exchange has collected since that time. The text of the proposed rule change is available on the Amex's Web site at (*http://www.amex.com*), the Office of the Secretary, the Amex 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 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

Effective with transactions beginning October 3, 2005, the Exchange increased the Specialist Transaction Fee from $.00005 to $.00007 of the total value of a specialist's transactions in equities.[4] After further consideration, analysis of the impact of the fee increase and discussions with its members, the Exchange has determined to rollback the increase in the Specialist Transaction Fee to $.00005.[5] The increase in the Specialist Transaction Fee implemented in October 2005 was part of a number of changes to the Equity Fee Schedule, the purpose of which was to generate additional revenue for the Exchange and to create additional incentives for market participants to send order flow to the Amex. According to the Exchange, for market participants other than the specialists, the changes in the aggregate contributed to the increase in revenue for the Exchange. The changes to fees imposed on the specialists, which also generated an increase in revenue, included an increase in the Specialist Transaction Fee and the elimination of a rarely used exemption from the Transaction Fee for trades in paired securities.

According to the Exchange, the Specialist Transaction Fee is based on the dollar value of equity shares executed by the specialist. As a result, specialists trading high-priced and/or high volume securities account for a disproportionate amount of the revenue generated by the fee. The recent increase in the fee exacerbated this result. The Exchange submits that rolling back the increase will alleviate, in part, this disproportionate impact on certain specialists.[6] Although the rollback of the increase in the Specialist Transaction Fee will result in a decrease in the additional revenues expected to be generated by the recent changes to the Equity Fee Schedule, the Exchange represents that this decrease will not result in an increase or other revisions to fees charged to other market participants. In a separate filing submitted pursuant to Section 19(b)(3)(A) and Rule 19b–4(f)(2), this proposed reduction in the Specialist Transaction Fee became effective upon filing.[7]

The Exchange is now requesting to rebate the increase in the Specialist Transaction Fee collected since October 3, 2005. Beginning October 3, 2005, the Exchange billed and collected the increased Specialist Transaction Fee. Upon approval of this proposal to allow a refund of the increased portion of the fee collected, the Amex will issue a credit to the specialists for the amount collected while the higher fee was in place. Notwithstanding the proposed rebate, the Exchange believes that the recent changes to the Equity Fee Schedule continue to be an equitable

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[4] 17 CFR 200.30–3(a)(1).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1, which replaced the original filing in its entirety, made technical and clarifying changes to the proposed rule change.

[4] *See* Securities Exchange Act Release No. 52701 (October 28, 2005), 70 FR 67504 (November 7, 2005) (notice of filing and immediate effectiveness of SR–Amex 2005–101).

[5] *See* Securities Exchange Act Release No. 53232 (February 6, 2006) (notice of filing and immediate effectiveness of SR–Amex–2006–008).

[6] *See supra* note 5.

[7] *See supra* note 5. This reduction was effective upon filing on a prospective basis from February 6, 2006.

allocation of reasonable fees among its members, issuers and other users of its facilities.

2. Statutory Basis

The Amex believes that the proposed rule change, as amended, 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 because it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities. Specifically, the Exchange is proposing to reimburse a recent fee increase that the Exchange believes disproportionately impacts some members.[10]

B. Self-Regulatory Organization's Statement on Burden on Competition

Amex does not believe that the proposed rule change, as amended, will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change, as amended.

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–2005–130 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Amex–2005–130. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section. Copies of such filing also will be available for inspection and copying at the principal office of the Amex. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–Amex–2005–130 and should be submitted on or before March 9, 2006.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful review, 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.[11] Specifically, the Commission believes that the proposed rule change, as amended, is consistent with Section 6(b)(4) of the Act,[12] which requires that the rules of the exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Commission notes that the Exchange believes that the increase in the Specialist Transaction Fee, which became effective on October 3, 2005, resulted in a disproportionate burden on Specialists who trade high-priced and/or high volume securities because the Specialist Transaction Fee is based on the dollar value of equity shares executed by the specialist. Therefore, and as noted above, the Exchange has reduced the amount of the Specialist Transaction Fee from $.00007 to $.00005 in a separate filing (effective upon filing on February 6, 2006) [13] and now requests approval to reimburse the increased amount of the Specialist Transaction Fee collected since October 3, 2005. The Commission finds that the Exchange's proposal to rebate the increased amount of the Specialist Transaction Fee collected between October 3, 2005 and February 6, 2006 is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.

Moreover, the Commission finds good cause for approving this proposed rule change, as amended, before the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The Commission believes that accelerated approval of the proposal is appropriate in order to allow Amex to issue credits to its Specialists as quickly as possible.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[14] that the proposed rule change, and Amendment No. 1 thereto, (SR–Amex–2005–130) be, and hereby is, approved on an accelerated basis.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[15]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E6–2199 Filed 2–15–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–53264; File No. SR–Amex–2005–117]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Relating to Amendments to the Amex Membership Corporation's Certificate of Incorporation

February 9, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).

[10] Amex clarified that although it refers in this sentence to the elimination of a recent fee increase, this proposal requests approval to rebate the increased amount of the Specialist Transaction Fee collected between October 3, 2005 and February 6, 2006. Telephone conversation between Claire McGrath, Senior Vice President and General Counsel, Amex, and Johnna B. Dumler, Attorney, Division of Market Regulation, Commission, on February 9, 2006. In a separate filing, SR–Amex–2006–008, which became effective upon filing, the Amex eliminated the increase in the Specialist Transaction Fee. *See supra* note 5.

[11] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78f(b)(4).

[13] *See supra* note 5.

[14] 15 U.S.C. 78s(b)(2).

[15] 17 CFR 200.30–3(a)(12).

(''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 23, 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 Amex. On January 24, 2006, Amex filed Amendment No. 1 to the proposed rule change.[3] On February 1, 2006, Amex filed Amendment No. 2 to the proposed rule change.[4] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange submits for Commission approval amendments to the Amex Membership Corporation's (''AMC'') Restated Certificate of Incorporation (''AMC Certificate''). In addition, the Amex proposes to amend Articles II, IV, and XIII of its Constitution to revise various references to the AMC Certificate.

The text of the proposed rule change is available on the Amex's Web site (*http://www.amex.com*), at the Amex's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning the purpose of, and basis for, the proposed rule change, as amended, and discussed any comments it received on the proposed rule change, as amended. The text of these statements may be examined at the places specified in Item IV below. The Amex has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

AMC proposes to amend the AMC Certificate to: (i) Permit the transfer or lease of trading rights among AMC members and member organizations apart from the memberships in respect of which they were made available; and (ii) eliminate the existing requirement that AMC submit to a vote of its members the authorization of new forms of trading rights. As part of the sale of the Amex to AMC, the Amex submitted and the Commission approved a proposal requiring that amendments to the AMC Certificate and By-laws be submitted to the Amex Board of Governors for determination of whether the amendments constituted a ''rule of an exchange'' as that term is defined in the Act.[5] If the Amex Board determines that the amendments to the AMC Certificate or Bylaws are ''rules of the exchange'', then such amendments must be filed with and approved by the Commission pursuant to Section 19(b) of the Act and Rule 19b–4 thereunder before they may become effective. At its meeting on July 20, 2005, the Amex Board reviewed the proposed amendments to the AMC Certificate and determined that they constituted a rule of the exchange since, as more specifically described below, the amendments involved whether certain actions by Amex need the consent of the holders of AMC memberships and involve the consents necessary for the issuance of trading rights on the Amex.

Currently, Section 6 of the AMC Certificate provides that AMC make available one Regular Trading Right for each Regular Member and one Options Principal Trading Right for each Options Principal Member and that such trading rights shall not be transferred or leased apart from those memberships. In addition, Section 7(a) of the AMC Certificate provides that the following actions need the consent of the holders of its memberships: (i) The sale, issuance, transfer or other disposition of ''equity securities'' as that term is defined in Section 7(a); and (ii) the authorization, grant or issuance of trading rights other than regular trading rights, options principal trading rights or the Limited Trading Permits. The AMC Board at its meeting on July 11, 2005 voted to approve and recommend to its members that the AMC Certificate be amended to: (i) Eliminate the reference in Section 6 to one trading right, thus allowing the issuance of more than one right to Regular Members and Options Principal Members; (ii) eliminate the prohibition in Section 6 on such trading rights being transferred or leased apart from the Regular and Options Principal Memberships; and (iii) eliminate the requirement that a vote of the membership is required for the authorization or issuance of trading rights as described in Section 7(a)(ii). Instead, the AMC membership's consent will be required for any action taken by the Amex to increase the number of memberships issued by AMC. Membership consent will still be required for the sale, issuance, transfer or other disposition of equity securities as provided in Section 7(a)(i). It should also be noted that Amex will still need to get AMC Board approval for the issuance of new trading rights. The AMC Board can, if it chooses, seek the consent of its membership for any proposal calling for the issuance of new trading rights.

The issue of transferable trading rights arose recently in regard to a proposal to allow specialists and registered options traders to enter quotes in options from remote locations.[6] To participate in remote quoting, specialists and registered options traders will be issued rights, which will attach to the individual eligible to receive them and will not attach to a sale of the membership. It is proposed that with the permission of the Amex these rights will be separately transferable by the specialist or registered options trader eligible to receive them. Therefore, while the rights will only be transferable to other members or member organizations, they will trade separately from the membership and will not increase the number of memberships issued by AMC. The AMC Board believes that the issuance of these types of rights is appropriate and the rights should be transferable or able to be leased apart from the membership. Additionally, the AMC Board does not believe that the issuance of these types of rights was contemplated to be included as an action requiring consent pursuant to Section 7(a) of the AMC Certificate. Therefore, the AMC Board is proposing to amend the AMC Certificate to: (i) Provide that trading rights can be transferred or leased apart from the membership; and (ii) revise the requirement so that consent is not required for the issuance of trading rights that do not include an increase in the number of memberships issued by AMC. The AMC Board determined to make this change to the AMC Certificate in order to give flexibility to the Amex

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 replaced the original filing in its entirety.

[4] *See* Partial Amendment No. 2.

[5] *See* Securities Exchange Act Release No. 50927 (December 23, 2004) 69 FR 78486 (December 30, 2004) (approving SR–Amex–2004–50). Section 3(a)(27) of the Act defines the rules of an exchange to be the constitution, articles of incorporation, by-laws, and rules, or instruments corresponding to the foregoing, of an exchange, and such stated policies, practices, or interpretations of such exchange as the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors to be deemed to be rules of such exchange.

[6] *See* Securities Exchange Act Release No. 53220 (February 3, 2006) (notice for SR–Amex–2005–100).

to take prompt action to implement new forms of trading rights designed to enhance Amex's position in an increasingly competitive and fast moving marketplace. At a special meeting of the Regular and Options Principal members held on September 28, 2005, the AMC members approved the amendments to the AMC Certificate. The AMC Board also approved non-substantive changes to the text of the AMC Certificate.

In addition, management proposes to amend the following sections of the Amex Constitution: Article II, Section 8; Article IV, Section 1; and Article XIII, Sections 1 and 3 to replace references to the AMC's ''Second Restated Certificate of Incorporation'' with ''Restated Certificate of Incorporation''. Further, Amex proposes to delete the following text from Article II, Section 8 of the Amex Constitution: ''as in effect on the date hereof'', which is used when referring to the AMC Certificate and By-laws, since it is unnecessary and confusing. The Commission notes that Amex also proposes other non-substantive changes to the proposed rule text.[7]

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with the provisions of Section 6(b) of the Act,[8] in general, and with Section 6(b)(5) of the Act,[9] 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 facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system, and , in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange did not receive any written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, as amended; or

B. institute proceedings to determine whether the proposed rule change, as amended, should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Amex–2005–117 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Amex–2005–117. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Amex–2005–117 and should be submitted on or before March 9, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E6–2200 Filed 2–15–06; 8:45 am]

BILLING CODE 8010–01–P

[7] Telephone conversation between Claire McGrath, Senior Vice President & General Counsel, Amex, and David Michehl, Attorney, Division of Market Regulation, Commission, on January 31, 2006 confirming the intention of the Amex to make non-substantive changes to the introduction and Sections 3, 6, and 19 of the AMC Certificate.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–53266; File No. SR–CBOE–2005–59]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Relating to Listing Standards for Broad-Based Index Options

February 9, 2006.

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 August 3, 2005, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below. On October 24, 2005, the CBOE filed Amendment No. 1 to the proposed rule change.[3] On February 6, 2006, the CBOE filed Amendment No. 2 to the proposed rule change.[4] The Commission

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1, which replaces the original filing in its entirety, includes several non-substantive revisions that provide clearer and more accurate listing standards.

[4] Amendment No. 2 makes a technical revision to CBOE Rule 24.2(a) to include a reference to proposed new paragraph 24.2(f), which was

Continued

is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons and is approving the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to amend its rules to adopt generic listing standards for broad-based index options. The text of the proposed rule change is available on CBOE's Web site (*http://www.cboe.com*), at the CBOE'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 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 III below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The CBOE proposes to adopt CBOE Rule 24.2(f) to establish initial listing standards for broad-based index options. The proposal will allow the CBOE to list, pursuant to Rule 19b–4(e) under the Act,[5] broad-based index options that meet the initial listing standards in CBOE Rule 24.2(f). The listing standards require that the underlying index be broad-based, as defined in CBOE Rule 24.1(i)(1);[6] that options on the index be a.m.-settled; that the index be capitalization-weighted, modified capitalization-weighted, price-weighted, or equal dollar-weighted; and that the index be comprised of at least 50 securities, all of which must be ''NMS stocks,'' as defined in Rule 600 of Regulation NMS.[7] In addition, CBOE Rule 24.2(f) requires that: the index's component securities meet certain minimum market capitalization,[8] eligibility,[9] and average daily trading volume requirements;[10] no single component security account for more than 10% of the weight of the index and that the five highest weighted component securities represent no more than 33% of the weight of the index in the aggregate;[11] non-U.S. component securities that are not subject to comprehensive surveillance agreements represent no more than 20% of the weight of the index in the aggregate;[12] the index value be widely disseminated at least once every 15 seconds by the Options Price Reporting Authority (''OPRA''), the Consolidated Tape Association Plan/Consolidated Quotation Plan (''CTA/CQ''), the Nasdaq Index Dissemination Service (''NIDS'') or by one or more major market data vendors during the time options on the index are traded on the Exchange;[13] the Exchange reasonably believes it has adequate system capacity to support the trading of options on the index;[14] an equal dollar-weighted index is rebalanced at least once every calendar quarter;[15] if an index is maintained by a broker-dealer, the index is calculated by a third-party who is not a broker-dealer, and the broker-dealer has erected an informational barrier around its personnel who have access to information concerning changes in, and adjustments to, the index;[16] and that the CBOE have written surveillance procedures in place with respect to the index options.[17]

The CBOE also proposes to adopt CBOE Rule 24.2(g), which establishes maintenance standards for broad-based index options listed pursuant to CBOE Rule 24.2(f). Specifically, under proposed CBOE Rule 24.2(g)(1), the requirements set forth above must continually be satisfied, except that the minimum market capitalization, eligibility, and average daily trading volume requirements outlined above, and the requirement that no single component security account for more than 10% of the weight of the index and that the five highest weighted component securities represent no more than 33% of the weight of the index in the aggregate, must be satisfied only as of the first day of January and July of each calendar year. In addition, proposed CBOE Rule 24.2(g)(2) provides that the number of component securities in the index (which initially must be at least 50) may not increase or decrease by more than 10% from the number of component securities in the index at the time of its initial listing. If the option fails to meet these maintenance standards, the CBOE may not open for trading any additional series of options of that class unless the continued listing of the class of index options has been approved by the Commission under Section 19(b)(2) of the Act.[18]

In addition, the CBOE proposes to apply current CBOE Rule 24.4(a), which establishes a position limit of 25,000 contracts on the same side of the market, with a restriction of no more than 15,000 contracts in the near-term series, to broad-based index options listed pursuant to CBOE Rule 24.2(f). Options listed pursuant to proposed CBOE Rule 24.2(f) will, in all other aspects, be traded pursuant to the Exchange's trading rules and procedures applicable to index options, and be covered under the Exchange's existing surveillance procedures for index options.

2. Statutory Basis

CBOE believes the proposed rule change is consistent with Section 6(b)[19] of the Act in general and furthers the objectives of Section 6(b)(5)[20] in particular in that it should promote just and equitable principles of trade, serve to remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public

inadvertently omitted from the original rule filing and Amendment No. 1.

[5] 17 CFR 240.19b–4(e).

[6] CBOE Rule 24.1(i)(1) defines ''broad-based index'' to mean ''an index designed to be representative of a stock market as a whole or of a range of companies in unrelated industries.''

[7] *See* proposed CBOE Rules 24.2(f)(1), (2), (3), (4) and (9). Rule 600 of Regulation NMS defines an ''NMS stock'' to mean ''any NMS security other than an option.'' An ''NMS security'' is defined 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.'' *See* 17 CFR 242.600.

[8] *See* proposed CBOE Rule 24.2(f)(5), which requires that component securities that account for at least 95% of the weight of the index have a market capitalization of at least $75 million, except that component securities that account for at least 65% of the weight of the index have a market capitalization of at least $100 million.

[9] *See* proposed CBOE Rule 24.2(f)(6), which requires that component securities that account for at least 80% of the weight of the index satisfy the requirements of Rule 5.3 applicable to individual underlying securities. CBOE Rule 5.3 requires in part that underlying securities of options listed and traded on the CBOE be ''NMS stocks'' as defined in Rule 600 of Regulation NMS, 17 CFR 242.600, and have at least a 7 million share float, 2000 holders, total annual trading volume of 2.4 million shares and a minimum price of $3 per share, and that the issuer must be in compliance with its obligations under the Act.

[10] *See* proposed CBOE Rule 24.2(f)(7), which requires that each component security that accounts for at least 1% of the weight of the index has an average daily trading volume of at least 90,000 shares during the last six month period.

[11] Proposed CBOE Rule 24.2(f)(8).

[12] Proposed CBOE Rule 24.2(f)(10).

[13] Proposed CBOE Rule 24.2(f)(11).

[14] Proposed CBOE Rule 24.2(f)(12).

[15] Proposed CBOE Rule 24.2(f)(13).

[16] Proposed CBOE Rule 24.2(f)(14).

[17] Proposed CBOE Rule 24.2(f)(15).

[18] 15 U.S.C. 78s(b)(2).

[19] 15 U.S.C. 78f(b).

[20] 15 U.S.C. 78f(b)(5).

interest. According to CBOE, the adoption of the proposed rule change will enable CBOE to act expeditiously in listing options on new broad-based security indexes in the same manner currently afforded to narrow-based indexes as defined under Rule 24.2(b). In addition, CBOE believes that the proposed rule change will remove impediments to a free and open market place by providing competition for new products. CBOE further believes that the proposed rule change will permit CBOE to more effectively bring new products to the marketplace for competition, as well as permit CBOE to compete with other new products that may be introduced to the marketplace.

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 the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither received nor solicited written comments on the proposal.

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–CBOE–2005–59 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2005–59. 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–2005–59 and should be submitted on or before March 9, 2006.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful review, 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.[21] In particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act,[22] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

To list options on a particular broad-based index, the CBOE currently must file a proposed rule change with the Commission pursuant to Section 19(b)(1) of the Act[23] and Rule 19b–4 thereunder.[24] However, Rule 19b–4(e)[25] provides that the listing and trading of a new derivative securities product by a self-regulatory organization (''SRO'') will not be deemed a proposed rule change pursuant to Rule 19b–4(c)(1)[26] if the Commission has approved, pursuant to Section 19(b) of the Act,[27] the SRO's trading rules, procedures, and listing standards for the product class that would include the new derivative securities product, and the SRO has a surveillance program for the product class.

As described more fully above and in CBOE's filing, the CBOE proposes to establish listing standards for broad-based index options. The Commission's approval of the CBOE's listing standards for broad-based index options will allow options that satisfy the listing standards to begin trading pursuant to Rule 19b–4(e),[28] without constituting a proposed rule change within the meaning of Section 19(b) of the Act[29] and Rule 19b–4 thereunder,[30] for which notice and comment and Commission approval is necessary.[31] The CBOE's ability to rely on Rule 19b–4(e)[32] to list broad-based index options that meet the requirements of CBOE Rule 24.2(f) potentially reduces the time frame for bringing these securities to the market, thereby promoting competition and making new broad-based index options available to investors more quickly.

The Commission notes that the CBOE has represented that it has adequate trading rules, procedures, listing standards, and a surveillance program for broad-based index options. CBOE's existing index option trading rules and procedures will apply to broad-based index options listed pursuant to CBOE Rule 24.2(f). Other existing CBOE rules, including provisions addressing sales practices and margin requirements, also will apply to these options. In addition, the CBOE proposes to establish position and exercise limits of 25,000 contracts on the same side of the market, with a restriction of no more than 15,000 contracts in the near-term series, for broad-based index options listed pursuant to CBOE Rule 24.2(f), by applying CBOE Rule 24.4(a) to such

[21] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[22] 15 U.S.C. 78f(b)(5).

[23] 15 U.S.C. 78s(b)(1).

[24] 17 CFR 240.19b–4.

[25] 17 CFR 240.19b–4(e).

[26] 17 CFR 240.19b–4(c)(1).

[27] 15 U.S.C. 78s(b).

[28] 17 CFR 240.19b–4(e).

[29] 15 U.S.C. 78s(b).

[30] 17 CFR 240.19b–4.

[31] When relying on Rule 19b–4(e), 17 CFR 240.19b–4(e), the SRO must submit Form 19b–4(e) to the Commission within five business days after the SRO begins trading the new derivative securities product. *See* Securities Exchange Act Release No. 40761 (December 8, 1998), 63 FR 70952 (December 22, 1998) (File No. S7–13–98).

If the underlying index does not satisfy all of the conditions in the listing standards contained in proposed CBOE Rule 24.2(f), the CBOE would be required to file a proposed rule change with the Commission pursuant to Section 19(b)(2) of the Act, 15 U.S.C. 78s(b)(2), and obtain Commission approval to list options on that index.

[32] 17 CFR 240.19b–4(e).

options.[33] The Commission believes that the proposed position and exercise limits should serve to minimize potential manipulation concerns.

The CBOE represents that it has adequate surveillance procedures for broad-based index options and that it intends to apply its existing surveillance procedures for index options to monitor trading in broad-based index options listed pursuant to CBOE Rule 24.2(f). In addition, because CBOE Rule 24.2(f) requires that each component of an index be an ''NMS stock,'' as defined in Rule 600 of Regulation NMS under the Act,[34] each index component must be listed on a registered national securities exchange or Nasdaq. Accordingly, the CBOE will have access to information concerning trading activity in the component securities of an underlying index through the Intermarket Surveillance Group (''ISG'').[35] CBOE Rule 24.2(f) also provides that non-U.S. index components that are not subject to a comprehensive surveillance sharing agreement between the CBOE and the primary market(s) trading the index components may comprise no more than 20% of the weight of the index.[36] The Commission believes that these requirements will help to ensure that the CBOE has the ability to monitor trading in broad-based index options listed pursuant to CBOE Rule 24.2(f) and in the component securities of the underlying indexes.

The Commission believes that the requirements in CBOE Rule 24.2(f) regarding, among other things, the minimum market capitalization, trading volume, and relative weightings of an underlying index's component stocks are designed to ensure that the markets for the index's component stocks are adequately capitalized and sufficiently liquid, and that no one stock dominates the index. In addition, CBOE Rule 24.2(f) requires that the underlying index be ''broad-based,'' as defined in CBOE Rule 24.1(i)(1).[37] The Commission believes that these requirements minimize the potential for manipulating the underlying index.

The Commission believes that the requirement in CBOE Rule 24.2(f) that the current index value be widely disseminated at least once every 15 seconds by OPRA, CTA/CQ, NIDS, or by one or more major market data vendors during the time an index option trades on the CBOE should provide transparency with respect to current index values and contribute to the transparency of the market for broad-based index options. In addition, the Commission believes, as it has noted in other contexts, that the requirement in CBOE Rule 24.2(f) that an index option be settled based on the opening prices of the index's component securities, rather than on closing prices, could help to reduce the potential impact of expiring index options on the market for the index's component securities.[38]

The Exchange has requested accelerated approval of the proposed rule change. The Commission finds good cause for approving the proposed rule change, as amended, prior to the 30th day after the date of publication of the notice of filing in the **Federal Register**. The proposal implements listing and maintenance standards and position and exercise limits for broad-based index options substantially the same as those recently approved for the International Securities Exchange, which were subject to the full public comment period, with no comments received.[39] The Commission does not believe that the Exchange's proposal raises any novel regulatory issues. Therefore, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,[40] to approve the proposed rule change, as amended, on an accelerated basis.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[41] that the proposed rule change (SR–CBOE–2005–59), as amended, is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[42]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E6–2197 Filed 2–15–06; 8:45 am]

BILLING CODE 8010–01–P

[33] *See* CBOE Rule 24.4(a). Under CBOE Rule 24.5, the exercise limits for index option contracts are equivalent to the position limits prescribed for option contracts with the nearest expiration date in CBOE Rule 24.4 or 24.4A.

[34] 17 CFR 242.600.

[35] The ISG was formed on July 14, 1983, to, among other things, coordinate more effectively surveillance and investigative information sharing arrangements in the stock and options markets. All of the registered national securities exchanges and the National Association of Securities Dealers, Inc., are members of the ISG. In addition, futures exchanges and non-U.S. exchanges and associations are affiliate members of the ISG.

[36] However, such non-U.S. index components, as ''NMS stocks,'' would be registered under Section 12 of the Act, 15 U.S.C. 78*l*, and listed and traded on a national securities exchange or Nasdaq, where there is last sale reporting.

[37] *See supra* note 6.

[38] *See, e.g.*, Securities Exchange Act Release No. 30944 (July 21, 1992), 57 FR 33376 (July 28, 1992) (order approving a CBOE proposal to establish opening price settlement for S&P 500 Index options).

[39] *See* Securities Exchange Act Release No. 52578 (October 7, 2005), 70 FR 60590 (October 18, 2005). *See also* Securities Exchange Act Release No. 52781 (November 16, 2005), 70 FR 70898 (November 23, 2005) (order approving on an accelerated basis generic broad-based index option listing standards for the American Stock Exchange).

[40] 15 U.S.C. 78s(b)(2).

[41] *Id.*

[42] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–53260; File No. SR–CBOE–2006–04]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend CBOE Membership Rules Relating to Membership Sale Process

February 9, 2006.

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 January 9, 2006, the Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') 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 Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders it effective upon filing with the Commission.[5] 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 proposes to revise Exchange membership rules related to the membership sale process. The text of the proposed rule change is available on CBOE's Web site, *http://www.cboe.com*, at CBOE's principal office, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] The CBOE provided the Commission with written notice of its intent to file the proposed rule change on December 7, 2005. CBOE asked the Commission to waive the 30-day operative delay. *See* Section 19(b)(3)(A) of the Act, and Rule 19b–4(f)(6)(iii) thereunder. 15 U.S.C. 78s(b)(1), 17 CFR 240.19b–4(f)(6)(iii).

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 parts 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 is revising CBOE Rules 3.13(b) and 3.14(a) to implement new provisions that would take effect in the event of a ''crossed'' membership market. Specifically, the proposed rule change would provide that (i) when a bid is submitted that exceeds the best offer posted on the Exchange, a seat sale transaction will occur at the best offer posted on the Exchange, and (ii) when an offer is submitted that is less than the best bid posted on the Exchange, a seat sale transaction will occur at the best bid posted on the Exchange. For example, if the seat market is a $500,000 bid and a $525,000 offer, and subsequently a properly submitted bid is received by the CBOE Membership Department for $530,000, a seat sale transaction will occur at the posted offer of $525,000. Likewise, if the seat market is a $500,000 bid and a $525,000 offer, and thereafter a properly submitted offer is received by the CBOE Membership Department for $495,000, a seat sale transaction will occur at the posted bid of $500,000. The Exchange expects this rule would be used rarely since the Exchange provides prompt updates of all properly submitted bids and offers on the Exchange Bulletin Board, the Exchange ''seat market'' telephone hotline, and the Exchange's Web site. However, it is possible for a bid or offer to be submitted that ''crosses'' the current membership market. Current CBOE Rules 3.13 and 3.14 only explicitly address what occurs in the event that the bid and offer are matched with the same price. The Exchange believes that this rule filing will improve those rules by explicitly addressing what shall occur when a bid is submitted that exceeds the best offer or an offer is submitted that is less than the best bid.

The proposed rule change also makes clear that bids and offers must be submitted in writing during seat market hours.[6] The purpose of this proposed rule change is to ensure that all bids and offers are received by the Membership Department and processed in an orderly manner. The Exchange will issue an information circular to the Exchange's membership to inform them of the hours that will constitute seat market hours.

The Exchange notes that the proposed rule change was reviewed and endorsed by the Exchange's Membership Committee, which is comprised of a cross-section of Exchange members and representatives of member organizations.

2. Statutory Basis

The Exchange states that the proposed rule change is designed to improve the operation of the CBOE seat market thereby benefiting both the Exchange and its members. Therefore, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5),[8] in particular, in that it is designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule does not (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, provided that the Exchange has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change or such shorter time as designated by the Commission,[9] the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11]

A proposed rule change filed under Rule 19b–4(f)(6) under the Act[12] normally may not become operative prior to 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii)[13] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The CBOE has requested that the Commission waive the 30-day operative delay, which would make the rule change operative immediately. The Commission believes that such waiver is consistent with the protection of investors and the public interest, for it will allow the CBOE to clarify CBOE Rules 3.13 and 3.14 to address what shall occur with respect to trading in CBOE memberships in the event of a ''crossed'' membership market. In addition, the proposed rule change clarifies that bids and offers for CBOE memberships must be submitted in writing during CBOE's seat market hours. For these reasons, the Commission designates that the proposal become operative immediately.[14]

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.[15]

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] Seat market hours, as specified on the forms for submitting a bid or offer for membership purchase, are currently 7 a.m. to 4 p.m. Central time.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] As required under Rule 19b–4(f)(6)(iii) under the Act, the Exchange provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposal.

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6)(iii).

[14] For purposes only of waiving the 30-day pre-operative period, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[15] *See* 15 U.S.C. 78s(b)(3)(C).

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–2006–04 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2006–04. 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 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–2006–04 and should be submitted on or before March 9, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E6–2201 Filed 2–15–06; 8:45 am]

BILLING CODE 8010–01–P

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–53269; File No. SR–NASD–2006–018]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto To Modify the Routing Sequence for Directed Cross Orders

February 10, 2006.

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 February 2, 2006, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), submitted to the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. Nasdaq filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] which renders it effective upon filing with the Commission. On February 9, 2006, Nasdaq filed Amendment No. 1 to the proposed rule change.[4] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change is intended to explicitly add INET to the routing sequence for Directed Cross Orders in exchange-listed securities directed to the NYSE and to allow subscribers to determine whether they wish to route to market centers in addition to Brut, Nasdaq, and INET prior to the NYSE when the NYSE is the final destination of the order.[5] The text of the proposed rule change is below. Proposed new language is in *italics*; deletions are in [brackets].[6]

* * * * *

4903. Order Entry Parameters

(a) To Brut Orders—No Change

(b) Brut Cross Orders—

(1) No Change

(A)–(C) No Change

(D) A Brut Cross Order may also be designated as a Directed Cross Order. A Directed Cross Order is an order that *is* entered *into* the System during market hours and is executable against marketable contra-side orders in the System. The order also is eligible for routing to other market centers. After being processed in the Brut System and exhausting available liquidity in the Brut System, the order is automatically routed by Brut to the specific market center selected by the entering party for potential execution. Any portion of the Directed Cross Order that remains unfilled after being routed to the selected market center will be returned to the entering party. For Directed Cross Orders in exchange-listed securities directed to the New York Stock Exchange if, after being processed in the Brut System and exhausting available liquidity in the Brut System, such orders will be automatically routed to the Nasdaq Market Center *and INET* for potential execution and thereafter, *if instructed by the entering party,* to other market centers that provide automated electronic executions before being sent to the New York Stock Exchange. Directed Cross Orders in exchange-listed securities directed to the New York Stock Exchange shall remain at the *New York Stock E*[e]xchange[7] until executed or cancelled by the entering party.

(1)(E)–(F) No Change

(c)–(f) No Change

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] Amendment No. 1 made clarifying changes to the rule text and Section I of this notice.

[5] *See* Amendment No. 1.

[6] Changes are marked to the rule text that appears in the electronic NASD Manual found at *www.nasd.com.* Prior to the date when The NASDAQ Stock Market LLC (''NASDAQ LLC'') commences operations, NASDAQ LLC will file a conforming change to the rules of NASDAQ LLC approved in Securities Exchange Act Release No. 53128 (January 13, 2006).

[7] *See* Amendment No. 1.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Use of the Brut Directed Cross Order is purely voluntary. Brut processes the orders sent to it based on the order type selected by the entering party. In turn, the selection of a particular order type directs the Brut system as to how the user wants the order handled. This ability to choose among multiple order execution methods is consistent with today's open and competitive electronic market structure. In this structure, market participants, not markets, select the combination of order types and execution venues that best suit their trading goals.

Currently, the Directed Cross Order directed to the NYSE as the final destination checks for liquidity in INET, although INET is not specifically mentioned in the rule. The proposed rule change simply modifies the routing sequence to explicitly state that the order automatically routes to INET, as well as to Nasdaq, for potential execution.

Brut, Nasdaq, and INET are market centers that provide fast response times to orders, even by electronic standards. Nasdaq believes that the order type is widely used and benefits investors because the order is exposed to additional pools of liquidity for execution at the best price in the National Market System prior to reaching its final destination.

In addition, the proposed rule change would allow an entering party to determine whether it wants a Directed Order to check destinations in addition to Brut, Nasdaq, and INET. If the entering party opts not to allow additional routing, the order would route to NYSE after checking Brut, Nasdaq, and INET. Alternatively, the order would, upon instruction from an entering party, route to additional market centers prior to the NYSE when the NYSE is the final destination of the order. An entering party, in making the determination whether to check additional market centers, may take into consideration fees for removing liquidity and speed of execution. The new order will service best execution responsibilities of brokers who believe that other market centers may offer enough liquidity to justify the time and cost to attempt to access that liquidity.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with Section 15A of the Act,[8] in general, and furthers the objectives of Section 15A(b)(6) of the Act,[9] in particular, in that it is designed to foster coordination and cooperation with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Nasdaq has filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[10] and subparagraph (f)(6) of Rule 19b–4 thereunder.[11] 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) does not become operative for 30 days from the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder. As required under Rule 19b–4(f)(6)(iii), Nasdaq provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to filing the proposal with the Commission or such shorter period as designated by the Commission. Nasdaq has requested that the Commission waive 30-day delayed operational date provisions contained in the above rule, based upon a representation that the proposed rule filing would benefit investors and permit them to select the combination of order types and execution venues that best suit their trading goals, and should, therefore, be provided to investors as soon as possible. For this reason, the Commission designates the proposal to be effective and operative upon filing with the Commission.

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[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–NASD–2006–018 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASD–2006–018. 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

[8] 15 U.S.C. 78o–3.

[9] 15 U.S.C. 78o–3(6).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6).

[12] The effective date of the original proposed rule change is February 2, 2006 and the effective date of Amendment No. 1 is February 9, 2006. For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change, as amended, under section 19(b)(3)(C) of the Act, the Commission considers the period to commence on February 9, 2006, the date on which Nasdaq submitted Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2006–018 and should be submitted on or before March 9, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Nancy M. Morris,

Secretary.

[FR Doc. E6–2215 Filed 2–15–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–53261; File No. SR–PCX–2006–02]

Self-Regulatory Organizations; Pacific Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to streetTRACKS® Gold Shares Trading Hours

February 9, 2006.

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 January 24, 2006, 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 PCX. The PCX has filed the proposed rule change, pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The PCX, through its wholly owned subsidiary PCX Equities, Inc. (''PCXE''), proposes to amend its rules governing the Archipelago Exchange (''ArcaEx''), the equity trading facility of PCXE. With this filing, the Exchange proposes to expand the hours under PCXE Rule 7.34 that the streetTRACKS® Gold Shares (''Gold Shares'') are eligible to trade on ArcaEx pursuant to unlisted trading privileges (''UTP''). The Exchange has designated this proposal as non-controversial and has requested that the Commission waive the 30-day pre-operative waiting period contained in Rule 19b–4(f)(6)(iii) under the Act.[5]

The text of the proposed rule change is available on the Exchange's Internet Web site (*http://www.pacificex.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 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. 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 Commission previously approved a proposal to trade the Gold Shares pursuant to UTP during ArcaEx's core trading session from 9:30 a.m. Eastern Time (''ET'') until 4:15 p.m. ET.[6] The Exchange seeks to expand the Gold Shares' trading hours, proposing that they should be eligible to trade on ArcaEx during the early, core and late trading sessions (4 a.m. ET to 8 p.m. ET), in accordance with PCXE Rule 7.34.

In addition, the Exchange, via a link to the Trust's streetTRACKS® Gold Trust[sm] (''Trust'') Web site (*http://www.streettracksgoldshares.com*), will provide at no charge, continuously updated bids and offers indicative of the spot price of gold on its own public Web site: (*http://www.pacificex.com*), and on ArcaEx's Web site at (*http://www.archipelago.com*).[7] The Trust Web site also provides an intraday calculation of the estimated Net Asset Value (''NAV'') (also known as the Intraday Indicative Value or ''IIV'') of a Gold Share as calculated by multiplying the indicative spot price of gold by the quantity of gold backing each Gold Share. The indicative spot price and IIV per Gold Share are provided on an essentially real-time basis (updated at least every 15 seconds) and are available during ArcaEx's early, core and late trading sessions.[8]

In support of this proposed rule change, the Exchange states that the representations in the PCX Approval Order regarding trading in Gold Shares are applicable to all trading sessions, in particular:

1. The Exchange has appropriate rules to facilitate transactions in Gold Shares during all trading sessions.

2. The Exchange's surveillance procedures are adequate to properly monitor trading of the Gold Shares in all trading sessions.

3. The Exchange has distributed an Information Circular to Equity Trading Permit (''ETP'') Holders prior to the commencement of trading of the Gold Shares on the Exchange that explains the terms, characteristics, and risks of trading such shares.

4. The Exchange will require ETP Holders with a customer who purchases newly issued Gold Shares in any trading session on ArcaEx to provide that customer with a product prospectus and has noted this prospectus delivery requirement in the Information Circular.

5. Because ArcaEx is trading Gold Shares pursuant to UTP, the Exchange will cease trading in the Gold Shares during all ArcaEx trading sessions if: (a) The primary market stops trading the Gold Shares because of a regulatory halt similar to a halt based on PCXE Rule 7.12 and/or a halt because dissemination of the IIV and/or the unaffiliated gold value has ceased or the Exchange no longer provides a hyperlink to the Trust's Web site; or (b) the primary market delists the Gold

[13] 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).

[4] 17 CFR 240.19b–4(f)(6).

[5] 17 CFR 240.19b–4(f)(6)(iii).

[6] *See* Securities Exchange Act Release No. 51245 (February 23, 2005), 70 FR 10731 (March 4, 2005) (SR–PCX–2004–117) (''PCX Approval Order'').

[7] The Trust web site's gold spot price will be provided by The Bullion Desk *(http://www.thebulliondesk.com)*. The Bullion Desk is not affiliated with the Trust, its sponsor, its custodian or the Exchange. *See* Securities Exchange Act Release No. 50603 (October 28, 2004), 69 FR 64614 (November 5, 2004) (SR–NYSE–2004–22) (''NYSE Approval Order'')

[8] Additionally, each day, the Sponsor updates the IIV per Gold Share shortly after calculation of the net asset value per Gold Share. Telephone conversation between Stuart Thomas, Managing Director, World Gold Council, and David Strandberg, Archipelago Exchange, and Florence Harmon, Senior Special Counsel, Division of Market Regulation (''Division''), Commission dated January 12, 2006. *See also* NYSE Approval Order at p. 14 (the Trust's Web site will disseminate these values subject to an average delay of 5 to 10 seconds).

Shares. Additionally, the Exchange may cease trading the Gold Shares if such other event shall occur or condition exists which in the opinion of the Exchange makes further dealings on the Exchange inadvisable.

6. Because ArcaEx is trading pursuant to UTP the Gold Shares during its early and late trading sessions, when the primary market is closed, the Exchange will monitor the unaffiliated value of gold and IIV per Gold Share and ensure that trading of the Gold Shares on ArcaEx will cease during the early and late trading sessions, if the unaffiliated value of gold and IIV per Gold Share (used by the primary listing exchange) is no longer calculated or available during the early and late trading sessions, or the Exchange stops providing a hyperlink on the Exchange's Web site to such unaffiliated gold value or IIV per Gold Share.

2. Statutory Basis

The Exchange believes that its proposed rule change is consistent with Section 6(b) of the Act [9] in general, and furthers the objectives of Section 6(b)(5) of the Act,[10] in particular, in that it is designed to facilitate transactions in securities, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

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

Because the proposed rule change: (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 prior to 30 days after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interests, the proposed rule change has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [11] and Rule 19b-4(f)(6) thereunder.[12]

PCX requests that the Commission waive the 30-day pre-operative period specified in Rule 19b–4(f)(6)(iii).[13] The Commission hereby grants that request and finds that waiving the 30-day pre-operative period is consistent with the protection of investors and public interest because PCX has addressed regulatory issues herein by ensuring that the Gold Shares will trade in all ArcaEx trading sessions with the relevant IIV and indicative spot price of gold available. The waiver will permit the Exchange to implement the proposed rule change without delay and thereby providing ETP Holders and the public greater liquidity and opportunities to trade, helping to reduce trading costs and promote competition among marketplaces.[14] For these reasons, the Commission designates the proposal to be effective and operative upon filing with the Commission.[15]

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.[16]

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–2006–02 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–PCX–2006–02. The file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml)*. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PCX–2006–02 and should be submitted on or before March 9, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[17]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E6–2198 Filed 2–15–06; 8:45 am]

BILLING CODE 8010–01–P

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A)(iii).

[12] 17 CFR 240.19b–4(f)(6). As required by Rule 19b–4(f)(6)(iii) under the Act, the Exchange also provided the Commission with written notice of intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five days (or such time as designated by the Commission) prior to doing so.

[13] 17 CFR 240.19b–4(f)(6)(iii).

[14] 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).

[15] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[16] *See* Section 19(b)(3)(C) of the Act, 15 U.S.C. 78s(b)(3)(C).

[17] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 10372]

Kansas Disaster # KS–00009

AGENCY: Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Kansas (FEMA–1626–DR), dated 01/26/2006.

Incident: Severe Winter Storm.

Incident Period: 11/27/2005 through 11/28/2005.

Effective Date: 01/26/2006.

Physical Loan Application Deadline Date: 03/27/2006.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, National Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 01/26/2006, applications for Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Cheyenne; Decatur; Edwards; Gove; Graham; Hodgeman; Ness; Norton; Pawnee; Phillips; Rawlins; Rooks; Rush; Sheridan; Sherman; Thomas; Trego.

The Interest Rates are:

Other (Including Non-Profit Organizations) With Credit Available Elsewhere: 5.000.

Businesses and Non-Profit Organizations Without Credit Available Elsewhere: 4.000.

The number assigned to this disaster for physical damage is 10372.

(Catalog of Federal Domestic Assistance Number 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E6–2218 Filed 2–15–06; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 10373]

Nebraska Disaster # NE–00005

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Nebraska (FEMA–1627–DR), dated 01/26/2006.

Incident: Severe Winter Storm.

Incident Period: 11/27/2005 through 11/28/2005.

Effective Date: 01/26/2006.

Physical Loan Application Deadline Date: 03/27/2006.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, National Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 01/26/2006, applications for Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties:

Antelope, Boone, Boyd, Custer, Dawson, Dundy, Frontier, Furnas, Garfield, Gosper, Greeley, Hayes, Holt, Kearney, Knox, Lincoln, Logan, Loup, Madison, Mcpherson, Nance, Perkins, Phelps, Pierce, Red Willow, Rock, Valley, Wayne, Wheeler.

The Interest Rates are:

	Percent
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	5.000
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 10373.

(Catalog of Federal Domestic Assistance Number 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E6–2220 Filed 2–15–06; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 10374]

Nevada Disaster # NV–00005

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Nevada (FEMA–1629–DR), dated 02/03/2006.

Incident: Severe Storms and Flooding.

Incident Period: 12/31/2005 through 01/04/2006.

Effective Date: 02/03/2006.

Physical Loan Application Deadline Date: 04/04/2006.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, National Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 02/03/2006, applications for Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties:

Carson City (City), Douglas, Lyon, Storey, Washoe, Pyramid, Lake, Paiute Tribe in Washoe County, Washoe Tribe in Douglas County.

The Interest Rates are:

	Percent
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	5.000
Businesses And Non-Profit Organizations Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 10374.

(Catalog of Federal Domestic Assistance Number 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E6–2223 Filed 2–15–06; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 10370 and # 10371]

Nevada Disaster # NV–00004

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of NEVADA dated 02/10/2006.

Incident: Severe Storms and Flooding.

Incident Period: 12/30/2005 through 01/04/2006.

Effective Date: 02/10/2006.

Physical Loan Application Deadline Date: 04/11/2006.

Economic Injury (EIDL) Loan Application Deadline Date: 11/13/2006.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, National Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties:

Washoe.

Contiguous Counties:

Nevada: Carson City, Churchill, Humboldt, Lyon, Pershing, Storey.

California: Lassen, Modoc, Nevada, Placer, Sierra.

Oregon: Harney, Lake.

The Interest Rates are:

	Percent
Homeowners With Credit Available Elsewhere	5.375
Homeowners Without Credit Available Elsewhere	2.687
Businesses With Credit Available Elsewhere	6.557
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	5.000
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 10370 6 and for economic injury is 10371 0.

The States which received an EIDL Declaration # are Nevada, California, Oregon.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: February 10, 2006.

Hector V. Barreto,

Administrator.

[FR Doc. E6–2226 Filed 2–15–06; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

National Small Business Development Center Advisory Board Public Meeting

The U.S. Small Business Administration, National Small Business Development Center (SBDC) Advisory Board, will be hosting a public annual spring meeting to discuss such matters that may be presented by members, and the staff of the U.S. Small Business Administration. The meeting is scheduled for Tuesday, February 28, 2006 from 8 a.m. to 1 p.m. eastern standard time at the SBA Management and Administration Conference Room, 5th Floor, 409 Third Street, SW., Washington, DC 20416.

Anyone wishing to attend the National Small Business Development Center Advisory Board Meeting must contact Erika Fischer, Senior Program Analyst, U.S. Small Business Administration, Office of Small Business Development Centers, 409 3rd Street, SW., Washington, DC 20416, telephone (202) 205–7045 or fax (202) 481–0681.

Antonio Doss,

Associate Administrator, Office of Small Business Development Centers.

[FR Doc. E6–2191 Filed 2–15–06; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request

The Social Security Administration (SSA) publishes a list of information collection packages that will require clearance by the Office of Management and Budget (OMB) in compliance with Pub. L. 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. The information collection packages that may be included in this notice are for new information collections, revisions to OMB-approved information collections, and extensions (no change) of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and on ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Written comments and recommendations regarding the information collection(s) should be submitted to OMB desk officer and the SSA Reports Clearance Officer. The information can be mailed and/or faxed to the individuals at the addresses and fax numbers listed below:

(OMB) Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974.

(SSA) Social Security Administration, DCFAM, Attn: Reports Clearance Officer, 1333 Annex Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–965–6400.

I. The information collections listed below are pending at SSA and will be submitted to OMB within 60 days from the date of this notice. Therefore, your comments should be submitted to SSA within 60 days from the date of this publication. You can obtain copies of the collection instruments by calling the SSA Reports Clearance Officer at 410–965–0454 or by writing to the address listed above.

1. Claimant's Recent Medical Treatment—20 CFR 404.1512 & 416.912—0960–0292. The information collected on Form HA–4631 is used to facilitate processing an applicant's old age, survivors, and disability insurance (Title II) and Supplemental Security Income (SSI; Title XVI) claims. The form elicits from the claimant an updated list of medical treatment. This enables the Administrative Law Judge hearing the case, to fully inquire into past and current medical treatment the claimant received/receives and the effect on the claimant's physical and mental status. The respondents are applicants for Title II and Title XVI benefits.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 320,000.

Frequency of Response: 1.

Average Burden Per Response: 10 minutes.

Estimated Annual Burden: 53,333 hours.

2. The Mental Health Treatment Study (MHTS)—0960—NEW.

Background

As a result of advances in medical treatment, assistive devices, changes in the way those with disabilities are viewed, and legislation designed to assure access to employment, SSA is taking on an increasingly active role in assisting beneficiaries who want to return to work. As a result, SSA plans to develop the MHTS under Section 234 of the Social Security Act (42 U.S.C. 434), which gives the Commissioner of

Social Security the authority to carry out experiments and demonstration projects designed to determine the relative advantages and disadvantages of interventions that facilitate a beneficiary's return to work. Part of the agency's role involves finding ways to promote work and increase independence among disability beneficiaries.

SSA received additional support for this study in February 2001, through President Bush's New Freedom Initiative—a comprehensive program whose primary goal is to promote the full participation of individuals with disabilities in all areas of society. The aim of the Initiative is to help Americans with disabilities by increasing their access to effective technologies, expanding educational opportunities, increasing the ability of Americans with disabilities to integrate into the workforce, and promoting increased access into daily community life. This initiative provided SSA with the support necessary to address the need to expand educational and employment opportunities for beneficiaries in an effort to provide supports and services that will enable them to maximize their self-sufficiency and potentially enter or reenter the workforce.

MHTS Collection

The MHTS is a randomized study designed to test the degree to which eliminating programmatic work disincentives, establishing an accurate diagnosis and delivering appropriate mental health and supported employment will lead to improved functioning and competitive employment among Social Security Disability Insurance (SSDI) beneficiaries with a primary impairment of schizophrenia or affective disorder. Study outcomes will assess the impact and cost-effectiveness of the intervention, including identification of specific factors within the interventions that result in positive employment outcomes. This information will enable SSA to further develop ways to improve services to current and future beneficiaries. The information will also be used to guide any potential changes to program rules to allow for better coordination among other Federal and State programs. Interested beneficiaries will be initially screened to confirm their ability to participate in the study. The actual study is scheduled to be conducted over a 2-year period with initial measurement through a baseline survey, followed by quarterly progress surveys and a final follow-up survey. For study purposes, participants will be divided into two groups: (A) Treatment Group and (B) Control Group. The respondents to the study are SSDI beneficiaries who meet the study criteria and elect to participate.

Type of Request: New information collection.

Questionnaire	Total number of respondents	Burden per response	Frequency of response	Total annual burden hours
Screener	3,050	4 minutes	1	203
Treatment Group Surveys				
Baseline	1,500	30 minutes	1	750
Quarterly	1,500	25 minutes	7	4,375
Follow-up	1,500	20 minutes	1	500
Total				5,625
Control Group Surveys				
Baseline	1,500	30 minutes	1	750
Quarterly	1,500	10 minutes	7	1,750
Follow-up	1,500	20 minutes	1	500
Total				3,000

TOTAL ESTIMATED BURDEN FOR ALL STUDY ACTIVITIES

Participant	Number of respondents	Number of surveys per respondent	Total annual burden hours
Screener Survey	3,050	1	203
Treatment Group (T)	1,500	9	5,625
Control Group (C)	1,500	9	3,000
Total	6,050		8,828

II. The information collections listed below have been submitted to OMB for clearance. Your comments on the information collections would be most useful if received by OMB and SSA within 30 days from the date of this publication. You can obtain a copy of the OMB clearance packages by calling the SSA Reports Clearance Officer at 410–965–0454, or by writing to the address listed above.

1. Partnership Questionnaire—20 CFR 404.1080–.1082—0960–0025. Form SSA–7104 is used to establish several aspects of eligibility for Social Security benefits, including the accuracy of reported partnership earnings, the accuracy of retirement allegations, and lag earnings where they are needed for insured status. The respondents are applicants for Social Security Old Age, Survivors, and Disability Insurance Benefits.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 12,350.

Frequency of Response: 1.

Average Burden Per Response: 30 minutes.

Estimated Annual Burden: 6,175 hours.

2. Letter to Employer Requesting Information about Wages Earned by a Beneficiary—20 CFR 404.703 and 404.801—0960–0034. Form SSA–L725 is used by SSA to establish the exact wages earned by a Social Security beneficiary in situations where SSA has incomplete or questionable wage data. In turn, this information is used to determine if the beneficiary's current SSA payments are accurate. The respondents are employers of wage earners whose earnings records are incomplete or have been questioned.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 150,000.

Frequency of Response: 1.

Average Burden Per Response: 40 minutes.

Estimated Annual Burden: 100,000 hours.

3. Statement of Living Arrangements, In-Kind Support and Maintenance—20 CFR, 416.1130–.1148—0960–0174. Form SSA–8006 provides a national uniform vehicle for collecting information from SSI applicants and recipients about whether they receive income from in-kind support and maintenance. Responses are used to determine eligibility for SSI benefits. The respondents are individuals applying for SSI or those whose eligibility is being reevaluated.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 173,380.

Frequency of Response: 1.

Average Burden Per Response: 7 minutes.

Estimated Annual Burden: 20,228 hours.

4. Supplemental Security Income-Quality Review Case Analysis—20 CFR 416.1103(f)—0960–0133. Form SSA–8508–BK is used in a personal interview with a sample of SSI recipients and covers all elements of SSI eligibility. The information is used to assess the effectiveness of SSI policies and procedures and to determine payment accuracy rates. The respondents are SSI recipients.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 4,500.

Frequency of Response: 1.

Average Burden Per Response: 60 minutes.

Estimated Annual Burden: 4,500 hours.

5. 20 CFR 429, Subpart 100, Filing Claims Under the Federal Tort Claims Act—20 CFR 429.101–429.110—0960–0667. SSA uses the information collected to investigate and determine whether to make an award, compromise, or settlement under the Federal Tort Claims Act (FTCA). The information is only used by those Agency employees who need the information in the scope of their official duties. The respondents are individuals/entities making a claim under the FTCA.

Type of Request: Extension of an OMB-approved information collection.

Section	Annual number of responses	Frequency of response	Average burden per response (minutes)	Estimated annual burden hours
429.102; 429.103	1	1	1	1
429.104(a)	30	1	5	3
429.104(b)	25	1	5	2
429.104(c)	2	1	5	1
429.106(b)	10	1	10	2
Totals	68			9

Dated: February 8, 2006.

Elizabeth A. Davidson,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 06–1450 Filed 2–15–06; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 5308]

Culturally Significant Objects Imported for Exhibition Determinations: ''Temples and Tombs: Treasures of Egyptian Art From The British Museum''

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 ''Temples and Tombs: Treasures of Egyptian Art from The British Museum,'' 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 or custodians. I also determine that the exhibition or display of the exhibit objects at the Oklahoma City Museum of Art, Oklahoma City, Oklahoma, beginning on or about September 7, 2006, until on or about November 26, 2006; the Cummer Museum of Art and Gardens, Jacksonville, Florida, beginning on or about December 22, 2006, until on or about March 18, 2007; the North Carolina Museum of Art, Raleigh, North Carolina, beginning on or about April 15, 2007, until on or about July 8, 2007; the Fresno Metropolitan Museum of Art, History and Science, Fresno, California, beginning on or about March 7, 2008, until on or about June 1, 2008, 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 Wolodymyr Sulzynsky, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/453–8050). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: February 8, 2006.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E6–2232 Filed 2–15–06; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 5309]

Bureau of Educational and Cultural Affairs (ECA) Request for Grant Proposals: Teachers of Critical Languages Program

Announcement Type: New Cooperative Agreement.

Funding Opportunity Number: ECA/A/S/X–06–04.

Catalog of Federal Domestic Assistance Number: 00.000.

Application Deadline: April 14, 2006.

Executive Summary

The Fulbright Teacher Exchange Branch in the Office of Global Educational Programs of the Bureau of Educational and Cultural Affairs, U.S. Department of State (ECA/A/S/X), announces an open competition for an assistance award in the amount of $500,000 for the Teachers of Critical Languages Program. As part of the National Security Language Initiative, the program aims to strengthen national security and prosperity in the 21st century through education, especially in developing foreign language skills of Americans. The pilot program will bring qualified teachers from China and Jordan to teach their native languages in U.S. school systems. Organizations meeting the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3) may submit proposals to administer this program. In addition to strengthening foreign language instruction at U.S. schools, the international teachers selected for the program will have the opportunity to learn about U.S. teaching methodologies, culture and society, and to improve their English language proficiency. The program should begin in late July or August 2006 with a comprehensive two-week orientation for Jordanian and Chinese participants on U.S. culture and society, including U.S. foreign language teaching methodologies.

I. Funding Opportunity Description

I.1. Authority

Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87–256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is ''to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries * * *; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations * * *; and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world.'' The funding authority for the program above is provided through legislation.

I.2. Purpose

In support of the U.S. government's National Security Language Initiative to improve and strengthen American expertise in foreign languages, the Bureau of Educational and Cultural Affairs (ECA) will partner with a non-profit grantee organization to implement this program. The program will bring primary and secondary school teachers to the U.S. from the following countries: at least ten from China and two from Jordan to teach Chinese and Arabic, respectively, in American primary and secondary schools. To the extent possible, teachers should be assigned to schools with established foreign language programs in the subject languages. It is recommended that the foreign teachers team-teach with a U.S. teacher where possible. In addition to providing language instruction, the international teachers will serve as cultural resources on their home countries in history, geography, social studies and other relevant classes in the U.S. schools. U.S. students will benefit from having native language instructors and from a broadened foreign language curriculum. International teachers will be exposed to U.S. teaching methodologies, refine their teaching skills, increase their English language proficiency, and expand their knowledge of U.S. society and culture. The international teachers will return home to share their experiences with students and colleagues.

I.3. Program Goals

I.3a. To introduce and expand the teaching of critical foreign languages in American primary and secondary schools, thereby improving the language skills of young Americans and motivating increased study of these languages.

I.3b. To enable international teachers to learn first-hand about the culture and society of the United States, improve their English language proficiency, and to expand their knowledge of U.S. teaching methodologies.

I.3c. To increase mutual understanding between U.S. school communities and visiting international teachers, and by extension, their home institutions and students.

I.3d. To provide opportunities for U.S. and participant home country schools to develop lasting ties and to share educational best practices.

I.4. Program Components

In early 2006, ECA/A/S/X will collaborate with colleagues in Beijing and Amman to recruit international teachers. ECA/A/S/X will identify and recruit candidates for the program in cooperation with the Chinese Ministry of Education. In Jordan, ECA/A/S/X will recruit candidates in conjunction with the Regional English Language Officer (RELO) based at the U.S. Embassy in Amman. Simultaneously ECA/A/S/X will coordinate the recruitment of U.S. host schools. The grantee organization will be responsible for the following program components:

I.4a. Final selection of U.S. host schools: Upon the award of a grant in early June, the grantee organization should organize a panel to review applications from U.S. host schools and place international teachers at these schools in collaboration with the Bureau. Then the grantee organization should notify host schools and international teachers of their assignments and help them to prepare for the exchange. The grantee organization should provide an orientation for mentors and administrators from the U.S. schools selected to participate in the program.

Placements in primary and secondary schools will be for an academic year—August/September 2006 through May/June 2007—according to the calendar in the placement school. Placements should immerse teachers actively in the American classroom environment and may include the following elements: teaching their native languages in their own foreign language classes; observing a variety of classroom activities (active classroom, group projects, etc.); working with other teachers on curriculum development; and team teaching. Placements in schools should also include opportunities to learn about local school governance through such activities as faculty, board of education, and Parent-Teacher Association meetings.

I.4b. Pre-departure orientations for international teachers: International teachers should participate in a two- or three-day pre-departure orientation. The partner international organizations in Beijing and Amman will organize an orientation with substantial assistance and input from the grantee organization. The orientation will provide information about the program's goals and the U.S. Department of State's expectations of participants. At the

orientation, organizers will review comparative teaching practices, the teaching of foreign languages in the U.S. (including the development of lesson plans in the target languages) and prepare the participants for their further stay in the U.S. The orientation will provide an introduction to the U.S. government and its role in education, the U.S. educational system, and American culture with an emphasis on cross-cultural adjustment issues.

I.4c. U.S.-based Orientation: The grantee organization should design and conduct a two-week, academic orientation for the teachers upon their arrival in the U.S. in mid-to-late July 2006 that includes information on U.S. society and culture, to occur before the academic year assignment begins. This orientation should focus on the teachers' transition from teaching English as a foreign language at home to teaching Arabic or Chinese in a U.S. classroom. Additionally, participants should consult with U.S. teachers of the foreign languages they will be teaching and should come to understand current foreign language teaching practices in U.S. schools, including student-centered and applied learning methodology. Participants should also receive training in English for specific purposes during this orientation in order to become familiar with English language terms related to U.S. teaching and to the U.S. educational system. During this orientation, international teachers should begin preparing presentations on their own cultures to be made in their host schools and communities during the year.

I.4d. Workshop (4–5 days): During the fall, participants should come together for a workshop aimed at enabling them to make a full transition to their U.S. schools, to share their experiences in their U.S. classrooms, and to develop lesson plans and foreign language curricula for their schools. This workshop might be scheduled in conjunction with a professional development opportunity such as attendance at the American Council on the Teaching of Foreign Languages conference.

I.4f. Final debriefing, Washington, DC (3 days): Participants will share what they have observed and learned through presentations to other participants in the program. The participants should take part in a professional and cultural debriefing that includes relevant professional organizations and language associations, meetings with ECA representatives, and visits to museums and historic sites.

I.4g. Follow-on programming: This component will take place after the international participants return home. International teachers and U.S. host schools will be eligible to apply for small grants that will support school partnerships or other activities building on this exchange experience. The development and approval of follow-on grants must be coordinated by the grantee organization with the relevant non-governmental organizations, U.S. embassies (including the Regional English Language Officers, in Jordan), and ECA's Fulbright Teacher Exchange Branch. Applicant organizations' proposals should suggest a possible range of creative follow-on programming at a total cost of $35,000 for approximately eight to ten small grants.

The Bureau will work with the recipient of this cooperative agreement on administrative and programmatic issues over the duration of the award.

I.5. Program Planning and Implementation

Applicant organizations are requested to submit a narrative outlining a comprehensive strategy for the administration and implementation of this program. The narrative should include a strategy for selecting and collaborating with U.S. schools; a plan for selecting and placing international teachers in U.S. schools; a proposed design for orienting international teachers; a plan for monitoring the teachers' professional programs; and a plan for adequate follow-on programming. Employees of the grantee organization will be designated Alternate Responsible Officers, and will be responsible for issuing DS–2019 forms to participants on behalf of ECA/A/S/X and for performing all actions necessary to comply with the Student and Exchange Visitor Information System (SEVIS).

The comprehensive program strategy should reflect a vision for the program as a whole, interpreting the goals of the program with creativity and providing innovative ideas for the program. The strategy should include a description of how the various components of the program will be integrated to build upon and reinforce one another.

In a cooperative agreement, ECA/A/S/X will be substantially involved in the program activities mentioned above and beyond routine grant monitoring. ECA/A/S/X activities and responsibilities for this program are as follows:

- Formulation of program policy;
- Clearing texts and program guidelines for publication;
- Responsibility for seeking and receiving applications from U.S. host schools and international candidates;
- Oversight of the content for all orientations and end-of-program conference and debriefing as well as review and approval of program schedules;
- Regular updates on the progress of international teachers and their programs at the U.S. schools;
- Oversight of selection of follow-on programming awards.

II. Award Information

Type of Award: Cooperative Agreement. ECA's level of involvement in this program is listed under number I above.

Fiscal Year Funds: FY 2006.

Approximate Total Funding: $500,000.

Approximate Number of Awards: 1.

Approximate Average Award: $500,000.

Anticipated Award Date: June 1, 2006.

Anticipated Project Completion Date: June 30, 2008.

Additional Information: Pending successful implementation of this program and the availability of funds in subsequent fiscal years, it is ECA's intent to renew and expand this grant for two additional fiscal years, before openly competing it again.

III. Eligibility Information

III.1. Eligible Applicants

Applications may be submitted by public and private non-profit organizations meeting the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3).

III.2. Cost Sharing or Matching Funds

There is no minimum or maximum percentage required for this competition; however, the Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs.

When cost sharing is offered, it is understood and agreed that the applicant must provide the amount of cost sharing as stipulated in its proposal and later included in an approved grant agreement. Cost sharing may be in the form of allowable direct or indirect costs. For accountability, you must maintain written records to support all costs that are claimed as your contribution, as well as costs to be paid by the Federal government. Such records are subject to audit. The basis for determining the value of cash and in-kind contributions must be in accordance with OMB Circular A–110, (Revised), Subpart C.23—Cost Sharing and Matching. In the event you do not provide the minimum amount of cost sharing as stipulated in the approved

budget, ECA's contribution will be reduced in like proportion.

III.3. Other Eligibility Requirements

Bureau grant guidelines require that organizations with less than four years experience in conducting international exchanges is limited to $60,000 in Bureau funding. ECA anticipates awarding one grant, in an amount up to $500,000 to support program and administrative costs required to implement this exchange program. Therefore, organizations with less than four years experience in conducting international exchanges are ineligible to apply under this competition. The Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs.

IV. Application and Submission Information

Note: Please read the complete **Federal Register** announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

IV.1. Contact Information To Request an Application Package

Please contact the Office of Global Educational Programs, ECA/A/S/X, Room 349, U.S. Department of State, SA–44, 301 4th Street, SW., Washington, DC 20547, tel. (202) 453–8897, fax (202) 453–8890, or e-mail *Mosleypj@state.gov* to request a Solicitation Package. Please refer to the Funding Opportunity Number ECA/A/S/X 06–04 located at the top of this announcement when making your request. Alternatively, an electronic application package may be obtained from grants.gov. Please see section IV.3f for further information.

The Solicitation Package contains the Proposal Submission Instruction (PSI) document, which consists of, required application forms, and standard guidelines for proposal preparation.

It also contains the Project Objectives, Goals and Implementation (POGI) document, which provides specific information, award criteria and budget instructions tailored to this competition.

Please specify Program Officer Catharine Cashner and refer to the Funding Opportunity Number 06–04 located at the top of this announcement on all other inquiries and correspondence.

IV.2. To Download a Solicitation Package Via Internet

The entire Solicitation Package may be downloaded from the Bureau's Web site at *http://exchanges.state.gov/education/rfgps/menu.htm* or from the Grants.gov Web site at *http://www.grants.gov*.

Please read all information before downloading.

IV.3. Content and Form of Submission

Applicants must follow all instructions in the Solicitation Package. The original and seven copies of the application should be sent per the instructions under IV.3f. ''Application Deadline and Methods of Submission'' section below.

IV.3a. You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the U.S. Government. This 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. Please ensure that your DUNS number is included in the appropriate box of the SF–424 which is part of the formal application package.

IV.3b. All proposals must contain an executive summary, proposal narrative and budget.

Please Refer to the Solicitation Package. It contains the mandatory Proposal Submission Instructions (PSI) document and the Project Objectives, Goals and Implementation (POGI) document for additional formatting and technical requirements.

IV.3c. You must have nonprofit status with the IRS at the time of application. If your organization is a private nonprofit which has not received a grant or cooperative agreement from ECA in the past three years, or if your organization received nonprofit status from the IRS within the past four years, you must submit the necessary documentation to verify nonprofit status as directed in the PSI document. Failure to do so will cause your proposal to be declared technically ineligible.

IV.3d. Please take into consideration the following information when preparing your proposal narrative:

IV.3d.1. *Adherence to All Regulations Governing the J Visa.* The Bureau of Educational and Cultural Affairs is placing renewed emphasis on the secure and proper administration of Exchange Visitor (J visa) Programs and adherence by grantees and sponsors to all regulations governing the J visa. Therefore, proposals should demonstrate the applicant's capacity to meet all requirements governing the administration of the Exchange Visitor Programs as set forth in 22 CFR part 62, including the oversight of Responsible Officers and Alternate Responsible Officers, screening and selection of program participants, provision of pre-arrival information and orientation to participants, monitoring of participants, proper maintenance and security of forms, record-keeping, reporting and other requirements.

An employee of the Bureau will be named the Responsible Officer for the program; employees of the grantee organization will be designated Alternate Responsible Officers and will be responsible for issuing DS–2019 forms to participants and performing all actions to comply with the Student and Exchange Visitor Information System (SEVIS).

A copy of the complete regulations governing the administration of Exchange Visitor (J) programs is available at *http://exchanges.state.gov* or from: United States Department of State, Office of Exchange Coordination and Designation, ECA/EC/ECD–SA–44, Room 734, 301 4th Street, SW., Washington, DC 20547. Telephone: (202) 203–5029. FAX: (202) 453–8640.

Please refer to Solicitation Package for further information.

IV.3d.2. *Diversity, Freedom and Democracy Guidelines.* Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. ''Diversity'' should be interpreted in the broadest sense and encompass differences including, but not limited to ethnicity, race, gender, religion, geographic location, socio-economic status, and physical challenges. Applicants are strongly encouraged to adhere to the advancement of this principle both in program administration and in program content. Please refer to the review criteria under the 'Support for Diversity' section for specific suggestions on incorporating diversity into your proposal. Public Law 104–319 provides that ''in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy,'' the Bureau ''shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries.'' Public Law 106–113 requires that the governments of the countries described above do not have inappropriate influence in the selection process. Proposals should reflect advancement of these goals in their program contents, to the full extent deemed feasible.

IV.3d.3. *Program Monitoring and Evaluation.* Proposals must include a plan to monitor and evaluate the project's success, both as the activities unfold and at the end of the program. The Bureau recommends that your proposal include a draft survey questionnaire or other technique plus a description of a methodology to use to link outcomes to original project objectives. The Bureau expects that the grantee will track participants or partners and be able to respond to key evaluation questions, including satisfaction with the program, learning as a result of the program, changes in behavior as a result of the program, and effects of the program on institutions (institutions in which participants work or partner institutions). The evaluation plan should include indicators that measure gains in mutual understanding as well as substantive knowledge.

Successful monitoring and evaluation depend heavily on setting clear goals and outcomes at the outset of a program. Your evaluation plan should include a description of your project's objectives, your anticipated project outcomes, and how and when you intend to measure these outcomes (performance indicators). The more that outcomes are ''smart'' (specific, measurable, attainable, results-oriented, and placed in a reasonable time frame), the easier it will be to conduct the evaluation. You should also show how your project objectives link to the goals of the program described in this RFGP.

Your monitoring and evaluation plan should clearly distinguish between program *outputs* and *outcomes. Outputs* are products and services delivered, often stated as an amount. Output information is important to show the scope or size of project activities, but it cannot substitute for information about progress towards outcomes or the results achieved. Examples of outputs include the number of people trained or the number of seminars conducted. *Outcomes*, in contrast, represent specific results a project is intended to achieve and is usually measured as an extent of change. Findings on outputs and outcomes should both be reported, but the focus should be on outcomes.

We encourage you to assess the following four levels of outcomes, as they relate to the program goals set out in the RFGP (listed here in increasing order of importance):

1. *Participant satisfaction* with the program and exchange experience.

2. *Participant learning*, such as increased knowledge, aptitude, skills, and changed understanding and attitude. Learning includes both substantive (subject-specific) learning and mutual understanding.

3. *Participant behavior*, concrete actions to apply knowledge in work or community; greater participation and responsibility in civic organizations; interpretation and explanation of experiences and new knowledge gained; continued contacts between participants, community members, and others.

4. *Institutional changes*, such as increased collaboration and partnerships, policy reforms, new programming, and organizational improvements.

Please note: Consideration should be given to the appropriate timing of data collection for each level of outcome. For example, satisfaction is usually captured as a short-term outcome, whereas behavior and institutional changes are normally considered longer-term outcomes.

Overall, the quality of your monitoring and evaluation plan will be judged on how well it (1) specifies intended outcomes; (2) gives clear descriptions of how each outcome will be measured; (3) identifies when particular outcomes will be measured; and (4) provides a clear description of the data collection strategies for each outcome (*i.e.*, surveys, interviews, or focus groups). (Please note that evaluation plans that deal only with the first level of outcomes [satisfaction] will be deemed less competitive under the present evaluation criteria.)

Grantees will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

IV.3d.4. Describe your plans for: sustainability, overall program management, staffing, and coordination with ECA/A/S/X, Fulbright Commissions, and partner organization in Beijing. ECA/A/S/X considers program management, staffing and coordination with the Department of State essential elements of the program. Please be sure to give sufficient attention to these elements in your proposal by providing a staffing plan that outlines the responsibilities of each staff person and explains which staff member will be accountable for each program responsibility. Wherever possible please streamline administrative processes. Please refer to the POGI in the Solicitation Package for specific guidelines.

IV.3e. Please take the following information into consideration when preparing your budget:

IV.3e.1. Applicants must submit a comprehensive budget for the entire program. The budget should not exceed $500,000 for program and administrative costs. There must be a summary budget as well as breakdowns reflecting both administrative and program budgets. Applicants may provide separate sub-budgets for each program component, phase, location, or activity to provide clarification.

IV.3f. Application Deadline and Methods of Submission:

Application Deadline Date: Friday, April 14, 2006.

Reference Number: ECA/A/S/X–06–04.

IV.3f.1. Applications may be submitted in one of two ways:

1. In hard-copy, via a nationally recognized overnight delivery service (i.e., DHL, Federal Express, UPS, Airborne Express, or U.S. Postal Service Express Overnight Mail, etc.), or

2. Electronically through *http://www.grants.gov.*

Along with the Project Title, all applicants must enter the above Reference Number in Box 11 on the SF–424 contained in the mandatory Proposal Submission Instructions (PSI) of the solicitation document.

IV.3f.2. *Submitting Printed Applications.* Applications must be shipped no later than the above deadline. Delivery services used by applicants must have in-place, centralized shipping identification and tracking systems that may be accessed via the Internet and delivery people who are identifiable by commonly recognized uniforms and delivery vehicles. Proposals shipped on or before the above deadline but received at ECA more than seven days after the deadline will be ineligible for further consideration under this competition. Proposals shipped after the established deadlines are ineligible for consideration under this competition. ECA will not notify you upon receipt of application. It is each applicant's responsibility to ensure that each package is marked with a legible tracking number and to monitor/confirm delivery to ECA via the Internet. Delivery of proposal packages may not be made via local courier service or in person for this competition. Faxed documents will not be accepted at any time. Only proposals submitted as stated above will be considered.

Important note: When preparing your submission please make sure to include one extra copy of the completed SF–424 form and

place it in an envelope addressed to ''ECA/EX/PM''.

The original and eight copies of the application should be sent to: U.S. Department of State, SA–44, Bureau of Educational and Cultural Affairs, Ref.: ECA/A/S/X–06–04 , Program Management, ECA/EX/PM, Room 534, 301 4th Street, SW., Washington, DC 20547.

Applicants submitting hard-copy applications must also submit the ''Executive Summary'' and ''Proposal Narrative'' sections of the proposal in text (.txt) format on a PC-formatted disk. The Bureau will provide these files electronically to the appropriate Public Affairs Sections at the U.S. embassies for their review.

IV.3f.2—*Submitting Electronic Applications.* Applicants have the option of submitting proposals electronically through Grants.gov (*http://www.grants.gov*). Complete solicitation packages are available at Grants.gov in the ''Find'' portion of the system. Please follow the instructions available in the 'Get Started' portion of the site (*http://www.grants.gov/GetStarted*).

Applicants have until midnight (12 a.m.) of the closing date to ensure that their entire application has been uploaded to the grants.gov site. Applications uploaded to the site after midnight of the application deadline date will be automatically rejected by the grants.gov system, and will be technically ineligible.

Applicants will receive confirmation e-mail from grants.gov upon the successful submission of an application. ECA will not notify you upon receipt of electronic applications.

V. Application Review Information

V.1. Review Process

The Bureau will review all proposals for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. The program office, as well as the Public Diplomacy section overseas, where appropriate will review all eligible proposals. Eligible proposals will be subject to compliance with Federal and Bureau regulations and guidelines and forwarded to Bureau grant panels for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other Department elements. Final funding decisions are at the discretion of the Department of State's Assistant Secretary for Educational and Cultural Affairs. Final technical authority for assistance awards (cooperative agreements) resides with the Bureau's Grants Officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

1. *Program Development and Management:* The proposal narrative should exhibit originality, substance, precision, and relevance to the Bureau's mission as well as the objectives of the Teachers of Critical Languages Program. It should include an effective program plan and demonstrate how the distribution of administrative resources will ensure adequate attention to program administration, including host institution selection.

2. *Multiplier effect/impact:* Proposed programs should strengthen long-term mutual understanding, including maximum sharing of information and establishment of long-term institutional and individual linkages.

3. *Support of Diversity:* Proposals should demonstrate substantive support of the Bureau's policy on diversity. Achievable and relevant features should be cited in both program administration (selection of participants, program venue and program evaluation) and program content (orientation and wrap-up sessions, program meetings, resource materials and follow-up activities).

4. *Institutional Capacity and Record:* Proposals should demonstrate an institutional record of successful exchange programs, including responsible fiscal management and full compliance with all reporting requirements for past Bureau grants as determined by Bureau Grants Staff. Proposed personnel and institutional resources should be adequate and appropriate to achieve the program's goals.

5. *Follow-on Activities:* Proposals should provide a plan for continued follow-on activity (both with and without Bureau support) ensuring that the Teachers of Critical Languages Program is not an isolated event. Activities should include tracking and maintaining updated lists of all alumni and facilitating follow-up activities for alumni.

6. *Project Evaluation:* Proposals should include a plan and methodology to evaluate the Teachers of Critical Languages Program's degree of success in meeting program objectives, both as the activities unfold, at the end of the one-year teaching assignment, and at the program's conclusion. Draft survey questionnaires or other techniques plus description of methodologies to use to link outcomes to original project objectives are recommended. Successful applicants will be expected to submit intermediate reports after each project component is concluded, or quarterly, whichever is less frequent.

7. *Cost-effectiveness and Cost Sharing:* The overhead and administrative components of the proposal, including salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate. Proposals should maximize cost sharing through other private sector support as well as institutional direct funding contributions.

VI. Award Administration Information

VI.1a. Award Notices

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures. Successful applicants will receive an Assistance Award Document (AAD) from the Bureau's Grants Office. The AAD and the original grant proposal with subsequent modifications (if applicable) shall be the only binding authorizing document between the recipient and the U.S. Government. The AAD will be signed by an authorized Grants Officer, and mailed to the recipient's responsible officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review from the ECA program office coordinating this competition.

VI.2. Administrative and National Policy Requirements

Terms and Conditions for the Administration of ECA agreements include the following:

Office of Management and Budget Circular A–122, ''Cost Principles for Nonprofit Organizations.''

Office of Management and Budget Circular A–21, ''Cost Principles for Educational Institutions.''

OMB Circular A–87, ''Cost Principles for State, Local and Indian Governments''.

OMB Circular No. A–110 (Revised), Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Nonprofit Organizations.

OMB Circular No. A–102, Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments.

OMB Circular No. A–133, Audits of States, Local Government, and Non-profit Organizations.

Please reference the following Web sites for additional information: *http://www.whitehouse.gov/omb/grants. http://exchanges.state.gov/education/grantsdiv/terms.htm#articleI.*

VI.3. Reporting Requirements

You must provide ECA with a hard copy original plus one copy of the following reports:

Quarterly financial reports; Annual program reports for the first and second year of the agreement; and final program and financial report no more than 90 days after the expiration of the award.

Grantees will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. (Please refer to Application and Submission Instructions (IV.3.d.3) above for Program Monitoring and Evaluation information.)

All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

All reports must be sent to the ECA Grants Officer and ECA Program Officer listed in the final assistance award document.

VII. Agency Contacts

For questions about this announcement, contact Catharine Cashner, Office of Global Educational Programs, ECA/A/S/X, Room 349, ECA/A/S/X–06–04, U.S. Department of State, SA–44, 301 4th Street, SW., Washington, DC 20547, telephone (202) 453–8880 and fax number (202) 453–8890, *CashnerCE@state.gov*.

All correspondence with the Bureau concerning this RFGP should reference the above title and number ECA/A/S/X–06–04.

Please read the complete **Federal Register** announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

VIII. Other Information

Notice

The terms and conditions published in this RFGP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFGP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements per section VI.3 above.

Dated: February 10, 2006.

C. Miller Crouch,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. E6–2233 Filed 2–15–06; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34822]

Kansas City Southern, The Kansas City Southern Railway Company, and Meridian Speedway LLC—Exemption for Transactions Within a Corporate Family

Kansas City Southern (KCS), The Kansas City Southern Railway Company (KCSR), and the newly formed Meridian Speedway LLC (MSLLC) have filed a verified notice of exemption under 49 CFR 1180.2(d)(3) for a transaction within a corporate family. The transaction involves the transfer to MSLLC of KCSR's rail line between Meridian, MS, and Shreveport, LA, KCS's continuance in control of MSLLC when it becomes a rail carrier, and the subsequent grant back of operating rights by MSLLC to KCSR to allow KCSR to operate as MSLLC's contract operator in fulfilling MSLLC's contractual and common carrier obligations.[1] This notice is related to two concurrently filed notices, STB Finance Docket Nos. 34821 and 34823, where Norfolk Southern Railway Company (NSR) and KCSR, respectively, have sought authority to acquire trackage rights over the line.

The parties had intended to consummate the transaction on the later of two dates, January 24, 2006, or upon completion of the environmental or historical documentation process as required under 49 CFR 1105.[2] However, by decision served on January 23, 2006, the effective date of the three exemptions was stayed, at the joint request of CN, NSR, KCS, KCSR, and MSLLC, until February 23, 2006. Accordingly, consummation of the transaction cannot occur until February 23, at the earliest.

This transaction and the transactions described in the two related notices of exemption are part of a joint-venture between KCS and NSR to share and upgrade this portion of the Meridian Speedway, a line running between Meridian, MS, and Dallas, TX.

This is a transaction within a corporate family of the type exempted from prior review and approval under 49 CFR 1180.2(d)(3). Based on the parties' description of the intracorporate transaction, it should not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family.

As a condition to the use of this exemption, any employees adversely affected by this transaction will be protected by the conditions set forth in *New York Dock Ry.—Control—Brooklyn Eastern Dist.,* 360 I.C.C. 60 (1979).

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34822 must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Robert B. Terry, Kansas City Southern, 427 West 12th Street, Kansas City, MO 64105; and William A. Mullins, Baker & Miller PLLC, 2401 Pennsylvania Ave., NW., Suite 300, Washington, DC 20037.

Board decisions and notices are available on our web site at *http://www.stb.dot.gov.*

Decided: February 10, 2006.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 06–1415 Filed 2–15–06; 8:45 am]

BILLING CODE 4915–01–P

[1] KCSR currently operates via trackage rights over approximately four-tenths of a mile section of track in Jackson, MS, that is controlled by Canadian National Railway Company (CN) as successor to Illinois Central Gulf Railroad Company (IC) pursuant to a trackage rights agreement dated March 26, 1986, between MidSouth Rail Corporation and IC (Jackson Trackage Rights Agreement). KCSR also currently operates over a railroad bridge over the Mississippi River at Vicksburg, MS, pursuant to a lease agreement between the Vicksburg Bridge and Terminal Company and The Yazoo and Mississippi Valley Railroad Company dated February 11, 1928, as amended and/or replaced from time to time (Vicksburg Bridge Lease). The transaction contemplates having both the Jackson Trackage Rights Agreement and the Vicksburg Bridge Lease assigned to MSLLC.

[2] KCSR and NSR, believing that the transaction will help increase traffic on the line, have contacted the Board's Section of Environmental Analysis concerning any necessary environmental review.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–290 (Sub-No. 237X)]

Norfolk Southern Railway Company—Abandonment Exemption—in Baltimore County, MD

Correction

In notice document 05–24626 beginning on page 168 in the issue of Tuesday, January 3, 2006, make the following correction:

On page 168, in the second column, under DEPARTMENT OF TRANSPORTATION, in the first paragraph, line 10 of the text, ''UU–12.8'' should read ''UU–13.8''.

Vernon A. Williams,

Secretary.

[FR Doc. 06–1416 Filed 2–15–06; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 5 Taxpayer Advocacy Panel (Including the States of Iowa, Kansas, Minnesota, Missouri, Nebraska, Oklahoma, and Texas)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Area 5 Taxpayer Advocacy Panel will be conducted. The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, March 14, 2006, at 9:30 a.m. Central Time.

FOR FURTHER INFORMATION CONTACT: Mary Ann Delzer at 1–888–912–1227, or (414) 297–1604.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Area 5 Taxpayer Advocacy Panel will be held Tuesday, March 14, 2006, at 9:30 a.m. Central Time via a telephone conference call. You can submit written comments to the panel by faxing to (414) 297–1623, or by mail to Taxpayer Advocacy Panel, Stop 1006MIL, 310 West Wisconsin Avenue, Milwaukee, WI 53203–2221, or you can contact us at *http://www.improveirs.org.* This meeting is not required to be open to the public, but because we are always interested in community input, we will accept public comments. Please contact Mary Ann Delzer at 1–888–912–1227 or (414) 297–1604 for additional information.

The agenda will include the following: Various IRS issues.

Dated: February 13, 2006.

Martha Curry,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E6–2258 Filed 2–15–06; 8:45 am]

BILLING CODE 4830–01–P

Federal Register

Thursday,
February 16, 2006

Part II

Environmental Protection Agency

40 CFR Part 63

National Emission Standards for Hazardous Air Pollutants: Plywood and Composite Wood Products; List of Hazardous Air Pollutants, Lesser Quantity Designations, Source Category List; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[OAR–2003–0048; FRL–8028–9]

RIN 2060–AN05

National Emission Standards for Hazardous Air Pollutants: Plywood and Composite Wood Products; List of Hazardous Air Pollutants, Lesser Quantity Designations, Source Category List

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule, amendments; notice of final action on reconsideration.

SUMMARY: On July 30, 2004, EPA promulgated national emission standards for hazardous air pollutants (NESHAP) for the plywood and composite wood products (PCWP) source category. The Administrator subsequently received a petition for reconsideration of certain provisions in the final rule. In addition, following promulgation, stakeholders expressed concern with some of the final rule requirements including definitions, the emissions testing procedures required for facilities demonstrating eligibility for the low-risk subcategory, stack height calculations to be used in low-risk subcategory eligibility demonstrations, and permitting and timing issues associated with the low-risk subcategory eligibility demonstrations. In two separate **Federal Register** notices published on July 29, 2005, we announced our reconsideration of certain aspects of the final rule, and we proposed amendments to the final rule. In the notice of reconsideration, we requested public comment on the approach used to establish and delist a low-risk subcategory of PCWP affected sources, as outlined in the final rule, and on an issue related to the final rule's startup, shutdown, and malfunction (SSM) provisions. In the proposed amendments notice, we proposed simplifying the requirements for the low-risk demonstrations (LRD) and allowing additional time for facilities to submit them. We also requested comment on whether to extend the MACT compliance date. We also clarified some common applicability questions. In this action, we are promulgating amendments to the PCWP NESHAP and providing our conclusions following the reconsideration process.

DATES: February 16, 2006. The incorporation by reference of one publication listed in this final action is approved by the Director of the Office of the Federal Register as of February 16, 2006.

ADDRESSES: *Docket.* The EPA has established a docket for this action under Docket ID No. OAR–2003–0048 and Legacy Docket ID No. A–98–44. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.*, confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket and Information Center is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: For information concerning applicability and rule determinations, contact your State or local representative or appropriate EPA Regional Office representative. For information concerning rule development, contact Ms. Mary Tom Kissell, Sector Policies and Program Division, (Mailcode: C439–03), EPA, Research Triangle Park, NC 27711; telephone number: (919) 541–4516; fax number: (919) 541–0246; e-mail address: *kissell.mary@epa.gov.*

SUPPLEMENTARY INFORMATION:

Regulated Entities

Categories and entities potentially affected by today's action include:

Category	SIC code [a]	NAICS code [b]	Examples of regulated entities
Industry	2421	321999	Sawmills with lumber kilns.
	2435	321211	Hardwood plywood and veneer plants.
	2436	321212	Softwood plywood and veneer plants.
	2493	321219	Reconstituted wood products plants (particleboard, medium density fiberboard, hardboard, fiberboard, and oriented strandboard plants).
	2439	321213	Structural wood members, not elsewhere classified (engineered wood products plants).

[a] Standard Industrial Classification.
[b] North American Industrial Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by today's action. To determine whether your facility is affected by today's action, you should examine the applicability criteria in § 63.2231 of the final rule. If you have questions regarding the applicability of today's action to a particular entity, consult Ms. Mary Tom Kissell listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Worldwide Web (WWW)

In addition to being available in the docket, an electronic copy of today's action also will be available on the Worldwide Web (WWW) through EPA's Technology Transfer Network (TTN). Following the Administrator's signature, a copy of this action will be posted on the TTN's policy and guidance page for newly promulgated rules at *http://www.epa.gov/ttn/oarpg.* The TTN provides information and technology exchange in various areas of air pollution control.

Judicial Review

Under section 307(b)(1) of the CAA, judicial review of the final rule amendments to the NESHAP is available by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by April 17, 2006. Under section 307(d)(7)(B) of the CAA, only those objections that were raised with reasonable specificity during the period for public comment may be raised during judicial review. Under section 307(b)(2) of the CAA, the requirements that are the subject of the

final rule amendments may not be challenged later in civil or criminal proceedings brought by EPA to enforce the requirements.

Outline

The information presented in this preamble is organized as follows:

I. Background
II. Comments and Responses on Low-risk Option
A. Legal Basis
B. Background Pollution and Co-located Emission Sources
C. Ecological Risk
D. The Dose-Response Value Used for Formaldehyde
E. Appendix B to 40 CFR Part 63 Subpart DDDD Requirements
F. Selection of Process Units and Emissions Determination Procedures in Table 2A to Appendix B to 40 CFR Part 63 Subpart DDDD
G. Emission Testing Requirements in Appendix B to 40 CFR Part 63 Subpart DDDD
H. Compliance Date for Existing Sources
I. Low-Risk Demonstration Submittal Dates for Existing Sources
J. Compliance Date for Affected Sources Previously Qualifying For the Low-Risk Subcategory
K. Low-Risk Demonstration Submittal Dates for New Sources
L. Legal Issues With Title V Implementation Mechanism
M. Timing of Title V Permit Revisions
N. Permit Conditions
O. Costs and Benefits of Establishing a Low-Risk Subcategory
III. Responses to Comments on the Proposed Amendments and Clarifications for Subpart DDDD
A. Definitions
B. Applicability of the PCWP Rule to Lumber Kilns Drying Utility Poles
C. Capture Efficiency Determination
D. Incorporation by Reference of NCASI Method ISS/FP-A105.01
IV. Responses to Comments on SSM Issues
V. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Congressional Review Act

I. Background

We proposed NESHAP for the PCWP source category on January 9, 2003 (68 FR 1276). The preamble for the proposed rule requested comment on how and whether we should incorporate risk-based approaches into the final rule to avoid imposition of regulatory controls on facilities that pose little risk to public health and the environment. Fifty-seven interested parties submitted comments on the proposed rule during the comment period. The final rule (subpart DDDD in 40 CFR part 63) was published on July 30, 2004 (69 FR 45944) after consideration of these comments. We adopted a risk-based approach in the final rule by establishing and delisting a low-risk subcategory of PCWP affected sources based on our authority under section 112(c)(1) and (9) of the Clean Air Act (CAA). Under this approach, PCWP affected sources may submit for EPA approval proposed demonstrations that they meet certain risk-based criteria and, therefore, are eligible to join the low-risk subcategory and avoid applicability of the PCWP NESHAP. The methodology and criteria for PCWP affected sources to use in demonstrating that they are part of the delisted low-risk subcategory were promulgated in appendix B to subpart DDDD of 40 CFR part 63. Sources whose LRD EPA approves then must seek permit revisions under title V of the CAA that incorporate their low-risk parameters as enforceable terms and conditions in order to ensure they remain low-risk and remain exempt from otherwise applicable PCWP NESHAP requirements.

Following promulgation of the final PCWP rule, the Administrator received a petition for reconsideration filed by the Natural Resources Defense Council (NRDC) and Environmental Integrity Project (EIP) pursuant to section 307(d)(7)(B) of the CAA.[1] The petition requested reconsideration of nine aspects of the final rule: (1) Risk assessment methodology, (2) background pollution and co-located emission sources, (3) dose-response value used for formaldehyde, (4) costs and benefits of the low-risk subcategory, (5) ecological risk, (6) legal basis for the risk-based approach, (7) maximum achievable control technology (MACT) compliance date for affected sources previously qualifying for the low-risk subcategory, (8) SSM provisions, and (9) title V implementation mechanism for the risk-based approach. The petitioners stated that reconsideration of the above issues is appropriate because they claimed that the issues could not have been practicably raised during the public comment period. The petition for reconsideration also requested a stay of the effectiveness of the risk-based provisions.

In a letter dated December 6, 2004, EPA granted NRDC's and EIP's petition for reconsideration and declined the petitioners' request that we take action to stay the effectiveness of the risk-based provisions. On July 29, 2005 (70 FR 44012), we published a notice of reconsideration to initiate rulemaking by requesting comments on the issues in the petition for reconsideration, including the full content of appendix B to subpart DDDD.

In a separate notice published on July 29, 2005 (70 FR 44012), we proposed amendments to subpart DDDD and both of the appendices to subpart DDDD. We proposed amendments to appendix B to subpart DDDD to reduce the number of emissions tests required while ensuring that emissions from all PCWP process units at the relevant source are considered when demonstrating eligibility for the low-risk subcategory. For emission points that would still require emission tests, we proposed that the emissions tests may be conducted after the LRD is submitted. We also proposed that physical changes necessary to achieve low-risk status may be completed after the LRD is submitted. We proposed to alter the way the stack height is calculated for a look-up table analysis and to clarify some timing issues related to LRD, including the deadline for submitting LRD. We also requested comment on whether the MACT compliance date should be extended for sources submitting LRD or for all sources. Furthermore, we proposed to amend subpart A to 40 CFR part 63, subpart DDDD of 40 CFR part 63, and appendix B to subpart DDDD to allow use of a new test method developed by the National Council of the Paper Industry for Air and Stream Improvement (NCASI) for measuring hazardous air pollutants (HAP).

For 40 CFR part 63, subpart DDDD, we proposed several changes to ensure that the rule is implemented as intended: (1) Amend the sampling location for coupled control devices, (2) amend language to clarify rule

[1] In addition to the petition for reconsideration, four petitions for judicial review of the final PCWP rule were filed with the U.S. Court of Appeals for the District of Columbia by NRDC and Sierra Club (No. 04–1323, D.C. Cir.), EIP (No. 04–1235, D.C. Cir.), Louisiana-Pacific Corporation (No. 04–1328, D.C. Cir.), and Norbord Incorporated (No. 04–1329, D.C. Cir.). The four cases have been consolidated. In addition, the following parties have filed as interveners: American Forest and Paper Association (AF&PA), Hood Industries, Scotch Plywood, Coastal Lumber Company, Composite Panel Association, APA-The Engineered Wood Association, American Furniture Manufacturers Association, NRDC, Sierra Club, and EIP. Finally, the Formaldehyde Council, Inc. and the State and Territorial Air Pollution Program Administrators and Association of Local Air Pollution Control Officials (STAPPA/ALAPCO) are participating in the litigation as amicus curiae.

applicability during unscheduled startups and shutdowns, (3) add language to clarify rule applicability for affected sources with no process units subject to compliance options or work practice requirements, and (4) amend selected definitions. A minor numbering error was proposed to be corrected in appendix A to 40 CFR part 63, subpart DDDD. We also clarified some common applicability questions, and we requested comments on whether to extend the deadline for compliance with the rule's requirements for all subject sources.

We received public comments from nine stakeholders on the reconsideration issues during the comment period. Although some commenters on the 2005 reconsideration referred to previous comments they submitted following the 2003 proposal, we have not included the previous comments in the summary presented here unless they are directly relevant to the reconsideration. However, the previous comments are included in the docket for this final rulemaking or the background information document (BID). Our responses to comments today are intended to respond to the comments specifically submitted on our proposed reconsideration notice and to any relevant incorporated comments. We received public comments from 12 stakeholders on the proposed amendments during the comment period. We received supporting comments only (or no comments) on a number of the proposed amendments, including the proposed amendment to the: (1) Sampling location for coupled control devices; (2) definitions of ''molded particleboard,'' ''plywood and composite wood products manufacturing facility,'' and ''plywood''; (3) requirements for affected sources with no process units subject to the compliance options or work practice requirements; (4) numbering of paragraphs referenced in 40 CFR 63.2269; (5) test methods for benzene; (6) criteria for assuming zero for Method 29 non-detect measurements; and (7) numbering of appendix A to 40 CFR part 63, subpart DDDD. We have promulgated these amendments as proposed based on the rationale provided in the proposed rule (70 FR 44012, July 29, 2005), and no further discussion of these amendments is presented here. We are also promulgating a revised compliance deadline for sources subject to the rule, which is one year later than the date originally promulgated. The new compliance deadline is October 1, 2008. Our rationale for this revision is contained in our responses below.

II. Comments and Responses on Low-risk Option

A. Legal Basis

Comment: Several commenters stated that there are numerous ways in which the risk-based exemptions contravene the language, structure, and history of the 1990 CAA amendments and EPA's past policies. The commenters noted that technology-based standards should precede risk-based standards, that creating a subcategory based on risk is illegal, that delaying the compliance date to allow the risk-based standards is contrary to the CAA, that not setting emission standards is generally not authorized, that considering sources in the low-risk subcategory when establishing MACT floors is not allowed by the CAA, and that the CAA does not authorize EPA to delist subcategories (versus categories) of sources of carcinogenic emissions.

Other commenters stated there is ample legal basis for establishing and delisting the low-risk PCWP subcategory and supported retaining the low-risk option.

Response: After considering the 2003 proposed PCWP NESHAP and the public comments submitted thereon, the 2004 final PCWP NESHAP, the petition for reconsideration of the final PCWP NESHAP, the 2005 notice of final PCWP NESHAP reconsideration and the comments submitted in response to that notice, EPA stands by the legal rationale for the PCWP low-risk approach explained in the 2004 final PCWP NESHAP (69 FR 45983–45991, July 30, 2004) and incorporates that rationale by reference.

Regarding the comments on the proposed reconsideration that raised new points or elaborated on points previously made, the explanation for why risk may be an appropriate criterion for distinguishing between sources in establishing source categories and subcategories has been clearly set forth in the general policy rationale for the final PCWP NESHAP and today's final action on reconsideration. CAA section 112(c)(9) shows that Congress intended that EPA be able, either in advance of or following the promulgation of emission standards under section 112, to remove source categories and subcategories from regulation under section 112 ''whenever'' relevant risk-based findings are made.

We disagree that the risk-based approach causes a delay in the compliance date for MACT in contravention of section 112(d)(1) and 112(i). This is because the PCWP sources that remain in the MACT category must meet emission standards by the promulgated MACT deadline, and any sources that wish to join the low-risk subcategory and avoid MACT at the compliance deadline must, on that date, either comply with MACT or have been approved as a member of the low-risk subcategory. While we have in today's final rule revised the MACT compliance deadline to fall one year later than was originally promulgated, this revision is not a result of the mere inclusion of the action we have taken under section 112(c)(9). Rather, it is a result of the significance of the changes we have made to the PCWP NESHAP overall, as well as changed expectations about the scope of MACT-subject and would-be low-risk sources who will need to obtain, install, and certify emissions controls. It is also true that a source that is low-risk and exempt from MACT at the compliance date may later undergo changes that subject it to MACT for the first time, and that the PCWP rule in some cases allows such a source to comply with MACT 3 years after it has lost its low-risk status. This is consistent, however, with how we treat area sources that change status to major sources and thereby join a MACT-regulated category for the first time.

We also disagree that once EPA lists a category or subcategory, it is absolutely required by section 112(c)(2) and 112(d)(1) to set emission standards for that category or subcategory. Section 112(c)(9) itself depends upon the identification of a ''category'' or ''subcategory'' as identifying the set of major sources that may be deleted from the list of sources to be regulated, and indeed by its terms assumes that the category or subcategory may be ''on the list'' (and possibly already regulated) before EPA determines that the risk-based criteria to justify its removal have been met.

As we previously explained in the 2004 final PCWP NESHAP, the approach we have taken for the low-risk PCWP subcategory is not the source-by-source granting of risk-based exemptions rejected by Congress in the 1990 CAA amendments. That approach would have allowed any source, in any source category, to seek an exemption from section 112 standards, without demonstrating that it qualified under previously established criteria to join an already existent delisted subcategory, and without subsequent compliance responsibilities such as having to incorporate its parameters reflecting low-risk eligibility into federally enforceable permit terms and

conditions. The PCWP approach, instead, operates more like the applicability determination process that a source uses to discover which set of multiple sets of applicable requirements under the CAA it must comply with. If a PCWP source is not low-risk, it must meet MACT; but if it meets the low-risk criteria, it must still meet specific, enforceable requirements that can be enforced through the title V permit to the same extent as otherwise applicable MACT standards. Our approach is not the same as the rejected ''de minimis'' exemption since sources must specifically show that they meet the statutory criteria of section 112(c)(9) that define the low-risk PCWP source category, criteria that are explicitly enumerated in the statutory language itself, rather than based on a legal doctrine allowing exemptions from statutory requirements notwithstanding the absence of express statutory language for such exemption.

We are surprised by the commenter's assertion that our MACT floors for non-low-risk PCWP sources may not be based, in part, on emissions limitation achieved by sources that subsequently show they are eligible for inclusion in the low-risk PCWP subcategory. When we develop MACT standards, we necessarily start at a step where we do not already know what the scope of the final standards' requirements will ultimately be. In identifying the MACT floors for new and existing sources under section 112(d)(2) and 112(d)(3), it is simply not possible to know with certainty exactly which sources will have to meet MACT requirements. In fact, it is always possible that any major source will change its emissions or operations prior to the compliance date such that it is no longer major and, therefore, not subject to the final standards. In the case of PCWP, our approach presumes that nearly all sources are in the MACT category at the outset and that sources may join the non-MACT subcategory over time, but it would be impossible at the MACT floor determination stage to estimate the ultimate population of low-risk sources, just as it is impossible to estimate the number of major sources that may become ''area'' sources before the MACT compliance dates. In both cases, it would not be administratively feasible—nor is it legally required—to adjust the MACT floor determination over time as the MACT category population changes. There is no indication in the CAA that such an approach, especially to the extent it excluded better-performing sources from floor determinations and thereby weakened technology-based standards, would be consistent with Congress's overall purpose in basing section 112(d) standards on the emissions levels achieved in practice by the best-performing sources.

Regarding the issue of whether EPA may delist only ''categories'' of sources that emit carcinogens, but not ''subcategories,'' EPA agrees with the commenters that suggest there is functionally no difference between the two terms, and that it is unnecessary to resolve the debate over whether Congress committed a ''scrivener's error'' raised by other commenters. In section 112(c), Congress provides EPA with broad discretion in not only defining the criteria to be used to identify individual categories and subcategories, but in deciding when one group of sources might constitute a ''category'' versus a ''subcategory,'' there is literally no statutory definition of either term, and the use of one over the other to define a group of sources is merely a semantic distinction with no legal difference.

Regarding the commenter's objections to EPA's discussion regarding congressional intent related to our authority to establish and delist source categories and subcategories, we conclude that it is not necessary, or even possible, to resolve the debate over what Congress may or may not have silently intended, given the clear statutory language in section 112(c)(1) and 112(c)(9). The plain language of section 112(c)(1) explicitly states that nothing in that subsection ''* * * limits the Administrator's authority to establish subcategories under this section, as appropriate[,] * * *'' and given that Congress created express authority to delist categories and subcategories under section 112(c)(9) when the specified risk-based criteria are satisfied, it is clearly appropriate for EPA to establish categories and subcategories in a way that best enables the use of the authority provided by section 112(c)(9) when the agency identifies source groups that demonstrate they present no risks above the enumerated criteria. Any other interpretation of the statutory language would unnecessarily restrict the broad discretion that the CAA provides for this purpose. We, therefore, agree with the commenters who stated that section 112, especially when taken as a whole, provides ample authority for EPA's risk-based approach in the 2004 final PCWP NESHAP.

Comment: Two commenters stated that section 112(d) of the CAA clearly establishes a two-step process for addressing HAP emissions through the MACT and residual risk provisions and that the risk-based exemptions contained in the PCWP MACT are contrary to the CAA.

One commenter stated that risk-based exemptions are contrary to the concept of the ''level-playing field'' that should result from the proper implementation of technology-based MACT standards. The commenter also noted that the National Air Toxics Assessment (NATA) information shows the need for a nationwide technology-based approach and indicates that HAP exposure is very high throughout the entire country in both densely populated urban areas and remote rural locations.

Response: We disagree that inclusion of a low-risk subcategory in the final PCWP rule is contrary to the 1990 CAA Amendments. The PCWP MACT are technology-based standards developed using the procedures dictated by section 112 of the CAA. The only difference between the final PCWP rule and other MACT rules is that we used our discretion under CAA section 112(c)(1) and 112(c)(9) to subcategorize and delist low-risk affected sources, in addition to fulfilling our duties under CAA section 112(d) to set MACT. It is clear from the statutory language that, once EPA has listed a source category under section 112(c)(1), it is then faced with the decision whether to regulate the source category under section 112(d) or to delist it under section 112(c)(9). In light of the authority provided by section 112(c)(9), it is unreasonable to assert that once a category is listed it must in all cases be regulated under section 112(d)(1), since the result of a delisting under section 112(c)(9) is that the source category is exempt from section 112 regulation. Moreover, nothing in the statutory language suggests that this authority to implement section 112(c)(9) is limited by what effect such action may have on competition within a specific industry. Rather, section 112(c)(9) of the CAA requires that categories or subcategories meet specific risk criteria in order to be delisted, and to determine this, risk analyses may be used. We disagree with the commenter that we must wait for implementation of CAA section 112(f) before utilizing risk analysis in this manner, since nothing in section 112(c)(9) suggests that its authority may not be used until after application of technology-based standards under section 112(d). The 2004 final PCWP NESHAP are particularly well-suited for a risk-based option because of the specific HAP that are emitted by PCWP sources. For many affected sources, the HAP are emitted in amounts that pose little risk to the surrounding population. However, the cost of controlling these HAP is high

and may not be justified by environmental benefits for these low-risk affected sources. Only those PCWP affected sources that demonstrate that they are low-risk are eligible for inclusion in the delisted low-risk subcategory. The criteria included in the 2004 final PCWP NESHAP, as amended by today's final rulemaking, defining the delisted low-risk subcategory are based on sufficient information to develop health-protective estimates of risk and will protect human health and the environment.

We agree that one of the primary goals of developing a uniform national air toxics program under CAA section 112 of the 1990 CAA amendments is to establish a ''level playing field,'' where appropriate. We do not agree, however, that this goal limits our broader authority under section 112(c)(1) and (9), and we do not feel that defining a low-risk subcategory in the PCWP NESHAP does anything to remove the level playing field for PCWP facilities. The PCWP NESHAP and its criteria for demonstrating eligibility for the delisted low-risk subcategory apply uniformly to all PCWP facilities across the nation. The PCWP NESHAP establishes a baseline level of emission reduction or a baseline level of risk (for the low-risk subcategory). All PCWP affected sources are subject to these same baseline levels, and all facilities have the same opportunity to demonstrate that they are part of the delisted low-risk subcategory. Therefore, concerns regarding facilities moving to areas of the country with air toxics programs that are less-stringent than today's PCWP NESHAP should be alleviated.

Although NATA may show measurable concentrations of toxic air pollution across the country, these data do not suggest that PCWP facilities that do not contribute to the high exposures and risk should be included in MACT regulations, notwithstanding our authority under CAA section 112(c)(9). Our decisions regarding whether a source has demonstrated its eligibility for inclusion in the low-risk delisted subcategory will be based on whether the risks from that particular source, as proven by its specific facts, are within our pre-established criteria that are based on the statutory levels defining when a source category or subcategory may be delisted.

B. Background Pollution and Co-Located Emission Sources

Comment: One commenter stated that many of the HAP emitted from PCWP facilities are found ubiquitously in U.S. ambient air and, therefore, a risk assessment methodology that ignores background pollution (including co-located sources) underprotects. The commenter noted that the 2003 proposal notice recognized that simply ensuring that the risks caused by PCWP sources themselves were below a hazard index (HI) of one (without accounting for other sources of exposure) would be underprotective. However, in the final PCWP NESHAP, EPA decided to use an HI of 1.0, but did not require sources to account for background pollution or emissions from co-located sources, thus failing to ensure that sources are truly low-risk. Two other commenters noted that the final PCWP NESHAP limits the analysis of risk to the impact of selected emissions units, but the major-source status of a source is based on facilitywide emissions.

Other commenters argued that EPA correctly refrained from considering risks from background ambient HAP concentrations and from co-located sources. One commenter also noted that EPA selected a very conservative HI of 1.0, which builds in a margin of safety in the event that exposure to background sources of HAP increases the risk to public health. Therefore, EPA has in a way accounted for background and co-located source emissions in formulating the low-risk subcategory. The commenter added that CAA section 112(d) and 112(c)(9) address source categories established pursuant to CAA section 112(c)(1) without regard to background or co-located sources outside the source category.

Another commenter added that CAA section 112(c)(9)(B) delisting criteria pertaining to both threshold and non-threshold HAP are focused solely on exposures attributed to the affected source in question. The commenter believes the statutory criterion in CAA section 112(c)(9)(B)(i) is clearly defined (one in a million cancer risk) and is to be evaluated solely with reference to the emissions from affected sources, not background concentrations. The commenter believes that ''ample margin of safety'' delisting criterion for threshold HAP in CAA section 112(c)(9)(B)(ii) is more than adequately achieved by the combined conservatism of the dose/response assessment (inherent in the derivation of the reference concentration (RfC) or other inhalation benchmark) and the exposure assessment (inherent in the dispersion modeling methodology and the assumption of continuous exposure to the maximum average annual emissions for the duration of a lifetime).

Response: We do not believe that it is necessary or appropriate to consider background HAP concentrations or HAP emissions from co-located sources in implementing our authority to delist the low-risk PCWP subcategory. After reviewing the comments and reconsidering the relevant sections of the CAA, we agree with the commenters who argued that section 112(c)(9) decisions may be based on risk assessments that focus on the emissions from the affected source and are not required to consider co-located source emissions or background concentrations. The residual risk program may consider, as appropriate, risks from co-located source emissions and risks from total emissions from a particular location. This approach is reiterated in the recently finalized Coke Oven Batteries Residual Risk rule 70 FR 19991 (April 15, 2005), where we said we will only consider emissions from the regulated source category when determining acceptable risk during the first step of the residual risk analysis. However, during the second step, where we determine the ample margin of safety considering costs and technical feasibility (70 FR 19997–98), we may consider co-located sources and background levels where appropriate. Additionally, the national strategy for area sources will address emissions from multiple sources in urban areas.

Comment: One commenter contended that the authors of the MACT and delisting provisions at issue made clear that they intended all co-located sources of HAP to be included when EPA made risk-based decisions. The commenter provided examples of legislative history of the 1990 CAA amendments which the commenter believes explains Congressional intent in crafting section 112(c)(9).

Another commenter contended that Congress intended EPA to focus only on the source in question, and provided examples from the legislative history of CAA section 112(d)(4), which according to the commenter is an analogous provision. The commenter argued that Congress was clear when it intended for EPA to consider background concentrations and contributions from all sources. The commenter provided examples from the CAA and judicial precedent.

Response: While we believe that under section 112(f) we may consider, as appropriate, co-located source and background emissions when conducting residual risk reviews, after reviewing the comments and the different statutory language in section 112(c)(9), we do not believe it is necessary or appropriate to consider emissions except those from the affected source category or subcategory at issue. This is because the specific language of section 112(c)(9), compared to that in section

112(f), indicates that the focus of a delisting action should be on the risks presented by the emissions from the affected source category or subcategory itself, rather than from other sources.

The criteria for a delisting decision regarding a source category that emits carcinogens are discussed in section 112(c)(9)(B)(i) in a way that suggests EPA is to start its analysis by first identifying the sources ''in'' (i.e., the process units that make up the affected source) the source category, and determine whether HAP ''emitted by'' such affected sources ''in'' the category exceed quantities that cause a lifetime cancer risk greater than one-in-one million to the individual who is most exposed to emissions of ''such pollutants from the source[.]'' This focus on emissions from sources that are actually within the source category as being the scope of HAP concentrations that must not exceed the enumerated cancer risk benchmark would be frustrated by an analysis that imports HAP emissions from other sources not in the source category, or that includes background HAP concentrations that may not be attributable to any source at all.

Similarly, section 112(c)(9)(B)(ii) provides that for non-carcinogen HAP, EPA is to assess whether emissions ''from no source in the category or subcategory'' exceed a level adequate to protect public health and whether emissions ''from any source'' in the subject category or subcategory will cause an adverse environmental effect. Again, the statutory language focuses on the emissions that are attributable to sources within the source category or subcategory under review, and does not direct EPA to extend its analysis to either emissions from other sources in other categories or subcategories or to non-attributable background concentrations.

Contrast this with the language of section 112(f)(2)(A), which, initially, directs EPA to determine whether further risk-based standards are required in order to provide an ample margin of safety to protect public health to prevent an adverse environmental effect, without specific reference as in section 112(c)(9)(B)(i) and (ii) to the emissions from sources within the source category in question. This difference alone suggests that EPA may take a broader look in assessing risks under section 112(f) than is required under section 112(c)(9). Moreover, in establishing the trigger for when EPA is required to adopt residual risk standards, section 112(f)(2)(A) focuses on the lifetime excess cancer risk to the individual most exposed to emissions from sources in the subject category or subcategory, but does not, like in section 112(c)(9)(B)(i), clearly indicate that the excess cancer risk is to be that caused only from the emissions from the sources within the subject source category. Rather, under the language of section 112(f)(2), EPA may consider the cancer risk experienced by the most exposed individual, whatever the source or sources of that risk may be, and then regulate if the subject source category contributes to that risk. A similar analysis applies to section 112(f)(2)(A)'s directive to assess whether further standards are necessary to prevent an adverse environmental effect, which, unlike the language in section 112(c)(9)(B)(ii), does not specifically state that such effect must be caused by emissions from the sources in the subject source category. Finally, the language in section 112(f)(2)(A) that establishes the threshold of protection residual risk standards must achieve also does not explicitly limit EPA's authority to focusing only on the emissions from the affected sources in the subject category.

Therefore, while both section 112(f)(2) and 112(c)(9) use the phrase ''ample margin of safety'' to define the triggers for action and/or the benchmark that must be met in action, the differences in additional contextual language in the two subsections makes it reasonable to interpret section 112(c)(9) as allowing a more narrowly focused risk assessment for source category and subcategory delistings than the agency has stated it intends to pursue in residual risk, in which we have asserted the ability to evaluate ''other relevant factors'' beyond those presented by the affected source (70 FR 19998).

Comment: One commenter stated that if the final PCWP rule incorporates risk-based exemptions, sources included in the low-risk subcategory should not be exempted from consideration during the residual risk process. Other commenters argued that EPA does not have authority to consider facilitywide or background emissions in residual risk determinations.

Response: We disagree that we do not have the authority to include the entire facility in our residual risk analyses. In the preamble to the coke ovens residual risk rule, we reiterated our discretion to include, as appropriate, emissions from outside the source category during the ample margin of safety determination. The emissions evaluated during this ample margin of safety determination can include those from PCWP sources that are part of the low-risk subcategory.

C. Ecological Risk

Comment: Two commenters stated that the risk-based exemptions in the PCWP rule do not address ecological risks that may result from uncontrolled HAP emissions. One of the commenters believes that EPA's ecological assessment for the final rule is fundamentally inadequate. The commenter believes EPA failed to meet the legal requirement in the CAA in several obvious ways: (1) The assessment focused on just a few HAP and thus ignored potential environmental impacts from other emissions; (2) by evaluating a single location, the assessment ignored potential site-specific environmental receptors and locally affected species; and (3) the consideration of only persistent and bioaccumulative HAP would not capture potential acute effects on the environment.

To the contrary, one commenter believes that EPA properly evaluated ecological risks. The commenter referred to their study of ecological risks which the commenter believes concurs with EPA's findings that no potential adverse risk to ecological resources is likely based on the available data.

Response: To determine whether low-risk PCWP sources are likely to cause adverse environmental effects due to HAP emissions, EPA performed a screening assessment of ecological risks from these sources. The ecological assessment focused on HAP that are emitted by PCWP facilities and that have the potential to persist in the environment and bioaccumulate. The list of persistent and bioaccumulative HAP (PB HAP) is described in EPA's Air Toxics Risk Assessment (ATRA) Reference Library (*http://www.epa.gov/ttn/fera/risk_atra_main.html*). We did not evaluate inhalation risks of non-PB HAP to ecological receptors explicitly. Rather, we assert that the acute and chronic dose-response values for human inhalation exposure, which will be used by PCWP facilities to demonstrate their low-risk status, are protective of inhalation exposures that may be experienced by many terrestrial animals. Human dose-response values are derived from studies that consider human data and data from laboratory animals. With the addition of uncertainty factors, the final dose-response values are generally substantially lower than the level observed to cause an adverse effect in exposed animals. Therefore, if the maximum inhalation hazard to humans, which is the major basis for the LRD, is below the level of concern, we do not expect adverse effects on environmental

receptors due to inhalation exposures. For the HAP that must be included in PCWP LRD, and for which ecological inhalation toxicity values are readily available, the human inhalation dose-response values are protective for inhalation exposures to ecological receptors when a hazard quotient or HI of 1.0 is used. For the details of this comparison see the memo titled, ''Comparison of ecological inhalation toxicity values to human health inhalation toxicity values for HAP that must be considered in Low-Risk Demonstrations (LRDs) from sources in the Plywood and Composite Wood Products (PCWP) source category''.

For the assessment of persistent or bioaccumulating HAP, we made several ecosystem-protective assumptions. We derived estimated worst-case media concentrations by assuming the maximum air concentrations and the maximum deposition rates occurred at the same location, although this is often not the case. We examined six locations representing diverse meteorological conditions, and for the final assessment, we used the location providing the highest predicted HAP concentrations. We used the most conservative ecological screening values readily available, which may overestimate the potential for toxicity to site-specific populations and communities. Finally, we assumed 100 percent bioavailability of the HAP, although site-specific bioavailability is often much less. The results of our ecological assessment demonstrate that for all pollutants assessed, and for all pathways assessed, the ecological hazard quotient values are less than 1. The highest hazard quotient is 0.043, or more than 20 times below a level of potential concern. Given this result, and the ecosystem-protective nature of the assessment scenario, we do not believe that HAP emitted from PCWP facilities will harm local ecosystems. Therefore, we conclude that HAP emissions from any source that demonstrates eligibility to join the low-risk PCWP subcategory will not cause an adverse environmental effect.

D. The Dose-Response Value Used for Formaldehyde

Comment: One commenter noted that in proposing the risk-based exemption idea, EPA indicated that it would use unit risk estimates (UREs) from EPA's Integrated Risk Information System (IRIS) to calculate whether or not a given source is low-risk. However, in the final rule, EPA relied on a much lower value derived by the CIIT Centers for Health Research (CIIT)(previously the Chemical Industry Institute of Toxicology) using a model that estimated the carcinogenic effects of formaldehyde on the respiratory system.

Several commenters recommended that EPA continue to use the IRIS potency factor for formaldehyde until EPA has completed its thorough review process (including public review) and updated IRIS. The commenters stated that adopting a factor that has not undergone the full IRIS review process jeopardizes public health. The commenters recommended that EPA accelerate completion of the IRIS review.

To the contrary, one commenter believes that EPA properly evaluated the carcinogenicity of formaldehyde by abandoning the outdated and scientifically inaccurate IRIS value and instead relying on evidence that has received broad acceptance in the international scientific community. The commenter also believes that IRIS is far from definitive, as EPA resource constraints have resulted in many chemical summaries that are significantly outdated. The commenter contended that EPA management has repeatedly emphasized that EPA is required to consider other information, in addition to the IRIS database, when evaluating the health effects of chemicals in a regulatory context.

Response: We agree with the first commenters that we should use the best available sources of health effects information for risk or hazard determinations. As we have stated previously, we do not rely exclusively on IRIS values. Rather, we consider all credible and readily available assessments.[2] For air toxics risk assessments, we identify pertinent toxicity or dose-response values using a default hierarchy of sources, with IRIS being the preferred source, to assist us in identifying the most scientifically appropriate benchmarks for our analyses and decisions. The IRIS process contains a peer-review process, and the resulting values represent EPA consensus. When adequate toxicity information is not available in IRIS, we consult other sources in a default hierarchy that recognizes the desirability of review and consistency with EPA risk assessment guidelines. This process ensures that we have consistent and scientifically sound assessments. Furthermore, where the IRIS assessment is relatively dated and newer peer-reviewed assessments are available, we will consider the full set of such assessments in selecting the basis for the risk assessment. In the case of formaldehyde, we have determined that the cancer potency derived using the approach developed by CIIT, which has been peer reviewed by an external review panel sponsored by EPA and the Canadian government, represents an appropriate alternative to EPA's current IRIS URE for formaldehyde. Therefore, this potency represents the best available peer-reviewed science at this time. We also agree with the last commenter that the issue of changing health-based guideline values is a general challenge in setting health-based regulations. However, we are committed to setting such regulations that reflect current scientific understanding, to the extent feasible. If dose-response values change, PCWP sources in the low-risk subcategory must ensure that they continue to meet the low-risk requirements in appendix B to subpart DDDD using the revised values. If PCWP sources no longer meet those low-risk criteria due to a change in a peer-reviewed dose-response value selected by the Agency for those assessments, that source must comply with the technology standards of the PCWP MACT. Facilities conducting LRD should refer to appendix B to subpart DDDD of 40 CFR part 63 for guidance on choosing appropriate dose-response values.

Comment: Several commenters submitted in-depth comments relating to the CIIT report and carcinogenicity of formaldehyde. Some commenters argued that the CIIT model for carcinogenic potency of formaldehyde is limited in a number of ways, and needs further validation and peer review. The commenters described recent epidemiological studies that reportedly link formaldehyde exposure to leukemia. Other commenters believe that EPA correctly evaluated the formaldehyde cancer potency value for the final rule and stated that the CIIT risk assessment is the best available science. The commenters disagreed that the availability of new scientific studies justifies use of the outdated IRIS value and argued that the new studies are flawed.

Response: As mentioned above, we are committed to using the best-available science for our risk assessments. In situations where the IRIS assessment lags behind current scientific knowledge and newer peer-reviewed assessments are available, we will consider the full set of such assessments in selecting the basis for the risk assessment. These alternatives need to be grounded in publicly-available,

[2] U.S. Environmental Protection Agency. 1999. *Residual Risk Report to Congress*. Office of Air Quality Planning and Standards, Research Triangle Park, NC 27711, March 1999, EPA–453/R–99–001; available at *http://www.epa.gov/ttn/oarpg/t3/meta/m8690.html*. (EPA 1999)

peer-reviewed information. In the case of formaldehyde, we have determined that the cancer potency derived using the approach developed by CIIT and peer-reviewed by an independent expert peer review panel sponsored by EPA and the Canadian government represents an appropriate alternative to EPA's current IRIS URE for formaldehyde, and is therefore the best-available peer-reviewed science at this time. However, we note that a comprehensive reassessment of cancer risk has been initiated for IRIS. This reassessment will include modeling analyses and endpoints (e.g., lymphohematopoietic cancer) not considered in the CIIT assessment. We expect the IRIS reassessment to be completed in 2007. The revised IRIS assessment will represent the best-available peer-reviewed science at the time of its completion and we will require LRD to use the revised URE that results from the reassessment process.

E. Appendix B to 40 CFR Part 63 Subpart DDDD Requirements

1. Average Stack Heights

Comment: One commenter stated that the promulgated risk assessment methodology allows a source to use average stack heights, which decreases the accuracy of the risk assessment and may significantly understate the risks from any given source. The commenter stated that EPA's proposal to incorporate a weighted stack height for the look-up tables only exacerbates the problem. The commenter predicted that sources will only use the weighted stack height when it is to their advantage.

Other commenters stated that the values in the look-up tables and the use of average stack heights are not health protective under worst-case conditions. The commenters stated that dispersion is a non-linear function and it is impossible to try and simplify the effects of a stack. For example, the impact of a 40-foot stack is not one half the impact of a 20-foot stack. In fact, depending on the building heights and the distance to the receptor, the impact of the taller stack could be similar to the shorter one.

One commenter disagreed that use of average stack heights where there are multiple emissions points may significantly understate risks. The commenter pointed out that the LRD requires sources to use the shortest distance to the property boundary, coupled with the average stack height. The commenter believes that use of the shortest distance to the property boundary would more than compensate for any underestimates in exposure in any unlikely instances where lower emitting sources have the taller stacks.

Two commenters supported EPA's proposal to replace the average stack height calculation for the look-up tables in appendix B to subpart DDDD with a separately computed toxicity-weighted stack height corresponding to each of the three health effects. One commenter noted that the large majority of emissions from wood products facilities occur through relatively tall stacks. However, wood products facilities also have many very low-emitting emission points that are quite close to the ground. As promulgated, the rule requires these low-emitting near-ground emission points to be averaged with the higher-emitting stack emission points to develop an average stack height that understates actual stack heights. Therefore, the promulgated approach results in an overly conservative estimation of actual stack height which, coupled with the conservative assumption of using the shortest distance to the property boundary and the other elements of conservatism built into the look-up tables, goes beyond what is needed to protect human health with an ample margin of safety. The commenter stated that the proposed toxicity-weighted stack height approach addresses this issue in a reasonable and appropriate manner.

Another commenter agreed, arguing that assuming all emissions occur at the location of the stack with the minimum distance to the property boundary is unnecessarily conservative. The commenter recommended that an appropriate average property boundary distance be calculated using the same toxicity-weighted averaging procedure suggested for stack height.

Response: We agree that the average stack height is not the best metric for characterizing risks in a look-up table analysis. Appendix B to subpart DDDD now requires the calculation of a toxicity and emissions-weighted stack height for the look-up table analysis. Using this approach, the emission points with the highest toxicity-weighted emission rate will contribute the most to the stack height calculation while the emission points with the lowest toxicity-weighted emission rate will contribute the least. Thus, the weighted stack height metric provides a more accurate characterization of a source's emissions characteristics and it addresses commenters' concerns about under-predicting risks for sources with most emissions coming from the shortest stacks. Further, using this more precise method does not undercut our reliance on other health-protective assumptions in the look-up table analysis when most of the emissions come from taller stacks.

Use of weighted stack height is not optional, but is required for facilities performing the look-up table analysis in their LRD. We proposed to replace the average stack height calculation with the weighted stack height calculation.

Contrary to one commenter's statement, we do not assume dispersion to be linear with stack height. Rather, the allowable emission rates in the look-up tables are based on actual dispersion model runs using the stack heights given in the table. Additionally, we agree that collapsing across multiple stacks to generate a single weighted stack height will not result in the exact same model output as if each stack is modeled separately. However, use of the weighted stack height is a simplifying step that is not expected to be consistently more or less health-protective than modeling each stack separately. Because the look-up table analysis is designed to be simple and because several inputs to the tables bias them toward overestimating risks for most sources, using a weighted stack height is appropriate in this context. We agree with the commenter that, in cases where stacks are located on top of buildings, building height can impact dispersion and risk. Therefore, appendix B requires that when sources determine their stack heights, they must use the height of the stack above the ground. Therefore, if a stack is located on top of a building, that building height is incorporated into the stack height value. We also agree with the commenter that receptor location impacts risks. A look-up table analysis inherently incorporates health-protective assumptions regarding receptor location. The allowable emission rates in the look-up tables are based on the maximum predicted offsite pollutant concentrations, regardless of whether that site is populated. Additionally, sources must use the shortest distance between an emission point and the property boundary when conducting a look-up table analysis. Therefore, sources using the look-up tables must assume that all HAP emissions are coming from the emission point closest to their property boundary, that people live at the location of maximum predicted pollutant concentration, and that they remain at that location for a lifetime. This approach is more health-protective than if actual facility configuration and/or the location of actual populations were to be considered.

We also disagree with changing the minimum distance to property boundary. We recognize that using the

minimum distance to property boundary may overestimate the ambient concentration and exposure. However, the lookup table analysis is meant to be health-protective and using the minimum distance to property boundary helps ensure that this is the case.

2. HAP With No Health Benchmarks

Comment: One commenter stated that the promulgated risk assessment methodology fails to account for all HAP emitted by PCWP sources, omitting some HAP like propionaldehyde, one of the ''predominant'' HAP emitted by PCWP sources. The commenter noted that EPA's methodology would assign a zero cancer risk to any HAP for which EPA has yet to estimate such a value, even if such HAP may well be carcinogenic.

One commenter stated that six HAP (acrolein, acetaldehyde, formaldehyde, methanol, phenol, and propionaldehyde) make up 96 percent of the emissions from wood products facilities. The only one of these chemicals lacking a health benchmark is propionaldehyde. The commenter stated that EPA could extrapolate a propionaldehyde health benchmark from occupational exposure limits. Even using the resulting health benchmark, the commenter's analysis has demonstrated that propionaldehyde makes no meaningful contribution to individual source risk.

The commenter noted that EPA conducted a preliminary analysis of the risks associated with PCWP facilities which narrowed the substances considered to eight HAP, suggesting that the other HAP either were not emitted from these facilities or were emitted in such low levels as to not be meaningful contributors to risks in the source category. The commenter referred to a sensitivity analysis they commissioned and stated that the available data indicate that pollutants without health benchmarks do not have the potential to influence risk results for wood products industry. Accordingly, the commenter believes that EPA was justified in not requiring sources to consider the potential risks of pollutants emitted by wood products facilities that do not have health benchmarks.

The commenter disagreed that EPA has acted arbitrarily in assuming zero cancer risk for HAP for which it has yet to estimate such a value. The commenter noted that the petitioners want EPA to assume that all chemicals for which EPA has not set a cancer potency value are carcinogenic. The commenter believes the petitioners' approach would prevent EPA or any regulatory agency from ever making any realistic or meaningful evaluation of potential risks (in any context) and would merely serve to confuse (and scare) the public by suggesting that sources pose cancer risks when in fact they do not.

Response: We are committed to using the best science available for our risk assessments. To maintain this standard, we are using the default hierarchy of sources for cancer and non-cancer dose-response values that was originally developed for EPA's National-Scale Air Toxics Assessment (*http://www.epa.gov/ttn/atw/nata/natsa4.html*). When developing this hierarchy, we considered conceptual consistency with EPA risk assessment guidelines and the level of review incorporated into the dose-response values from each source. The EPA's IRIS process is the preferred source of dose-response values. When IRIS values are not available, we consider the alternative sources in our hierarchy. Additionally, in cases where the IRIS value lags behind the scientific literature, we are committed to considering alternative, credible dose-response values. Currently, we do not have an IRIS file for propionaldehyde, and an assessment is not available from the alternative sources in our hierarchy. However, appendix B to subpart DDDD requires sources to update their risk assessments if parameters, including dose-response values, change in a way that could increase risks. Therefore, if an acceptable cancer potency or non-cancer reference value for propionaldehyde becomes available, we will consider whether this HAP should be included in risk assessments for PCWP sources. One commenter suggested that we use a modified occupational exposure limit for propionaldehyde. In the past we have modified toxicity values developed for other purposes so that they can be used for inhalation assessments that support non-regulatory, screening applications. However, because in the present case the modified exposure limit would be used to make regulatory decisions, such a dose conversion is inappropriate, particularly in the absence of scientific peer-review.

We agree that it is appropriate to limit the number of HAP that must be included in PCWP affected source LRD to only those HAP that may possibly result in meaningful contributions to the affected source risk. However, we are not limiting the HAP included in the LRD to the six HAP defined as total HAP in subpart DDDD of 40 CFR part 63 (acrolein, acetaldehyde, formaldehyde, methanol, phenol, and propionaldehyde). We identified the most prevalent HAP based on mass emitted for purposes of developing MACT compliance options because MACT is technology-based (i.e., the same technology that reduces emissions of the six HAP also reduces emissions of other organic HAP). The six HAP defined as total HAP in subpart DDDD of 40 CFR part 63 are the HAP that are most often emitted in detectable amounts from the most PCWP process units, and these HAP make up 96 percent of the mass of nationwide HAP emissions from the PCWP industry. However, the risks associated with emissions of HAP are dependent on the mass emitted and the relative toxicity of each HAP. Thus, the HAP emitted in the greatest mass may not result in the most risk because the HAP may not be as potent as other HAP emitted in lower mass. For example, methanol is the HAP emitted from the PCWP industry in the greatest mass, but because methanol is not as toxic as other HAP emitted (e.g., formaldehyde, certain HAP metals), it does not result in as much risk as do other HAP.

The commenter is correct in that our preliminary risk analysis conducted prior to proposal of the PCWP rule narrowed the list of HAP emitted from PCWP affected sources. We acknowledge receipt of the commenter's sensitivity analysis based on the data used in our pre-proposal risk analysis. Following proposal, we conducted a more detailed risk analysis to evaluate the merits of including a low-risk subcategory in the final PCWP rule. This memo is available in the docket and is titled, Risk Assessment for the Final Maximum Achievable Control Technology (MACT) Rule for the Plywood and Composite Wood Products (PCWP) Source Category. This post-proposal analysis considered emissions of more than 30 HAP emitted from the PCWP source category. Many of these HAP are only emitted in minute amounts that have been detected from a small number of PCWP process units. Nevertheless, we included them in our risk analysis to determine their contribution to PCWP affected source risk. We reviewed the toxicity values for each HAP and the mass of each emitted from PCWP affected sources to determine if it would be appropriate to narrow the list of HAP that PCWP affected sources must consider in their LRD. Based on our review, we determined that 95 percent of the cancer risk at PCWP affected sources is accounted for by the following HAP: acetaldehyde, benzene, arsenic, beryllium, cadmium, hexavalent

chromium, lead, nickel subsulfide, and formaldehyde. We also determined that 95 percent of the non-cancer risk at PCWP affected sources is accounted for by the following HAP: acetaldehyde, acrolein, formaldehyde, phenol, MDI, arsenic, cadmium, and manganese. We feel that inclusion of these HAP in a demonstration of eligibility of the low-risk PCWP subcategory is appropriate. Limiting the list of HAP that must be included in the LRD to 13 HAP minimizes emissions testing costs, while ensuring that the HAP that drive the risk at PCWP affected sources are accounted for on a site-specific basis.

3. Topography and Weather Patterns

Comment: One commenter stated that EPA's methodology treats all PCWP plants as though their local topography and climate are identical and that factors like prevailing winds are ignored. The commenter believes the risk assessment methodology should account for topography since different topographical features may exacerbate HAP exposures. The commenter stated that PCWP plants are located at widely varying altitudes and attached a chart.

One commenter stated that the modeling behind the development of the look-up table should consider downwash. Another commenter stated that facilities in areas with complex terrain should not be allowed to use the look-up tables because the assumptions used to develop the look-up table could not possibly account for this scenario. The commenter expressed concern that the look-up tables do not account for the common use of rain caps and for the likely event of building downwash.

One commenter disagreed that EPA's look-up tables fail to account for topography and weather patterns. To the contrary, the commenter noted that EPA made conservative assumptions (e.g., minimum fence line distance, worst-case meteorology, safety factors built into RfCs and UREs, and the assumption that plumes from all sources directly overlap), such that the look-up tables would be more likely to overestimate (rather than underestimate) actual risk. One commenter stated that it is unlikely that consideration of terrain will substantially affect the screening risk emission levels, given that most PCWP facilities are located in areas characterized by flat or gently rolling terrain.

Response: We disagree that we have not considered site-specific differences between sources in the methodology of appendix B to subpart DDDD. If sources conduct site-specific risk assessments, they should either use site-specific data, including for meteorological and topographical information, or they should use health-protective defaults. For look-up table analyses, we have made a number of health-protective assumptions, including worst-case meteorological conditions. Therefore, even though the look-up tables treat all sources as if they have the same meteorology, that default meteorology should result in higher predicted risks than actual site-specific meteorology.

However, we do not agree that the protective measures inherent in the look-up tables justify their use in all cases. As several commenters identified, we recognize that site-specific factors such as building downwash, the presence of rain caps, and complex terrain were not accounted for in the SCREEN3 dispersion modeling used to create the look-up tables. In situations where these factors can have a significant impact on the risks presented by a source, we agree that use of the look-up tables is not appropriate. Where we determine, during the risk assessment review process, that the look-up tables are inappropriate, sources would be required to demonstrate eligibility using a site-specific risk assessment. If a source is unable to make this demonstration, the source must then comply with the technology standards in the MACT.

4. Children's Health Risk

Comment: One commenter stated that EPA's risk assessment methodology does not adequately account for the sensitivities of children to environmental stressors because the methodology relies on pre-existing cancer potency estimates which are deficient with respect to early-life exposures.

However, another commenter believes that EPA's cancer potency factors are amply conservative to protect against potential childhood cancer risk. The commenter stated that the unit risk factor (URF) is specifically based on worst-case assumptions (i.e., linear multistage model for calculating the URF and through the assumption that a person will be continuously exposed for a lifetime).

Response: The EPA has issued revised Guidelines for Carcinogen Risk Assessment (Guidelines) and also Supplemental Guidance for Assessing Susceptibility from Early-Life Exposure to Carcinogens (Supplemental Guidance) which deal specifically with assessing the potential added susceptibility from early-life exposure to carcinogens. The Supplemental Guidance provides an approach for adjusting risk estimates to incorporate the potential for increased risk due to early-life exposures to chemicals that are concluded to be carcinogenic by a mutagenic mode of action. For these chemicals, the supplemental guidance indicates that, in lieu of chemical-specific data on which age or life-stage specific risk estimates or potencies can be based, default age-dependent adjustment factors can be applied when assessing cancer risk for early-life exposures. As EPA's hazard and dose-response assessments are updated under the new Guidelines and Supplemental Guidance, they will include consideration of the available information with regard to mode of action and the potential for this determination. Thus, when estimating cancer risks for the purposes of this regulation, the current HAP-specific assessments must be consulted to obtain both the current inhalation unit risk values and the determination as to mode of action. Where EPA's assessment has determined that the chemical is carcinogenic by a mutagenic mode of action, it is recommended that the risk assessment developed for the purposes of this regulation employ applicable life-stage specific potencies or age dependent adjustment factors per the Supplemental Guidance when early life exposure is expected to occur.

5. Distance to Nearest Residence

Comment: Commenters noted that the risk calculation depends upon the distance any given source is to the nearest residence, ignoring the possibility that there may be exposed people closer to the facility, such as a school, day care center, or neighboring business. One commenter stated that the most exposed individual is likely to be a person who actually works at the PCWP facility as opposed to a person beyond the facility fence line.

One commenter believes EPA should revise the risk screening to use the distance to the property line instead of the distance to the nearest resident. The commenter believes that both the look-up tables and the site-specific screening should use the property boundary or the point of maximum impact for the LRD.

A separate commenter disagreed that EPA should have required the site-specific assessments to evaluate continuous lifetime exposure at the nearest receptor (as opposed to the nearest residence), whether it be a school, shopping mall or church. The commenter noted that the promulgated PCWP rule allows risks to be computed at residential locations with the highest modeled risk for site-specific assessments. The commenter believes this is appropriate because EPA requires sources to assume the worst-case

exposure scenario (i.e., continuous, lifetime exposure for 70 years). The commenter noted that people would not spend 24-hours per day, 365 days per year for 70 years at a school, shopping mall or church. Although this exposure scenario is equally implausible for residences, the commenter thinks that residential locations are a more appropriate choice.

The commenter noted that the rule does not explicitly address the receptors that should be applied for the acute exposure assessments (which are required independently for acrolein and formaldehyde). The commenter requested that the rule clearly state that for acute exposures, the proper reference is to the property boundary rather than to the nearest residence.

Response: In exercising our authority under section 112(c)(9), we do not think it is appropriate to base our determinations on risks presented at the PCWP facility due to occupational exposures, since such risks are not caused by emissions of HAP into the ambient air (i.e., since they are on the plant site, they are not beyond the plant fence line and are therefore not into the ambient air). However, we do agree that risks to individuals at other locations surrounding the source could potentially exceed risks to individuals at nearby residences. Therefore, we have modified appendix B to subpart DDDD to indicate that, in addition to residences, risk assessments should include consideration of other locations such as schools and day care facilities. We note that, as we described in EPA's ATRA Reference Library, sources can deviate from default exposure assumptions if they can provide adequate justification for the deviation. Such deviation is appropriate where exposure duration is limited in terms of hours per day, days per week, and/or total number of years.

Look-up table assessments must use distance to property boundary, not distance to nearest residence. This requirement, which uses the point of maximum impact outside the property boundary, adds to the health-protection provided by look-up tables. We agree with the commenter that this is the preferred approach for the look-up table analyses. However, we disagree that site-specific risk assessments should be limited to the property boundary. If a site-specific risk assessment uses nearest residences for their risk calculations, and if new residences are constructed in an area of higher risk, sources must re-assess their risks to ensure they continue to meet the criteria in appendix B to subpart DDDD. If they no longer meet these criteria (e.g. because someone moved closer to their facility), then the source is no longer eligible for the low-risk subcategory. Such a source must then comply with the technology standards in the PCWP MACT.

We agree that acute assessments should use the point of maximum impact outside the facility's property boundary. This requirement is stated explicitly in appendix B to subpart DDDD.

6. Criteria Included in Site-Specific Risk Demonstrations

Comment: One commenter stated that EPA gives sources the ability to make source-specific demonstrations with a number of open-ended criteria. For instance, the commenter noted that appendix B to subpart DDDD allows any scientifically accepted peer-reviewed assessment methodology for site-specific risk assessment, and instructs sources to use health-protective default assumptions wherever site-specific data are not available. Thus, the commenter believes the facility owner has extreme control over how to assess its risks, and EPA provides few bounds on its discretion to approve such assessments as sufficiently scientifically accepted or health protective. Another commenter believes that the rule does not require that the risk assessment methodology be approved by any regulatory agency as scientifically acceptable or applicable.

One commenter stated that the approach included in the final rule is consistent with general risk assessment methodologies, including recommendations from the National Academy of Sciences Science and Judgment in Risk Assessment (1994) and has been standard EPA practice for over a decade. The commenter noted that EPA specifies its preference that sources conduct their site-specific risk assessments in accordance with the ATRA Reference Library (Volume 2) should facilities not pass the initial look-up table screening analysis. Sources also have the option of using alternative modeling methodologies provided they have undergone scientific peer review. The commenter believes that this does not, in turn, give sources unfettered freedom, but does recognize that new modeling approaches may be developed in the future.

Response: We continue to believe that providing sources with the discretion to use any ''scientifically-accepted, peer-reviewed risk assessment methodology'' (e.g., see EPA's ATRA Reference Library) is appropriate. However, contrary to the assertions of some commenters, this discretion is not unlimited. Section 7 of appendix B to subpart DDDD presents specific minimum criteria for site-specific low risk assessments. In order to demonstrate eligibility for the low-risk subcategory, the site-specific risk assessment conducted by the facility must meet the following criteria: (1) Estimate long-term inhalation exposures through an estimation of annual or multi-year average ambient concentrations; (2) estimate acute exposures for formaldehyde and acrolein maximum 1-hour average ambient concentrations; (3) estimate the inhalation exposure of the individual most exposed to source emissions; (4) estimate individual risks over a 70-year lifetime for the chronic cancer risk assessment; (5) use site-specific quality-assured data wherever possible; (6) use health-protective default assumptions wherever site-specific data are not available; and (7) contain adequate documentation of the data and methods used so that it is transparent and reproducible. The ATRA Reference Library provides examples of how a risk assessment can be conducted. These examples include instruction in basic risk assessment methodology, in determining what parameters to include in a risk assessment, and in the constraints that should be placed on those parameters. The documents within the ATRA Reference Library have been peer-reviewed and were developed according to the principles, tools and methods outlined in the 1999 EPA Report to Congress. However, the guidance in the ATRA Reference Library may not be appropriate for all sources. For that reason we believe that it is important for sources to be able to consider alternative analytical tools as long as those alternatives are scientifically defensible, peer-reviewed and transparent per the criteria listed above. Additionally, we disagree with the commenter that the risk assessment methodology will not be approved by a regulatory agency. The EPA will be responsible for reviewing all PCWP risk assessments, and part of that review will include ensuring that an appropriate assessment methodology is used. The EPA may disapprove any risk assessment that fails to meet the criteria of appendix B to subpart DDDD.

F. Selection of Process Units and Emissions Determination Procedures in Table 2A to Appendix B to 40 CFR Part 63 Subpart DDDD

1. Use of Emission Factors and Other Emission Estimation Procedures

Comment: Two commenters addressed EPA's proposed amendment to allow facilities to use emissions

factors in LRD for certain process units rather than conduct emissions tests. One commenter strongly supported both EPA's decision to simplify the calculation of emissions used in the risk assessments and the concept of using default emission values for relatively low emitting and/or hard-to-test process units because many of the process units included in table 2A to appendix B to subpart DDDD cannot be tested without research-level effort. Another commenter disagreed with the proposal to allow facilities to demonstrate compliance with the requirements of the low-risk subcategory using emissions factors and emissions estimates instead of conducting emissions tests. The commenter noted that EPA's own publications, including AP–42 and reports by the Office of the Inspector General, state that the use of emission factors for compliance purposes is inappropriate. According to the commenter, this proposal does not satisfy the section 112(c)(9)(B) requirement that EPA determine that all sources in a category emit HAP at levels below identified risk thresholds prior to exempting the category from applicable MACT standards. In addition, the approach does not fulfill EPA's commitment to require ''enhanced monitoring'' from all sources subject to a section 112 MACT standard.

Response: Appendix B to subpart DDDD provides methodology and criteria for sources to demonstrate whether they are part of the delisted low-risk subcategory. Sources that are part of the delisted low-risk subcategory are not part of the PCWP source category. Therefore, in developing the emission factors in table 2A to appendix B to subpart DDDD, we used the maximum available emission rate, as opposed to the average emission rate, to ensure that emission estimates used for LRD are health protective and reasonably account for the uncertainty associated with using emission factors.

Because the LRD are to be based on the cumulative risk from all process units within each PCWP affected source, we are requiring that each process unit be considered in the LRD. In developing table 2A to appendix B to subpart DDDD, we considered the feasibility of emissions testing for each type of PCWP process unit and chose to allow emission factors to be used for selected hard-to-test process units. We believe that most of the process units for which we would allow emissions estimates in lieu of testing are minor contributors to the total HAP emissions relevant to the LRD. Because sources may use only the most health-protective emission factors for only hard-to-test process units, we do not believe risk assessments will be less health protective with the inclusion of emission factors.

Affected sources that are not part of the low-risk subcategory must comply with the MACT requirements in subpart DDDD, and subpart DDDD contains compliance monitoring requirements for all the process units with control or work practice requirements under subpart DDDD. Sources that demonstrate eligibility to join the delisted low-risk PCWP subcategory, instead, are not subject to the section 112 MACT standard. Therefore, the PCWP rule follows through with the commitment to require all sources subject to section 112 MACT standards to conduct ''enhanced monitoring.''

Comment: Two commenters addressed the use of maximum emission factors and the use of statistically-derived emission factors in table 2A to appendix B to subpart DDDD. One commenter disagreed that EPA should use statistically-derived emission factors because, in many cases, there are insufficient data available to perform a statistical analysis. The commenter stated that where there is sufficient data, applying a statistical approach would not result in significantly different values from those already provided in table 2A to appendix B to subpart DDDD. The other commenter disagreed with EPA's use of maximum emission factors for hard-to-test process units. The commenter stated that some of the factors are so high that some sources will be forced to attempt to find ways to test the hard-to-test process units. The commenter suggested the EPA either multiply all emission factors by 0.75 (or some other constant) or study the data for each factor and statistically select a lower factor that is still conservative and guards public health but enables sources to avoid costly and unproductive testing.

Response: We proposed to include in appendix B to subpart DDDD the maximum emission factors available for each type of process unit because we believe use of maximum emission factors builds conservatism into the emissions estimates to help account for unit-to-unit variability and ensures protection of human health. However, in the preamble to the proposed amendments, we requested comment on using other statistical approaches. We received only one comment in favor of using a statistical approach, and the commenter did not provide any basis for assuming that emissions from untested PCWP process units are 75 percent of the emissions from the highest-emitting process units for which we have data. We recognize that some of the emission factors presented in table 2A to appendix B to subpart DDDD are quite conservative, that emission testing costs can be significant, and that some process units cannot easily be configured for emission testing. However, we disagree that use of the maximum emission factors is unnecessarily burdensome to small plants and companies because becoming part of the low-risk subcategory is only one option under subpart DDDD, and it is an option provided to reduce the burden on PCWP facilities that do not pose a significant risk to human health or the environment.

2. Blenders, Sanders, and Saws

Comment: One commenter disagreed that emissions testing is ''not feasible'' for several process units, including blenders, sanders, and saws. These sources are usually controlled by baghouses, which are normally required to be tested for particulate matter (PM). Because HAP emissions from these units can be high, the commenter recommended that actual test data be used rather than emission factors.

Response: We disagree that we should require testing of blenders, sanders, or saws. Methanol is the predominant HAP emitted from blenders. Methanol can also be emitted from sanders and saws. Methanol is not a HAP of concern for purposes of the LRD. Our emission estimates indicate that the appendix B HAP emissions from blenders, sanders, and saws contribute to, but are not likely to drive the risk determination for a PCWP facility because the emissions of these same HAP from dryers and presses exceed those from blenders, sanders, and saws.

Furthermore, based upon the information available to us, we disagree that most blenders, sanders, and saws are controlled by baghouses and that PM emission testing is normally required for these process units. We maintain that very few blenders, sanders, and saws are already configured for emissions testing. We also believe that we have struck an appropriate balance between the process units that must be tested and the process units for which maximum emission factor estimates will suffice for purposes of the LRD. As a result, we are not requiring emissions testing of blenders, sanders, and saws in today's final amendments.

Comment: One commenter suggested converting the acetaldehyde value for finishing sanders from 0.0028 lb/MSF ⅜″ to a lb/MSF surface area basis to be consistent with the other sander values.

Response: As requested, we have recalculated the finishing sander acetaldehyde emission factor based on

the production rate in terms of MSF/hr, and have included the revised factor (0.0031 lb/MSF) in table 2A to appendix B to subpart DDDD.

3. Emission Estimates for Lumber Kilns and Small-Scale Kiln Testing

Comment: One commenter supported small-scale lumber kiln testing. The commenter stated that full-scale lumber kilns are difficult to test because they are leaky and have highly variable exhaust rates, and most small-scale kilns do not have exhaust variability or fugitive emission issues. The commenter also noted that there is literature comparing results from small-scale kiln tests to the emissions from full-scale lumber kilns. The commenter stated that if certain conditions and guidelines are followed, the small-scale kiln tests can provide good estimates of emissions from lumber drying. The commenter suggested changes to the list of considerations for a small-scale kiln emissions testing program that was suggested by NCASI and placed in the docket prior to proposal of the amendments.

Response: We recognize the difficulties with testing full-scale lumber kilns due to their variable exhaust flow rates, and we agree that measurement of small-scale kiln emissions can provide data representative of full-scale kiln emissions provided that certain conditions are met. We have reviewed the commenter's suggestions for the consideration list, and we have used the list (with revisions) as the basis for the new appendix C to subpart DDDD of 40 CFR part 63. Facilities that do not want to use the emission factors in table 2A to appendix B to subpart DDDD may conduct small-scale kiln tests taking into account the considerations described in appendix C to subpart DDDD. Small-scale kiln tests that do not address these considerations may be rejected during our review of the LRD. The considerations described in appendix C to subpart DDDD apply only for small-scale lumber kiln emissions testing conducted to provide data for the LRD described under appendix B to subpart DDDD. Permitting authorities may require different procedures for testing or estimating lumber kiln emissions for purposes other than the LRD.

Comment: One commenter requested that EPA reevaluate the lumber kiln emission factors in table 2A to appendix B to subpart DDDD. According to the commenter, emission factors found in NCASI Technical Bulletin 845 are based on the most credible data, and using those factors generally results in much lower emissions than the values selected for table 2A to appendix B to subpart DDDD in the proposed amendments. The commenter expressed concern that using the values in the proposed amendments may lead to facilities being improperly classified as major sources of HAP.

Response: The emission factors presented in the proposed amendments to appendix B to subpart DDDD are not intended to be used for major source determinations. Facilities that are not major sources of HAP emissions are not subject to subpart DDDD, and the LRD procedures are therefore irrelevant for those sources. The emission factors in appendix B to subpart DDDD are intended to be health protective and are intended only for use by facilities choosing not to test their lumber kilns for purposes of the PCWP LRD. As stated previously, facilities that feel the emission factors presented in table 2A to appendix B to subpart DDDD would over-estimate lumber kiln emissions for purposes of the LRD have the option of supplying facility-specific test data for their lumber kilns. States may require data to be obtained for major source determination using methods other than those described in appendix B to subpart DDDD.

4. Wastewater Emission Estimates

Comment: One commenter stated that table 2A to appendix B to subpart DDDD should not require modeling of MDI emissions from wastewater and process water. The commenter stated that MDI hydrolyzes immediately upon contact with water, polymerizing into to an inert polyurea, so any wastewater from these operations cannot contain MDI.

Response: The commenter's assertion reflects the findings presented by the American Chemistry Council (ACC) Diisocyanates Panel in their petition to remove MDI from the list of HAP under section 112(b) of the CAA. Based upon the findings described in the petition, we agree that it is appropriate to change the entry in table 2A to appendix B to subpart DDDD to ''NA'' for wastewater/process water operations. However, our action with respect to table 2A to appendix B to subpart DDDD does not necessarily reflect our conclusions with regard to the petition to delist MDI, which we are still reviewing at this time.

5. Emission Estimates for Tanks

Comment: One commenter stated that the current wording of the definition of ''resin storage tank'' includes all resin additives, even caustic and acid. Neither caustic nor acid contain formaldehyde, phenol, or MDI, so emissions of the HAP of concern would not be expected. Additionally, the commenter stated that vessels holding powdered resin should not be considered resin storage tanks. The commenter suggested a revision of the definition of ''resin storage tank.'' The commenter also requested that EPA add a footnote to table 2A to appendix B to subpart DDDD to indicate that estimating emissions for tanks that do not contain formaldehyde, phenol, or MDI is not required.

Response: As proposed, table 2A to appendix B to subpart DDDD specifies default emission rates for tanks with resin containing a specific HAP or modeling using TANKS software. It was not our intent to require TANKS modeling of formaldehyde, phenol, or MDI for tanks holding resins without these HAP, but we realize that the language in the proposed table 2A to appendix B to subpart DDDD could be misinterpreted in this way. For the final amendments, we have revised the language in table 2A to appendix B to subpart DDDD to specify that emissions of a specific HAP need only be estimated if the tank holds a resin containing that HAP, regardless of whether the estimate is obtained using an emission factor or modeling. We also agree that it is not necessary to model emissions from powdered resin storage vessels, so we have amended the definition of ''resin storage tank'' to include only liquid resins and additives.

Comment: One commenter stated that the emission factors included in table 2A to appendix B to subpart DDDD for resin storage tanks are grossly over-estimated and the alternative techniques suggested by the table are limited and overly simplified. In addition, the commenter stated that there can be a significant difference between average (long-term) and maximum hourly (short-term) emissions. The emission factors should be reduced by a factor of at least 50 for short-term estimates and 100 for long-term. The commenter provided sample calculations to support reducing the emissions factors.

Response: We are aware that the default emission rates contained in proposed table 2A to appendix B to subpart DDDD for resin storage tanks are health protective. These emission rates represent the highest emission rate reported for any single tank in the MACT survey responses. Understanding the limitations of the default emission rates, we also provided modeling using EPA's TANKS software as an option for facilities who wish not to use the conservative default emission rates. To alleviate concerns about these emission rates, we have reevaluated the default emission rates for formaldehyde and

phenol. Because of the limited applicability of the emission rates provided in the MACT survey results, we used other conservative information from the MACT survey as inputs to the TANKS model to generate emission estimates. We arrived at default emission rates of 0.001 pounds per hour (lb/hr) formaldehyde and 0.0002 lb/hr phenol.

Section 7(b)(1) of appendix B to subpart DDDD requires estimation of annual average ambient concentrations for the chronic part of a site-specific risk assessment, and § (7)(b)(2) requires estimation of maximum short-term (hourly) emissions of formaldehyde and acrolein for purposes of estimating acute risk. One way to account for both acute and chronic exposures is to assume the worst-case for all emissions inputs to the risk model used to complete the acute and chronic portions of the analysis. Although some facilities may choose to use different emissions inputs in their site-specific LRD for the chronic and acute portions of the assessment, we disagree with the commenter that it is necessary for us to provide separate resin storage tank default emissions rates for average (long-term) and maximum hourly (short-term) emissions.

Comment: One commenter stated that table 2A to appendix B to subpart DDDD should identify specific techniques for estimating emissions from open-top tanks separately from techniques used to estimate emissions from closed-top tanks. These types of tanks are often used for mixing water and other additives into the resin. The commenter provided an equation for estimating these emissions from the 2002 EPA Risk Management Plan (RMP) Offsite Consequence Analysis Guidance (Appendix D).

Response: Several different approaches may be used to estimate emissions from open-top tanks, including, for example, the 2002 EPA RMP Offsite Consequence Analysis Guidance (Appendix D) noted by the commenter. A similar approach is documented in Chapter 8, section 4.4 of an Emission Inventory Improvement Program (EIIP) document entitled ''Methods of Estimating Air Emissions from Paint, Ink, and Other Coating Manufacturing Facilities.'' In addition, WATER9 or the approach outlined in forms VII and VIII of appendix C to 40 CFR part 63 (and described further with respect to the PCWP industry in a supporting memorandum) could be used to estimate emissions from open-top tanks. Rather than dictating specific methods to be used to develop estimates of open-top tank emissions, we have amended table 2A to appendix B to subpart DDDD to distinguish between open and closed resin storage tanks and added a row to state that engineering estimates must be developed for open resin storage tanks if they hold resin with any formaldehyde, phenol, or MDI content.

6. Insignificant Activities

Comment: One commenter stated that the phrase ''may emit'' included in the description of ancillary process units is elusive and could include emissions of any amount of HAP, no matter how small. The commenter requested that lists of insignificant and trivial activities be included in appendix B to subpart DDDD to streamline the process of preparing LRD. The commenter noted that the title V program allows emission units with insignificant or trivial emissions to be specified, but no emission estimates or permit limits are required. The commenter (and other commenters) provided suggested lists of insignificant and trivial emission units. Alternatively, the commenter suggested that the final amendments could explicitly allow a facility to list all the insignificant emission units in the PCWP source category at the facility and make a blanket ''engineering estimate'' evaluation that they are insignificant and their emissions are presumed to be zero. The commenter noted that if EPA disagrees with the facility's designation of an emission unit as an insignificant emission unit during its review of low-risk determination, then it can notify the facility that additional justification of its engineering estimate is needed for that emissions unit.

Response: The amended rule does not include lists of insignificant or trivial activities for several reasons which are documented in the BID for the final amendments. Instead, we have adopted the commenter's alternative suggestion. Each facility completing a LRD may include a site-specific list of insignificant activities for which the facility may make an engineering estimate of presumably zero appendix B emissions. The facility must provide rationale to document placement of each process unit or activity on the list (e.g., the unit does not process HAP-containing materials; no heat is applied; there is no mechanism for appendix B HAP formation, etc.). We will evaluate each facility's list of insignificant activities when reviewing the LRD. Any data that support the placement of a certain activity on the insignificant activities list should be included with the facility's LRD. Only process units and activities within the PCWP affected source should be included in this list.

Comment: One commenter noted that EPA did not include a definition of ''ancillary processes'' in the rule and suggested a possible definition.

Response: We agree that a definition of ''ancillary processes'' is needed since the term is used in table 2A of appendix B to subpart DDDD, and we have defined the term in section 15 of appendix B to subpart DDDD based on the definition suggested by the commenter (with necessary edits).

7. Other Specific Comments on Table 2A to Appendix B to Subpart DDDD

Comment: One commenter requested that a footnote be added to the formaldehyde emission factor for particleboard and medium density fiberboard (MDF) blending and forming operations in table 2A to appendix B to subpart DDDD. The footnote should state that the factor applies only to facilities using formaldehyde-based resins. Formaldehyde emissions from facilities that use 100% non-formaldehyde resins or adhesives (such as MDI) should be designated ''NA.''

Response: We agree with the commenter that it is appropriate to clarify that estimation of formaldehyde emissions from particleboard and MDF blending and forming operations is only necessary for those facilities that use resin containing formaldehyde. We have amended the final rule to include such a footnote.

Comment: One commenter supported excluding metals testing for process units firing only natural gas or propane and stated that footnote b of table 2A to appendix B to subpart DDDD should be revised to clarify that no emissions estimates are required for direct-fired process units firing natural gas or propane.

Response: We agree with the commenter's suggested change to the footnote b of table 2A to appendix B to subpart DDDD and we have amended the footnote as requested.

G. Emission Testing Requirements in Appendix B to 40 CFR Part 63 Subpart DDDD

1. Testing of Multiple Identical Dryers

Comment: One commenter supported the proposed amendment giving facilities the ability to use emissions test data from one unit for modeling of similar process units. The commenter stated that the proposed amendment will help industry better manage emissions testing costs and testing resources while ensuring data quality. Another commenter stated that EPA should consider age as a factor when determining whether units are similar.

As proposed, the amendment would inappropriately allow newer and cleaner-operating equipment to be tested in place of older, more run down equipment without any loss of emissions estimating accuracy.

Response: As a result of the second comment, we reviewed available data to see if any correlations with age of the process units are apparent. We concluded that we do not have the emissions test data spanning decades necessary to confirm or refute the commenter's assertion that age of the process unit is a crucial consideration. We generally agree that process units that are considerably older could be expected to have greater emissions than newer process units of the same design, particularly if the older process units have not been well maintained. Therefore, we have included age of the process unit as a consideration when applying test data from one unit to another similar unit at a plant site to be conservative. However, we wish to clarify that we consider distinctions in the age of the process unit, for purposes of the PCWP LRD, to be many years (e.g., 5 to 10 years) since our data do not show increased emissions as process units age over a few years.

Comment: One commenter suggested that EPA allow facilities to test one of multiple stacks or vents when the gases in those vents have been collected from the same process unit, originate from the same duct or vent, and are not expected to differ in gaseous pollutant concentration. The commenter clarified that this procedure should not be allowed unless the emissions have been collected and then subsequently divided (e.g., the procedure would be inappropriate for multiple vents above a wood products press).

Response: We agree with the commenter that applying results from one stack test to the emissions from multiple stacks is acceptable for purposes of the LRD when the gases in those stacks or vents have been collected into a single duct and subsequently divided and are not expected to differ in gaseous pollutant concentration. We also agree with the commenter that testing one of multiple process unit openings or vents, such as the vents above a wood products press, should not be allowed because the concentration from such vents could differ. We have added a paragraph to section 5 of appendix B to subpart DDDD to incorporate this suggestion.

2. Use of Previous Emission Tests

Comment: One commenter supported the proposed amendment to allow facilities to use previous emissions test data for the purposes of LRD. The commenter stated that the proposed amendment will help industry better manage emissions testing costs and testing resources while ensuring data quality. However, the commenter stated that rather than limiting the use of previously determined emission factors to those units that operate at the same conditions as during the emission test, EPA should require the subject units to be operated in a manner that would result in lower emissions. Another commenter stated that EPA should consider age as a factor when determining whether units are similar. As proposed, the amendment would inappropriately allow newer and cleaner-operating equipment to be tested in place of older, more run down equipment without any loss of emissions estimating accuracy.

Response: We agree with the first commenter that it is not often possible for a process unit to be operated under the exact same conditions as during a previous performance test. It was not our intention for this provision to be interpreted quite so literally. We have revised section 5(i)(3) in appendix B to subpart DDDD to state that the subject process units must be operated in a manner that would be expected to result in the same or lower emissions than observed during the previous emissions test and that the process units must not have been modified such that emissions would be expected to exceed the results from the previous emissions test.

Regarding the second comment, we discussed the effects of process unit age in a previous response. We are limiting previous data submitted for purposes of the LRD to emissions test data gathered in 1997 or later. We picked 1997 as the cutoff date because we recognize that a great deal of HAP emissions data was gathered for PCWP process units during that year, and we do not believe that this data is obsolete at this time provided the other conditions of section 5(i) of appendix B to subpart DDDD are met.

3. Fuel Analysis To Determine HAP Metals Emissions

Comment: Two commenters supported EPA's suggestion of using fuel analyses to estimate HAP metal emissions for direct-fired process units. One of these commenters stated that EPA should allow PCWP facilities to use procedures similar to those in subpart DDDDD, the Industrial, Commercial, and Institutional Boilers and Process Heaters NESHAP (Boilers/Process Heaters rule). This option would lower testing cost yet provide a maximally conservative value that would be protective of public health.

Response: We have decided to adopt a fuel analysis procedure similar to the procedure described in the Boilers/Process Heaters rule. Section 5 of appendix B to subpart DDDD includes a new paragraph referring to the relevant sections of subpart DDDDD. Plywood and composite wood products facilities may conduct a fuel analysis in lieu of emissions testing for HAP metals for purposes of the LRD. The relevant sections of the Boilers/Process Heaters rule include § 63.7521(a) and (c) through (e); § 63.7530(d)(1), (2), and (4); and line 2 of table 6 to subpart DDDDD. For purposes of conducting a fuel analysis for a PCWP LRD, ''total selected metals'' means the combination of the metal compounds included in table 1 to appendix B to subpart DDDD.

4. Formaldehyde and Phenol Test Methods

Comment: One commenter stated that NCASI Method CI/WP–98.01 should be allowed for formaldehyde and phenol measurement in table 2B to appendix B to subpart DDDD. The method is allowed in other parts of the rule for measurement of formaldehyde, phenol, and methanol, but it was not included in appendix B to subpart DDDD. The commenter stated that using NCASI Method CI/WP–98.01 instead of NCASI Method IM/CAN/WP–99.02 would reduce sampling cost and complexity without sacrificing sampling precision and accuracy.

Response: We agree that NCASI Method CI/WP–98.01, ''Chilled Impinger Method for Use at Wood Products Mills to Measure Formaldehyde, Methanol, and Phenol,'' is appropriate for measurement of formaldehyde and phenol. We have added NCASI Method CI/WP–98.01 to table 2B to appendix B to subpart DDDD for formaldehyde and phenol testing only.

To be consistent with the test methods allowed in subpart DDDD, we have also edited table 2B to appendix B to subpart DDDD to allow use of Method 0011 for formaldehyde and acetaldehyde, and to allow use of Method 316 (40 CFR part 63, appendix A) for formaldehyde.

In addition, a revised version of NCASI Method IM/CAN/WP 99.02 has been placed in Chapter III of the NCASI Methods Manual and the PCWP docket. The NCASI made minor revisions to the IM/CAN/WP 99.02 method to (1) clarify sections easily misunderstood or that did not provide sufficient instruction and (2) to add some flexibility to the quality assurance procedures and

criteria. We reviewed and agreed with these minor changes to the method.

5. Determining MDI Emissions

Comment: One commenter suggested that EPA also consider the use of EPA proposed Method 207, ''A Method for Measuring Isocyanates in Stationary Source Emissions,'' for measurement of MDI emissions. Method 207 is expected to provide lower detection limits than EPA CTM–031 and Method 320, which are already allowed to be used.

Response: We proposed Method 207 in the **Federal Register** on December 8, 1997 (62 FR 64532). A copy of the proposed method may be downloaded from *http://www.epa.gov/ttn/emc/proposed.html.* We intend to make minor revisions to the method and promulgate it in appendix M to 40 CFR part 51 within the next few months. We will accept data measured using the proposed Method 207 before the promulgated version of the method becomes available. Once promulgated, the final method 207 will appear in the **Federal Register**, appendix M to 40 CFR part 51, and on *http://www.epa.gov/ttn/emc/promgate.html.*

H. Compliance Date for Existing Sources

Comment: In response to our request for comment on the issue, several commenters requested an extension of the MACT compliance deadline (October 1, 2007, for existing sources). One commenter stated that EPA should consider a compliance deadline extension for all PCWP sources because of uncertainties associated with the promulgated amendments, or ''supplemental rule.'' The commenter stated that EPA could give sources 3 years (the maximum amount of time for compliance allowed by section 112(i)(3)(A) of the CAA) from the effective date of the supplemental rule. The commenter requested a new compliance date of August 1, 2008 (based on an extended LRD submittal deadline of March 1, 2008), and noted that this date is less than three years from the anticipated promulgation date of the supplemental rule. A separate commenter suggested extending the PCWP MACT compliance deadline to March 1, 2009 (based on a suggested LRD submittal deadline of March 1, 2008). Another commenter suggested extending the PCWP MACT compliance deadline to October 1, 2008 (based on a suggested LRD submittal deadline of April 1, 2007). The above commenters also suggested that EPA extend the compliance dates for sources that submit LRD that are not approved by EPA.

One commenter disagreed that facilities that do not submit a LRD should be granted any additional time to comply with MACT. The commenter also stated that if an existing facility's LRD is not approved, the facility should be given no more than one year from the current compliance date to comply with all requirements of the rule. Another commenter asserted that section 112(i)(3)(A) denies EPA authority to extend the rule's compliance date beyond October 1, 2007 for sources whose LRD are disapproved or for all PCWP sources.

Response: We are promulgating a MACT compliance date of October 1, 2008 in today's final action. We are providing this new compliance date for all PCWP sources (as opposed to only those sources that submit LRD). We are making this change to the MACT compliance date because today's final action results in revisions to several definitions in subpart DDDD and to the testing requirements in appendix B to subpart DDDD that are substantial and warrant revision of the MACT compliance date.

Our proposal specifically asked for comments on whether to set a new compliance deadline for all sources covered by the PCWP NESHAP. As mentioned by the commenters, section 112(i)(3)(A) of the CAA specifies that NESHAP for existing sources can have compliance deadlines of no more than 3 years following the effective date of their promulgation. The question then becomes which promulgation date to apply—July 29, 2004, which is the date the PCWP NESHAP was first promulgated, or today's date, on which we are promulgating numerous revisions to the rule. We interpret section 112 of the CAA as providing us with the authority to re-set the compliance deadline for NESHAP, as appropriate, in situations where promulgated amendments to the regulation are significant and substantial enough to warrant revisiting the question of how much time is needed for subject sources to comply with the requirements of the rule, as amended. This includes situations where a NESHAP is significantly revised to include additional control requirements in response to either a court's remand of the original rulemaking or a petition for reconsideration of the rule, or is so revised on the agency's own initiative.

We agree with the commenters that noted that section 307(b)(1) of the CAA specifically provides that the filing of a petition for reconsideration of a rule does not postpone the effectiveness of the rule. We do not consider the mere fact that a rule has become the subject of a petition for judicial review or a petition for administrative reconsideration to necessarily justify a re-setting of the compliance deadline. As we stated in the final reconsideration notices for the Brick and Boiler MACT rules (70 FR 69661, November 17, 2005 and 70 FR 76928, December 28, 2005, respectively), the uncertainties raised by reconsideration do not in general necessarily justify an extension of the compliance date. Instead, the facts of each rule's potential revision and the degree of the significance of the rule's amendments should be considered on a case-by-case basis. Where EPA has amended a MACT standard in a significant way, we have found it appropriate to set a new compliance date for the rule that takes into account new requirements not contained in the original rule. The relatively greater degree of changes we made to the overall PCWP rule, which substantially affect how it will be implemented for the majority of sources, as compared to changes we made to the Boiler MACT (we made no changes to the Brick MACT due to reconsideration), for example, justify a different outcome for the PCWP rule.

Thus, changes in expectations about the numbers and types of sources that will need to obtain, install and certify pollution control equipment to comply with the rule's requirements overall are compelling. Since the 2004 rule's promulgation, we found that many, even most, facilities expect to install controls or make other physical changes to the mill to meet the low-risk criteria. While we recognized in 2004 that some sources would have to make these changes to become low risk, we did not predict accurately the number of sources that would do so. Rather, we expected that sources needing to obtain, install and certify controls would be primarily those remaining in the MACT category, such that MACT-subject sources would face comparably less competition from would-be low-risk sources in seeking available vendors for those controls under the original compliance deadline of October 1, 2007. We now have a better understanding that more sources than we first anticipated in 2004, both MACT and low-risk sources, will need to install controls and will be competing for the services of a limited number of control device vendors.

In addition to the difficulties sources may encounter in installing controls and testing emissions, before today's final action, some sources faced uncertainty about whether they were part of the PCWP source category as defined in the

2004 promulgated NESHAP. We received several requests from sources and permitting authorities as to the applicability for certain types of processes such as molded particleboard and curved plywood components. We determined that many of these sources were part of the source category, but few had associated control requirements. However, some, we do not how many, may be required to control emissions (e.g., for a dryer). These are sources, such as furniture manufacturers, who believed they were not subject to the MACT standards in 2004. Since that time, through definitional changes in today's final action and assistance with applicability determinations, we have provided the necessary clarifications so that these sources may begin the process of determining their regulatory obligations, which could include installation of emissions controls.

As stated above, we do not generally regard the perceived ''uncertainty'' related to the reconsideration and amendment process as constituting a sufficient reason in and of itself for revising the overall compliance date. We note that prior to our issuance of today's final action, sources were able to begin emissions testing for purposes of the LRD with little certainty of what the final potentially-revised emissions testing requirements would be. Furthermore, the entire content of appendix B to subpart DDDD was under reconsideration. While this did not affect the effectiveness or applicability of the originally promulgated requirements pending our rulemaking process, we have learned that the reconsideration and amendment process did affect source decisions about whether to comply with the MACT standards or to apply to join the low-risk subcategory, which, ultimately, caused some sources to delay decisions about MACT compliance.

The emissions testing that facilities must complete for purposes of the LRD involves careful planning (e.g., deciding what process units to test and for which HAP, selection of test contractors, selection of test methods, test plan development, etc.) and the expense of such testing depends greatly on the number of process units and HAP that must be tested. Many facilities will likely plan and conduct emissions tests that serve a dual purpose: (1) To determine emissions of the appendix B HAP for purposes of the LRD, and (2) to determine uncontrolled emissions levels to identify potential MACT compliance options (e.g., to identify emissions averaging opportunities or see if emissions fall below the production-based compliance option) should the facility decide not to pursue the low-risk option. Facilities may view it as more economical to conduct testing of multiple process units and HAP combinations at one time than to repeatedly test individual process units for a few HAP (e.g., because test methods covering multiple HAP can be used, and there is less travel expense for test contractors if multiple tests are completed in one trip). Once onsite stack sampling is completed, laboratory analysis of the samples must be conducted and test reports prepared. The emissions testing that PCWP facilities must conduct, from the planning stage to receiving the final report, can easily take 9 months to 1 year. More time may be required if the testing company or laboratory does not correctly perform the tests or analysis the first time due to the difficulty of some of the test methods (e.g., relatively new NCASI test methods developed specifically for the PCWP industry). While adding these methods add flexibility for sources, sources did not know until today whether the final rule would incorporate them. We also recognize that the number of testing contractors with the equipment and familiarity needed to run the NCASI methods is limited, and that there will be much competition for the qualified testing contractors. Today's final amendments allow use of more test methods applicable to the multiple HAP of concern than did the 2004 final NESHAP (e.g., we are incorporating by reference the new NCASI method ISS/FP–A105.01), and before today's final amendments facilities were uncertain which methods would be acceptable. In addition, today's final amendments allow other emissions determination approaches such as small-scale kiln testing, fuel analyses to predict HAP metals emissions, and modeling of tank or wastewater emissions. For these reasons, many sources have delayed their emissions testing activities until after today's final amendments are promulgated. Emissions testing is only one step in completion of the LRD (i.e., it will take several months to a year or more for PCWP facilities to complete their LRD incorporating all of the emissions data and to complete changes to their facility to ensure they can meet the low-risk criteria on an ongoing basis). Although the changes to the overall rule are significant and the CAA allows us to set a new compliance date 3 years from the promulgation of today's final rule, we concluded only an additional 12 months beyond the original compliance date is necessary.

Comment: Two commenters stated that there is no reason why a source should not be able to move from the MACT to the low-risk subcategory if changes occur such that the facility qualifies as low-risk (e.g., equipment installation that reduces emissions or any future changes to the health benchmarks for acrolein and acetaldehyde), even if the facility qualifies after the MACT compliance deadline. The commenter stated that although these facilities would have already incurred the expense associated with MACT control installation, it may still be worthwhile to be classified as low-risk because of the reduced recordkeeping and reporting burdens.

Response: We agree that sources should be able to join the low-risk subcategory before or after the MACT compliance date. Allowing sources to become part of the low-risk subcategory after the MACT compliance date gives facilities more time to complete any physical changes necessary to operate as low risk, more time to complete their LRD, and more time to complete their permit applications. Existing sources needing extra time must comply with the MACT requirements in subpart DDDD as of October 1, 2008 and until they are part of the low-risk subcategory. Since the CAA does not prohibit us from adding sources to delisted subcategories after the MACT compliance date and existing sources must comply with MACT if not in the low-risk subcategory by the MACT compliance date, allowing sources additional time to complete their LRD is reasonable and should be allowed. Therefore, we have revised § 10 of appendix B to subpart DDDD accordingly.

I. Low-Risk Demonstration Submittal Dates for Existing Sources

Comment: Four commenters supported an extension of the LRD submittal deadline established in the 2004 final rule. One commenter supported the proposed revised date of April 1, 2007. Three additional commenters suggested extending the LRD submittal date beyond the proposed date of April 1, 2007, and requested that EPA adopt extensions of the LRD and MACT compliance deadlines to March 1, 2008, and August 1, 2008, respectively. One commenter stated that most facilities did not begin emissions testing upon promulgation of the PCWP rule because they were aware that clarifying amendments would be forthcoming. The commenters arrived at the March 1, 2008, low-risk submittal date by estimating the amount of time that would be needed to complete each

of eight steps that influence the timing of completing a LRD, including: Planning and performing emissions tests, completing a risk assessment, securing the capital needed to make any changes to the source, installing control devices or completing other physical changes, selecting and hiring contractors and control device vendors, coordinating the LRD activities of multiple facilities, receiving EPA approval of the LRD, and preparing the application for a title V permit modification.

Two commenters disagreed that EPA should extend the LRD submittal date. One commenter believes that extending the LRD submittal deadline would simply encourage sources to spend time and resources attempting to obtain unlawful exemptions instead of dedicating themselves to meeting the rule's cleanup standards by the 2007 compliance date. Another commenter stated that some facilities have already completed their LRD and are simply waiting for the amendments to be promulgated before submitting them.

Response: As explained above, we have revised section 10 of appendix B to subpart DDDD so that sources may become part of the low-risk subcategory any time. Therefore, there is no deadline for existing sources to become part of the low-risk subcategory in today's action. Existing sources that are not part of the low-risk subcategory on October 1, 2008 must be in compliance with the MACT standards in subpart DDDD.

We realize that some existing sources will want to be part of the low-risk subcategory by the MACT compliance date to avoid MACT compliance. For those sources, EPA will review complete and well-documented LRD received by February 1, 2008 and make every attempt to notify sources of our determination of their eligibility to become part of the low-risk subcategory no later than August 29, 2008. (A complete and well-documented LRD includes emissions tests performed on the facility as it will be operated and includes the documentation required in appendix B to subpart DDDD.) We believe this approach balances the time we need to review and approve (or disapprove) LRD with the time sources need to complete activities associated with the LRD.

We do not know how many facilities will submit LRD on or by February 1, 2008, but it could be well over a hundred. We plan to review LRD in the order we receive them and encourage sources to submit their LRD as early as possible. (We will review preliminary LRD based on modeling and emissions factors before February 1, 2008 and as our resources permit. Although these LRD will not be approvable, sources that want a review of their LRD at this preliminary stage should engage us as the earliest possible date.) We note that we may not be able to interact with sources as we might have otherwise (e.g., ask for clarification, recommend minor changes) as the MACT compliance date approaches because of time and resource constraints. If we have many LRD to review, we will likely return incomplete demonstrations without further review. We will likely notify these sources that we could not approve the LRD at that time. Sources whose LRD are deficient may re-submit revised demonstrations, but we will likely not review re-submittals until we have completed our review of all the other timely and complete LRD we have first received.

As to the decision individual sources make regarding whether to spend resources on demonstrating they are low risk, the decision is theirs to make. Similarly, a source must determine for itself when to submit its LRD. We encourage sources to submit their LRD before February 2008 so that we have time to work with sources to resolve deficiencies in their LRD and so that sources have time to resubmit their LRD (if necessary) prior to February 1, 2008.

Comment: One commenter supported EPA's proposal to allow a preliminary LRD that is based on proposed physical changes to the plant that have not yet been completed or verified by stack testing. The commenter noted that this approach addresses some timing concerns and also helps to ensure that sources do not undertake expensive facility changes only to find that EPA does not approve their LRD. The commenter noted that EPA should give sources until the proposed April 1, 2007, deadline (assuming this deadline is not extended further) to submit LRD that are based on proposed physical changes at the plant, and the facility should be required to complete the physical changes by October 1, 2007.

The commenter stated that, for sources making physical changes to comply with the low-risk criteria, confirmatory emissions testing should be required by the date on which performance testing for MACT compliance is due in the 2004 final rule (i.e., 180 days after the compliance deadline). This proposed timing makes sense because physical changes to meet the low-risk criteria and physical changes to meet one of the other compliance options follow similar engineering and capital planning timelines. The commenter noted that sources not making physical changes to their facilities should be allowed to conduct emissions tests after the low-risk submittal date but before the compliance date.

The commenter also supported EPA's proposal to allow sources to submit a preliminary LRD that relies on emissions factors. However, it is critical that EPA provide the source with confirmation that the source has used an acceptable methodology and that, if emission testing provides the results anticipated by the source, the source will meet the low-risk criteria and its demonstration will receive final approval. The commenter noted that allowing preliminary LRD will enable EPA to spread the demonstration reviews over a longer period of time because sources will submit their preliminary demonstrations earlier. In addition, if the preliminary demonstration is not approved, sources have more time to amend their demonstration or prepare for alternative compliance options.

The commenter suggested that EPA allow facilities to propose in their title V applications which process parameters will be limited and state that the emission limits will be set as a result of the most recent emission test. As a result of this change, States would not be able to issue the title V permit revision prior to the facility receiving approval of the LRD.

Another commenter argued that EPA would not have the time to thoroughly review both a pre-clearance application and a subsequent, emissions test-based verification that emissions do not exceed the emission factor calculations presented in the LRD. The commenter contended that EPA will likely focus on sources' pre-clearance submissions (in which sources have every reason to be overly optimistic) and pay only cursory attention to the subsequent compliance demonstrations.

Response: Existing sources may submit preliminary LRD at any time, including those without the required emissions tests and without completing physical changes to the facility. However, existing sources must complete the required emissions tests and physical changes to the facility, submit the complete LRD to EPA, receive approval from EPA (if the LRD is approvable), and apply for their title V permit revision before becoming part of the low-risk subcategory. We will consider preliminary LRD that do not contain the required emissions test data to be incomplete and we will not approve any LRD submitted by existing sources that do not contain this required information.

We recognize that it may be necessary to complete physical changes to emission sources before the required emissions testing can be conducted. Existing sources may now submit their LRD any time (as opposed to July 31, 2006, as originally promulgated). While giving sources more time to complete their LRD, we have minimized the amount of time we will have to review the numerous LRD that we anticipate will be submitted by February 1, 2008. Therefore, we will review preliminary, incomplete LRD only before February 1, 2008. After that date we will focus our efforts on reviewing complete LRD in fairness to those facilities that are low-risk without having to make physical changes to their emission sources and those facilities that completed their physical changes and emissions testing before February 1, 2008. As time allows, we will review and provide feedback to facilities submitting preliminary LRD several months prior to February 1, 2008. In addition, we will accept and attempt to complete our review of final LRD (that contain the required emissions test data) submitted after February 1, 2008 that are follow-up to preliminary LRD we have previously reviewed. Subsequent LRD submittals are likely to use the same risk assessment procedures and should not need as much time to review.

Existing sources will have about 2 years to complete their LRD and the necessary physical changes to their facilities between the time today's final action is available and the February 1, 2008 LRD submittal date. These 2 years, coupled with the availability of the low-risk criteria and risk methodology published in the 2004 final rule, should provide enough time for existing sources to become part of the low-risk subcategory by October 1, 2008 if they wish and have planned accordingly. Sources may also choose to submit their LRD later, and comply with the MACT requirements in subpart DDDD on the compliance date and until they become part of the low-risk subcategory.

J. Compliance Date for Affected Sources Previously Qualifying for the Low-Risk Subcategory

Comment: Two commenters disagreed with the 3-year MACT compliance extension for existing sources that are temporarily low-risk but begin to operate outside of the low-risk subcategory due to a population shift or change in dose-response values. One commenter stated that the CAA requires existing sources to comply no later than 3 years after the effective date and that EPA offers no legal justification or rationale for the extra 3 years provided to PCWP sources that are no longer low-risk.

Other commenters supported EPA's decision to allow sources in the low-risk subcategory to have 3 years to comply with the MACT limits when they are no longer part of the subcategory due to factors outside their control. The commenters stated that this is consistent with the normal 3-year period for sources to comply with a MACT standard after the effective date. The commenters stated that a 3-year compliance window is necessary to ensure the necessary steps are completed to transition between the low-risk subcategory and MACT compliance. Another commenter stated that this approach is exactly consistent with the existing regulatory provisions for area sources which become major sources (and thus are subject to MACT) and have 3 years to comply with MACT.

The commenter believes EPA has closed a potential loophole, rather than creating one as petitioners claim. That is, CAA section 112(c)(9) includes no provision for sources becoming ''re-subject'' to MACT if they no longer are low-risk. Rather, CAA section 112(c)(9) assumes that once a category is delisted, all sources in that category are permanently exempt from MACT. The commenter believes that, under the statute, if the subcategory no longer qualifies as low-risk, EPA must affirmatively relist the subcategory (and no deadline is provided by which EPA must do so). Relisting the category, in turn, would require EPA to promulgate MACT standards within 2 years, with compliance another 3 years later (or, a 5-year process in total from the date EPA decided to relist the category). The commenter believes that EPA has adopted a more protective approach and required compliance within 3 years.

Response: We agree with the commenter who analogized sources in this situation, where they lose low-risk eligibility due to changing factors that are outside their control, to the way we generally address area sources that undergo changes that subject them to MACT for the first time. In both cases, a source that was previously not part of the MACT-regulated category has become subject to MACT, and it is necessary for us to anticipate a feasible period for bringing the source into MACT compliance. Unlike the situation of a low-risk source that undergoes a change that it should know may have an effect on its ability to maintain low-risk status (for which we are retaining the 2004 final rule requirement that the source comply with MACT immediately upon the change), a source whose low-risk status is affected by changes outside of its control will need some time to comply with MACT, especially where the installation of controls is necessary. We appreciate the commenter's agreement that our approach for ensuring that sources that lose their low-risk status timely comply with PCWP MACT requirements is reasonable. However, we disagree with the commenter's suggestion that the alternative to our approach is to have to relist under CAA section 112(c)(1) either the ex-low-risk source or the entire low-risk subcategory before subjecting that source to MACT. This is because there are only two possible subcategories a PCWP source can belong to: Either the MACT-regulated category, or the delisted low-risk subcategory. If a low-risk source loses its eligibility for membership in the low-risk subcategory, it necessarily follows that it then rejoins the MACT-regulated category, since there is no other PCWP category or subcategory for the source to join. Our approach is intended to make this necessary transition occur efficiently, effectively and fairly.

Since it is possible that the types of changes in this situation, such as a change to a more stringent RfC, may have an impact on a large number of previously low-risk sources, it is fair and reasonable to establish a common compliance deadline for all such similarly affected sources. In adopting the 2004 final rule, based on the information before us, we determined that sources covered by the PCWP NESHAP would need the full statutory 3 years to comply due to the expected schedule for ordering and installing controls from the available vendors. Low-risk sources that, due to changes outside their control, suddenly find themselves in the PCWP MACT category, will essentially be placed in the same position as were PCWP MACT sources upon promulgation of the rule—that is, an event has occurred that has made them subject to the rule even though they took no action on their part to trigger the event. Likewise, those sources may very well then find themselves at the stage of the process that PCWP MACT sources faced in 2004, and have to begin finding a control vendor who can install controls on time. Based on the information we have today, we continue to believe that the full 3 years is needed for sources in this situation who become subject to MACT, and we see no reason to treat the two situations differently as the same process and obstacles will be faced by these sources. On the other hand, for sources that initiate their own changes that would affect their low-risk status,

we continue to believe that MACT planning must be built into those sources' considerations, and therefore maintain the requirement that they comply with MACT immediately upon undergoing changes.

K. Low-Risk Demonstration Submittal Dates for New Sources

Comment: Two commenters suggested that new sources submit a preliminary LRD before startup. One commenter requested that EPA clarify the procedures for new sources to be included in the low-risk category by allowing the demonstration to be submitted during construction using conservative factors, as provided for in § 5(h) of appendix B to subpart DDDD, with EPA approval prior to startup. Subsequent testing could be conducted within 180 days to demonstrate that actual emissions are below the rates used in the demonstration. The other commenter stated that new PCWP facilities that plan to join the low-risk subcategory should be required to submit a preliminary eligibility demonstration with their pre-construction permit application. That way, State and local agencies will know at the time the construction permit application is submitted that the facility plans to submit a LRD and may be exempted from the MACT requirements at a later date. The commenter noted that subpart DDDDD (the Boilers/Process Heaters rule) requires a preliminary eligibility demonstration using emissions estimates, and it also requires the facility to verify the data with source testing within 180 days of startup. The commenter also noted that since there are no provisions in the CAA for extending the compliance date for new sources, new sources that are denied the risk-based exemption must comply at startup and State and local agencies must include all the requirements of the PCWP MACT in their permits.

In addition, one commenter stated that it is not possible for new or reconstructed sources to conduct their emissions testing upon initial startup because the rule requires the facility to be run at maximum capacity during testing and new facilities take at least 3 months to reach maximum capacity. Therefore, submitting a LRD 180 days after startup is not reasonable for new or reconstructed sources. The commenter requested that new and reconstructed sources be required to conduct stack testing within 180 days of initial startup and to submit their LRD within 240 days of initial startup.

Response: Unlike existing sources, new sources cannot conduct the required emissions testing prior to startup. Therefore, we agree that requiring new sources to submit a pre-startup LRD would be useful. It allows new sources to determine whether or not they are likely to be low-risk facilities and helps permitting authorities by notifying them which sources plan to demonstrate eligibility for the low-risk subcategory. Therefore, today's final action requires new sources to submit a pre-startup LRD at least 9 months prior to startup. The pre-startup LRD must be based on the information (e.g., equipment types, estimated emission rates, etc.) that will likely be used to obtain the sources' title V permit and must incorporate the maximum emissions that will likely be allowed under the title V permit. New sources will also be required to submit a verification LRD, based on emissions testing, where required.

Today's action provides three options for new sources who want to become part of the low-risk subcategory. When new sources submit their pre-startup LRD, they must indicate whether they intend to join the low-risk subcategory based on their pre-startup LRD (option 1) or based on their verification LRD (option 2). The third option is for new sources to comply with the requirements of MACT in subpart DDDD at startup and join the low-risk subcategory after startup using the procedures for sources already in compliance with MACT provided in the amended section 10(b) of appendix B to subpart DDDD.

The first option allows new sources to join the low-risk subcategory based on their pre-start-up LRD (i.e., upon startup). The EPA will review and approve (if approvable) the source's pre-startup LRD prior to startup. The source must operate, and certify they are operating, consistently with their pre-startup LRD. After startup, the source must submit a verification LRD, based on the emissions determination requirements in table 2A to appendix B to subpart DDDD. The EPA will review the verification LRD. If the verification LRD does not support the pre-startup LRD, the source must comply with MACT for new sources immediately. This is not to say that the verification LRD must match the pre-startup LRD exactly. In fact, we would expect that the pre-startup LRD would be more conservative than the verification LRD. So while the two LRD may differ, the verification LRD must demonstrate that the facility can operate consistently as low risk and that the facility operated as low risk based on the pre-startup LRD.

The second option is for new sources join the low-risk subcategory based on their verification LRD (i.e., to operate consistently with their pre-startup LRD at startup and join the low-risk subcategory once EPA reviews and approves (if approvable) their verification LRD). The new source would submit a pre-startup LRD and EPA would review it prior to startup of the facility. The facility would then operate and certify operating consistently with their pre-startup LRD. The source becomes part of the low-risk subcategory when EPA approves (if approvable) their verification LRD. As required for sources choosing option 1, if the verification LRD does not support the pre-startup LRD, the source must comply with MACT for new sources immediately. Also, as for sources using option 1, we do not expect the pre-startup LRD to match the verification LRD exactly, but do require that the source operate as low risk from startup or comply with MACT.

New sources must submit an application for a significant title V permit modification to incorporate the low-risk parameters from the verification LRD into their title V permit within a year of their startup date.

New sources choosing either option 1 or option 2 face enforcement liability if the source's verification LRD source does not confirm their low-risk status. If the verification LRD does not demonstrate that the source is low risk, the source is out of compliance with MACT from startup. While any source in the low-risk subcategory is out of compliance with MACT if EPA is sued and judged to have wrongly approved the source's LRD, pre-startup LRD might be subject to more scrutiny by the public and more likely to face a challenge if the LRD was insufficient. Sources choosing option 2 could also be challenged for operating in violation of the MACT standard before EPA determines they are part of the low-risk subcategory.

L. Legal Issues With Title V Implementation Mechanism

Comment: One commenter believes the title V implementation approach for the CAA section 112(c)(9) low-risk exemptions adopted in the final rule: (1) Attempts to create specific and federally enforceable legal requirements, without notice-and-comment rulemaking, through an informal exemption ''letter approval'' process conducted between a source and EPA; (2) imposes those legal requirements upon States and the public by employing a State-issued title V permit to establish applicable requirements; (3) does so without providing States or the public with any meaningful, legal opportunity to

comment on or challenge those requirements; and (4) does so all in contravention of existing EPA legal interpretations and policy that prohibit use of title V permits for such purposes. The commenter stated that EPA does not identify another instance in which a statutorily-required determination by the Administrator achieves its culmination and embodiment in a title V permit, nor does EPA identify statutory authority in CAA section 112 or title V indicating Congressional intent to allow such a result. The commenter believes that this result transgresses title V's function to incorporate pre-existing federally enforceable applicable requirements into operating permits issued by approved permitting authorities, following applicability determinations by the approved permitting authority. The commenter stated that unlike the Prevention of Significant Deterioration (PSD) or New Source Review (NSR) permitting programs in which the rules contain criteria that are subsequently rendered applicable requirements in federally enforceable preconstruction permits, the risk exemption approval process gives definition and content to the qualifying conditions in an unenforceable, legally meaningless letter. The commenter noted that the State authorities do not render the low-risk approvals, have no ownership over them, and have no reason to stand behind them. The commenter stated that the public does not have the public comment, challenge, and petition opportunities afforded under title V for ordinary State applicability determinations.

Finally, the commenter noted that governing EPA statutory and regulatory interpretations prohibit the title V implementation approach employed in the final rule. If the risk determinations, parameters, and conditions exist exclusively in a title V permit and the title V permit expires, the parameters and conditions of the risk exemption would no longer exist as a legal matter. The existence of a legal document independent of title V preserves the ability of permitting authorities and EPA to reopen title V permits that failed to include all relevant permit terms or to make corrections upon permit renewal. Also, title V regulations allow a permitting authority to include a ''permit shield'' stating that compliance with the conditions of the permit shall be deemed compliance with any applicable requirements as of the date of permit issuance.

Three other commenters believe that title V permits represent an appropriate implementation mechanism for ensuring that low-risk sources never exceed the applicable risk thresholds. One of the commenters agrees that a significant title V permit modification is suitable for incorporating low-risk parameters. The commenter stated that the reason that a significant permit modification would be needed to incorporate the low-risk subcategory demonstration is found in 40 CFR 70.7(e)(2)(i)(A)(3), a minor permit modification ''gatekeeper,'' which prohibits use of minor modification procedures where a provision would require (or change) a case-by-case determination during the title V permit process. The commenter believes title V is not creating the applicable requirements, rather relevant low-risk parameters are requirements grounded in appendix B to subpart DDDD.

Another commenter stated that the title V process envisioned by the final rule is comparable to the synthetic minor permit process which has been in use for years. The commenter believes that CAA section 112(c)(9) does not specify any mechanism whatsoever for ensuring that sources in delisted categories remain below applicable risk thresholds. Once they are delisted, emissions (and risks) can increase without limitation unless and until EPA takes affirmative action to relist the source category or subcategory. Here, however, EPA is mandating that any source seeking inclusion in the low-risk subcategory agree to enforceable permit conditions to ensure that the source continues to be low-risk. The commenter argued that the procedure envisioned here is virtually identical to the ''applicability determination'' process under title IV of the CAA. The commenter believes the petitioner's argument that the approach transgresses title V's function is based on a misperception of how the risk-based approach would be implemented. The commenter stated that EPA's approval of the LRD will be conditioned on retention of relevant source parameters that are necessary to ensure that the source remains low-risk. These parameters become federally enforceable requirements that properly are included in the title V permit.

Response: The EPA agrees that the commenter who objected to the use of title V permits as an implementation tool in the low-risk process reflects a fundamental misunderstanding of what is required by the CAA in the delisting context with respect to sources who become no longer subject to section 112 emission standards. The EPA also agrees that the objecting commenter fails to appreciate the added confidence in the process afforded by the use of title V permitting procedures. Nothing in section 112(c)(9) of the CAA directs EPA to impose any further substantive or procedural requirements on sources in source categories or subcategories that are delisted. Under the CAA, such sources may permissibly be released from all obligations under section 112(d) of the CAA with respect to control of HAP emissions. Moreover, in determining whether an individual source is a member of one source category versus another subcategory, even while one is listed and subject to section 112(d) standards and the other is not, nothing in the CAA requires EPA to subject that decision to notice and comment rulemaking or to federally establish directly enforceable requirements. Given that, EPA could have theoretically adopted an approach that relies upon source and EPA application of the appendix B to subpart DDDD criteria for determining eligibility for the low-risk subcategory that, upon EPA approval of a source's LRD, subsequently releases the source from any further obligations related to the PCWP NESHAP. However, in order to better ensure that low-risk PCWP sources remain low risk following the factual findings necessary to approve their LRD, EPA chose to further require (and sources have accepted) significant continuing conditions, the failure to meet which will result in low-risk sources having to return to the PCWP MACT category. The best mechanism for imposing these conditions is the title V permit process, which can be used to establish as binding enforceable requirements terms and conditions that do not otherwise exist as CAA applicable requirements. The EPA has long held that the title V process can be used to establish enforceable limitations on the potential to emit air pollution, for example, in Indian country where there may otherwise be an absence of regulatory controls. Moreover, EPA's title V regulations have long provided for what types of permit modifications must occur to specifically accommodate changes that ''establish or change a permit term or condition for which there is no underlying applicable requirement and that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject.'' See 40 CFR 70.7(e)(2)(i)(A)(*4*). In the low-risk PCWP context, we believe that this authority is directly applicable to this situation where we are conditioning a source's continuing low-risk eligibility upon its assumption of enforceable terms and conditions reflecting its low-risk parameters, taken in order to avoid the

PCWP MACT requirements that would otherwise apply. As a policy matter, we believe this provides far better assurance that low-risk sources will remain so than would merely releasing them from all further obligations with respect to the NESHAP, and in light of the language of our title V regulations, we cannot accept the objecting commenter's view that imposing these conditions is not legally permissible.

Turning to the objecting commenter's specific complaints, we therefore disagree that the process attempts to create specific and federally enforceable requirements without notice and comment rulemaking through an informal approval process between the source and EPA. The process that occurs between the source and EPA is limited to EPA's review and approval or disapproval of the source's LRD submitted in support of its applicability determination request, and EPA's forwarding of approved low-risk parameters to the State permitting authority. The State's subsequent conversion of those parameters into enforceable terms and conditions is very much a notice and comment process.

Regarding the objection that the legal requirements for sources to maintain low-risk eligibility imposes those legal requirements on States and the public, it is, of course, under the principles of federalism embodied in the CAA, always within the States' legal rights to require a more stringent emission limitation for any PCWP source than is otherwise required by our rule, including requiring any low-risk PCWP source to meet MACT. See CAA section 116. In terms of burdening the public, presumably in having to participate in the title V permitting process (should the member of the public so choose), it is not apparent what alternative the objecting commenter would prefer. We assume that the commenter would not have us, for example, revise our title V rules to allow these changes to occur without the opportunity for public comment. We disagree that the process provides no meaningful opportunity to comment on low-risk parameters or their subsequent incorporation as terms and conditions in permits. First, EPA's approval of a source's LRD is a judicially reviewable final action under CAA section 307(b), as is any applicability determination under CAA section 112. Second, to provide better assurance that sources remain low risk than is absolutely required under CAA section 112(c)(9), we are requiring that the notice and comment permit issuance process be used to implement this need for assurance.

The EPA wishes to clarify the characterization of the low-risk parameters that result from the LRD approval process, especially in comparison to our recently finalized reconsideration and amendments of the Boilers/Process Heaters rule. In the Boilers/Process Heaters rule, in response to comments, we explained that the more appropriate title V regulation references of authority for incorporating the section 112(d)(4) compliance option are § 70.7(e)(2)(i)(A)(*3*), regarding establishment or changes of case-by-case determinations of an emission limitation or other standard, and §§ 70.7(f) and (g), regarding permit reopenings to incorporate new applicable requirements. This is because, unlike in the PCWP context, in the Boilers/Process Heaters rule, a source's choice of the risk-based compliance option is an alternative standard and an ''applicable requirement'' in the same manner as the MACT-based emission limitations in the Boilers/Process Heaters rule. However, in the PCWP context, prior to a source's obtaining a title V permit that reflects its EPA-approved low-risk parameters, the only enforceable applicable requirements relating to the PCWP NESHAP are the MACT standards themselves, as there is no alternative health-based compliance option within the standard itself. Rather, by the nature of the section 112(c)(9) delisting and exemption, a low-risk PCWP source assumes enforceable terms and conditions only through the title V permit process, taken as a condition for their continuing eligibility in the subcategory and avoidance of the PCWP MACT to which they would otherwise be subject. Therefore, for the PCWP low-risk subcategory, we continue to regard 40 CFR 70.7(e)(2)(i)(A)(*4*) as the relevant ''gatekeeper'' requiring changes to title V permits incorporating low-risk parameters to be made through the significant permit revision process. Moreover, since the low-risk parameters sent from EPA to State permitting authorities are not directly enforceable ''applicable requirements,'' unlike in the Boilers/Process Heaters rule, we do not regard the permit reopening provisions of 40 CFR 70.7(f) and (g) as being relevant. While, of course, under CAA section 112(c)(9) EPA could have chosen the statutorily permitted option of requiring no creation of enforceable terms and conditions at all following approval of a source's LRD, we have chosen to require the extra step of a process that is closer to that for other programs that apply to source efforts to limit the potential to emit. While the objecting commenter is dissatisfied that the process is not identical to those for Prevention of Significant Deterioration (PSD) or New Source Review (NSR), which both involve creation of enforceable requirements in preconstruction permits before they are incorporated into title V permits, we are frankly surprised that the commenter does not appear to appreciate the extra assurance we have obtained in requiring approved low-risk sources, notwithstanding their exemption from section 112(d) standards, to assume enforceable terms and conditions even though such is not required under section 112(c)(9).

Regarding the objecting commenter's points about the potential expiration of permits and the function of the title V ''permit shield,'' we do not regard these arguments as being valid reasons to choose to abandon title V as an implementation tool for the low risk approach, particularly since the logical alternative and clearest way to avoid the problems raised by the commenter is to require nothing further of low-risk PCWP sources once EPA approves their LRD and determines they are eligible for the delisted low-risk subcategory. In any case, once the source is in the subcategory, the section 112(d) standard no longer applies to the source and therefore a permit's expiration or the existence of its permit shield poses no potential conflict with the PCWP NESHAP. Instead, in order to ensure that it validly remains in the delisted low-risk subcategory, it is imperative on the source to ensure that it maintains a valid title V permit reflecting its low-risk parameters; otherwise it will fail to maintain low-risk eligibility and will have to comply with MACT.

M. Timing of Title V Permit Revisions

Comment: One commenter strongly supported EPA's proposal to require only the submittal of a facility's low-risk parameters to its permitting authority for incorporation into its title V permit (as opposed to having the title V permit revisions actually incorporated into the permit). The commenter stated that sources do not have any control over the amount of time that it takes for State permitting authorities to review and act upon requests for permit modifications. In addition, the commenter noted that this approach is consistent with the permit application shield provision of part 70 and the Boilers/Process Heaters rule's health-based compliance alternatives. The commenter also noted that the source is entirely responsible for ensuring that it remains in compliance with the relevant operating

parameters that are to be included in the title V permit, even before that permit is issued.

Two commenters disagreed with the proposal to allow facilities to qualify for the low-risk subcategory merely based upon submission of a title V permit revision application. Both commenters stated that EPA's approach violates title V, the part 70/71 regulations, and corresponding State laws. The commenters noted that many existing facilities subject to the PCWP MACT already will have permit terms and conditions subjecting the entire facility to the standard as a result of earlier permit revisions or renewals. The commenters stated that until the title V permits are revised to incorporate enforceable conditions into permits, sources must remain subject to the MACT standard. The commenters believe allowing a facility to become part of the low-risk subcategory before the State or local permitting authority approves the necessary permit revision undermines the role of the permitting authorities. The commenters also argued that the proposal makes the significant permit modification process and public participation meaningless.

Response: The EPA believes that the objecting commenters are confusing the EPA's role in reviewing LRD and determining source eligibility to join the low-risk subcategory with the State permitting authority's role in making sure permits currently reflect applicable requirements. We are providing greater assurance than is strictly required by CAA section 112(c)(9) that sources will remain low risk following EPA LRD approval. We are requiring that sources timely submit permit revision applications that reflect their low-risk parameters for future incorporation as enforceable terms and conditions. We believe this requirement will help ensure that such sources continue to operate under the conditions that proved them to be low risk. In cases where a PCWP source's permit already reflects the PCWP MACT requirements and the MACT compliance deadline has passed, of course, timely amendment of the permit itself will be needed in order to allow the source to alternatively operate according to its low-risk parameters. Until the permit is actually revised, the source will have to comply with its then-applicable terms and conditions, even if they reflect MACT and the source's LRD has been approved by EPA. But we do not regard this practical problem as being sufficiently severe to merit abandoning the additional assurance requirement entirely, or even being one that sources and title V permitting authorities may commonly face when permit terms become obsolete in the face of new applicable requirements.

Comment: Two commenters argued that State and local permitting authorities have the right to thoroughly review and disapprove LRD if they are incomplete or incorrect. However, the final rule does not clearly specify that State and local permitting authorities have this right, and it does not specify that a source must comply with the emission limits and requirements of the NESHAP if the demonstration is not approved by the State and local authority. The commenters noted that without reviewing the LRD, a State or local agency would be unable to defend granting an exemption to a facility during a public review process. The commenters noted that many State and local agencies will find it necessary to review the risk-based exemptions, and the process could place a very intensive resource demand on State and local air agencies that must verify extensive emissions and stack information and review the risk assessments to ensure that they have been done properly. The review of these risk assessments would require expertise in risk assessment methodology that State and local agencies may not possess.

Response: We acknowledge that review of the eligibility demonstrations for the delisted low-risk subcategory would require resources for verification of information and may require expertise in risk assessment methodology that is not yet available in some States. To alleviate these concerns, we will review and approve/disapprove the low-risk subcategory eligibility demonstrations submitted by PCWP facilities. The burden to States of assuring that affected sources continue to be low-risk will be no more than the burden associated with ongoing title V enforcement because the parameters that define a source as low-risk will be reflected in terms and conditions to be incorporated into the title V permit.

Notwithstanding an EPA finding that a source is eligible for inclusion in the low-risk subcategory, States are free, consistent with CAA section 116, to impose more stringent limitations on a low-risk source, including the requirements of this PCWP NESHAP that would otherwise apply if the source had not been found to be low risk. These requirements can be imposed on a State-devised schedule, and might even include provisions for independent State review and approval of LRD. The State might determine whether technical problems suggest that the source may not in fact be low risk, notwithstanding EPA's approval of the source's LRD. However, under the final rule, unless a State chooses to involve itself in the decision of whether a source is low risk, EPA approval of an LRD and the source's submission of a permit revision application are sufficient for the source to join the low-risk subcategory. In order to avoid an over-burdening of State resources, we have maintained the approach that relies upon EPA review and approval of LRD, and we depend upon States' inherent authority to require more of themselves and of sources, under CAA section 116, for those States that choose to do so.

Comment: One commenter stated that there is a possibility that in some cases, EPA's LRD approval action will be too late for a facility to submit its title V application before the MACT compliance deadline. The commenter requested that a facility be allowed to submit its title V application incorporating the emission rate and process limitations stated in the LRD concurrent with or soon after the submittal of the LRD to EPA.

Response: We disagree that the approach suggested by the commenter is appropriate. In the case of any LRD, we expect there will be the need to provide additional information or to correct aspects in initial submissions, and we do not think it is reasonable for permit applications to be based on these unreviewed, uncorrected LRD, especially since submission of a permit application starts a clock under State title V programs with a deadline for the permitting authority's action. While the problem identified by the commenter may prove to be a real one in specific cases, we have generally determined that the best way to ensure that low-risk sources remain low risk and that terms and conditions accurately reflect their status is to require that permit revision applications reflect EPA-approved LRD. Thus, it is important that sources submit their LRD sufficiently early to EPA so that ''last-minute'' review does not jeopardize the source's chances of becoming a low-risk source before the MACT compliance deadline, if that is the source's goal. Of course, in light of our other changes that extend the MACT compliance deadline and allow sources to become low risk after the MACT compliance deadline passes, we consider this problem to not be as severe as suggested by the commenter.

N. Permit Conditions

Comment: Two commenters requested that the number of parameters to be included in title V permits for low-risk sources be minimized to allow operational flexibility. One commenter stated that section 11(b) of appendix B

to subpart DDDD should ensure that the low-risk requirements continue to be met, but not impose cumbersome monitoring, recordkeeping, and reporting requirements with little environmental benefit. In particular, the commenter is concerned that the list of dispersion modeling parameters (such as stack height, stack temperature, and stack flow) can change without changing the overall conclusion of a risk analysis. The commenter stated that if parameters are too specific, every change to one of those parameters would require a revision to the site-specific risk assessment and a title V permit action before the source has regulatory permission to make the change. The commenter recommended that only conditions that refer to the health effects criteria established in appendix B to subpart DDDD be included.

Another commenter requested that EPA clarify that permits primarily should specify an emission limit and should restrict production rates only to the extent that they impact the plant's emission limit. The commenter noted that facilities will attempt to achieve highest production rates in combination with worst-case operating parameters during testing, but in practice, it can be difficult to reach worst-case conditions. The commenter stated that EPA should clarify that facilities can extrapolate the production rates and operating conditions measured during performance tests to ''true'' worst-case emissions scenarios for purposes of their operating permit limits.

Response: Our intent is that parameters incorporated as limits into a source's title V permit will be those parameters that determine the source's risk level. This will ensure that sources in the low-risk subcategory continue to operate in a manner that is consistent with their LRD. The results of a risk assessment for a particular source depend on many factors, including the emission rates and dispersion parameters associated with each process unit at the facility. Process unit emission rates are a function of production rate and the effectiveness of any emissions controls used. Process unit emission rates can also be impacted by other process-related parameters (e.g., process unit operating temperature, dryer firing method, fuel type, wood type, resin HAP content, etc.), but the effect of these parameters on emission rate is not as well defined as that of production rate and control system effectiveness. Therefore, we disagree with the notion of simply extrapolating emission rates based on process-related parameters other than production rate. However, we agree that emission rates can be reported in terms of production (i.e., as emission factors) and that production rate can be used to extrapolate to worst-case emission rates (provided that all other worst-case conditions remain the same as during the emissions test). The language in appendix B to subpart DDDD does not prevent such scaling of emission rates to account for increased production.

We maintain that production rate and other indicators of emission rate should be incorporated as limits into title V permits. This is because the requirement to memorialize the low-risk parameters as enforceable title V permit terms and conditions is a condition, under our rule, for eligibility in the low-risk PCWP subcategory established under CAA section 112(c)(1) and delisted under section 112(c)(9). Thus, while the effect of the determination that a source is low risk is to exempt it from other section 112 requirements, the requirement to assume title V permit conditions to maintain low-risk status is itself based on our implementation of section 112(c), and is a necessary condition a source must satisfy as an eligibility criterion for joining the low-risk subcategory. Sources that fail to meet this condition cannot maintain low-risk eligibility.

Appendix B to subpart DDDD does not require continuous measurement of process unit emission rates. Therefore, indicators of process unit emission rate must be documented on an ongoing basis to provide assurance that the actual emission rates used to establish the source as a member of the low-risk subcategory have not changed. Indicators of emission rate include process unit throughput, control device operating parameters (monitored as required in section 5(e) of appendix B) if a control device is used, and other pertinent process unit operational parameters depending on the type of process unit. These indicators of emission rate are appropriate title V permit conditions because, during an inspection, permitting authorities can readily monitor indicators of emission rate but cannot easily measure actual source emissions. Therefore, prior to increasing production rate above the level in a source's permit (or deviating from other permit conditions in a way that could result in HAP emissions above the levels used to establish a source as a member of the low-risk subcategory), that source must revisit its LRD and demonstrate that it continues to qualify for the low-risk subcategory at the higher production rate.

In addition, because our goal is to ensure that risks posed by a facility are maintained at a level at or below those in the facility's LRD, it is also necessary to include certain dispersion parameters as title V permit conditions. Stack height is an important dispersion parameter for the risk demonstration and should be included as a permit condition. If stack height is already incorporated into the title V permit independent of the LRD, then this parameter should be linked explicitly to the LRD so that stacks cannot be modified without revisiting the demonstration. We have also included stack height in section 11(b) of appendix B to ensure it is included as a permit condition for those facilities that do not already have stack height incorporated into their title V permits. We agree that it is not necessary to include stack temperature and exhaust flow rate as title V permit conditions because these parameters are not likely to change considerably in a way that would increase risks without an associated change in other parameters for which title V permit limits will be established (i.e., process throughput, control device operating conditions if a control device is used, or other pertinent process conditions).

We believe appendix B to subpart DDDD already allows operational flexibility while ensuring that sources operate in a manner that is consistent with their LRD. For example, appendix B to subpart DDDD does not include any process unit parameter monitoring, reporting, or recordkeeping requirements. Thus, monitoring, recordkeeping, and reporting requirements must be developed by a permitting authority and then incorporated into a facility's title V permit in order to ensure a facility's compliance with its LRD. Additionally, the requirement that the LRD be based on worst-case operating conditions provides facilities with operational flexibility because if a source meets our low-risk requirements while operating under worst-case conditions, then the source should also meet those criteria when operating under any other conditions. Finally, section 5(h) of appendix B clarifies that facilities can use emission rates in their LRD that are more conservative than worst-case conditions in order to further increase their operational flexibility.

O. Costs and Benefits of Establishing a Low-Risk Subcategory

Comment: One commenter stated that EPA should revise the cost-benefit analysis to accurately reflect the lack of public health protection resulting from the low-risk subcategory. Another commenter charged that EPA's own data

reveal that the risk-based exemptions in the final PCWP rule have a substantially higher net social cost than a lawful MACT standard without the exemptions, and also result in significantly higher emissions of HAP, volatile organic compounds (VOC) and PM than a rule without exemptions. The commenter noted that the preamble to the rule admitted that the exemptions could increase HAP emissions by 4,400 tons per year (tpy), when compared to requiring all plants to meet pollution control requirements. The preamble also acknowledged that exposure to the HAP released by the PCWP industry have been linked to extensive noncancer health effects but the Regulatory Impact Analysis (RIA) for the final rule did not assign an economic value to these very serious health impacts.

The commenter stated that the Office of Management and Budget (OMB) has recognized and published estimates of the cost to the public health associated with exposure to each ton of PM or VOC, but EPA did not attempt to quantify the public health costs associated with higher increases of these pollutants. The commenter stated that even using the lowest end of the monetized benefits published by OMB, the value of reducing VOC and PM emissions from all PCWP plants exceeds the savings to industry under the exemptions in the final rule.

The commenter noted that EPA estimated that requiring all PCWP plants to reduce HAP would result in incidental increases in nitrogen oxide (NO_X) emissions, but EPA made no attempt to compare this potential increase to the additional emissions of HAP, VOC, and PM that would result from the exemptions. The available evidence suggests that the NO_X increases are relatively trivial, especially when compared to the additional pollution authorized by the rule's exemptions. Nitrogen oxide is a pollutant of concern because it is a precursor in the formation of ground-level ozone. But the exemptions that EPA has adopted could increase emissions of VOC (another critical ozone precursor) by as much as an estimated 13,000 tpy. Arbitrarily, neither the RIA nor the preamble explains why increasing VOC by 13,000 tpy to avoid 1,200 tpy of NO_X would yield a net benefit in reducing ozone formation.

Similarly, the Final RIA notes that NO_X can form fine PM, but the exemptions in the rule actually could result in an increase in PM of 6,100 tpy. Based on their calculations using OMB cost-benefit values, the commenter contended that the reduction in NO_X emissions does reduce public health costs, but the increase in VOC and PM emissions results in an increase in public health costs anywhere from 44 to 414 times higher than the public health savings from the NO_X reductions from the exemptions.

In addition, the commenter cited internal EPA documents and stated that the decision to include risk-based exemptions appears to have been driven by the desire to lower the cost of the rule, which contradicts the ruling in *National Lime Assn* v. *EPA*, 233 F.3d 625, 640 (D.C. Cir. 2000) that cost may only be taken into account when considering beyond-the-floor emissions limitations.

Other commenters disagreed and believe there is little sense in requiring a facility to undertake costly control expenditures when it does not pose a significant risk to human health or the environment. One commenter disagreed that the increased HAP emissions resulting from the low-risk subcategory will impose significant risks on the general public because, by definition, a source cannot qualify for the low-risk subcategory unless it does not impose any meaningful risks on the general public.

The commenter also disagreed with the petitioners' claim that EPA should have quantified the potential health benefits of the collateral VOC and PM reductions that would have resulted if low-risk sources were required to install controls. The commenter argued that while there may be health benefits to reducing PM or VOC, to the extent that reductions in these criteria air pollutants are needed, the proper vehicle is title I of the CAA, not through a title III HAP regulation. The commenter believes it is improper to justify HAP regulation under title III solely by the fact that there may be incidental benefits from criteria pollutant reductions.

The commenter stated that the costs of the rule outweighed the benefits for low-risk sources. According to the commenter, the incinerator controls that would be necessary in most cases to meet the rule would cause increased energy demand and a sharp increase in the annual emissions of some criteria pollutants from facilities. The commenter disagreed with the petitioners' claim that increased NO_X emissions are outweighed by the reductions in VOC. The commenter stated that most PCWP facilities are in NO_X-limited areas, such that any increase in NO_X has the potential to increase ozone formation, whereas emissions of VOC do not.

The commenter also disagreed with the petitioners' argument that EPA's evaluation of costs and benefits in analyzing whether to implement the low-risk subcategory ''runs afoul of *National Lime Ass'n* v. *EPA*, 233 F.3d 625, 640 (D.C. Cir. 2000),'' which held that costs may be considered only when setting ''above the floor standards.'' The commenter noted that the Court's decision in that case was made solely with reference to CAA section 112(d), and EPA here has created a subcategory pursuant to 112(c)(1) and delisted it pursuant to CAA section 112(c)(9).

Response: In the RIA for the final rule, we quantified the social costs of the final standard but did not quantify the change in social costs that would result from application of the low-risk subcategory. Based on the results of economic impact analyses for other MACT standards in general, it is likely that the change in social costs (in this case, without an estimate of benefits) is approximated by the $66 million reduction in compliance costs that is estimated in the supporting information for the final rule and mentioned in Appendix A of the RIA. All assumptions underlying emissions estimates related to the low-risk subcategory are found in the supporting information for the final rule.

We explain in Chapter 6 of the RIA that we did not provide a monetized value for the benefits from reduced health effects from HAP reductions associated with the final rule due to a lack of sufficient scientific data. The state of science in this area is still in that position today. Use of a benefit transfer approach as suggested by commenters is not appropriate in this case. We are continuing our analytical work to address the uncertainty in a benefits transfer approach. We did not provide estimates of the monetized benefits associated with the VOC emission reductions since we did not have sufficient air quality modeling runs available to allow us to estimate these benefits and because we did not have sufficient scientific data to place a monetized benefit value on these reductions. The OMB has prepared benefits estimates for VOC emission reductions in its annual Thompson Reports (reports on benefits and costs of Federal Agency regulations), but these estimates represent broad, general estimates of the monetized value for these reductions and not benefits of VOC emission reductions from sources affected by this final rule. This same point regarding the generalized foundation upon which the Thompson Report estimates rest may be made for our not providing monetized benefits for

the fine PM emission reductions. For the same reasons we did not estimate monetized benefits for the rule, we did not estimate monetized disbenefits associated with the low-risk subcategory (e.g., additional NO_X emissions associated with RTO operations): A lack of sufficient scientific data to assign a monetized benefits value for HAP reductions, a lack of sufficient air quality modeling runs and sufficient scientific data to assign a monetized benefits value for VOC reductions, and the generalized foundation upon which the Thompson Report estimates are based for PM reductions.

It should be noted that we could only consider HAP emissions in setting the final standards as per the requirements of CAA section 112. Quantification of benefits and disbenefits are requested in OMB's RIA guidelines but are not legally required information for setting MACT standards.

We disagree with the assertion that our consideration of costs, in the context of establishing and delisting the low-risk PCWP subcategory, violates the DC Circuit's decision in *National Lime.* In setting the MACT floors for the PCWP NESHAP, cost was not a factor, and costs of compliance may not be used under the PCWP NESHAP as a basis for avoiding MACT, if it otherwise applies. Sources will be able to avoid MACT only if they demonstrate that they are in fact low risk. There is nothing improper about our general desire to reduce costs of CAA compliance, where appropriate and where imposing those costs is not necessary. In fact, the very existence of CAA section 112(c)(9) reflects the basic congressional goal of avoiding imposing regulatory burden where that burden is not needed to provide an ample margin of safety to protect public health.

III. Responses to Comments on the Proposed Amendments and Clarifications for Subpart DDDD

A. Definitions

1. Dryer Definitions

Comment: One commenter stated that the definition of ''tube dryer'' should be amended to differentiate tube dryers from pneumatic conveyors that use conditioned air. The commenter provided a suggested revised definition of ''tube dryer.''

Response: We did not intend to include pneumatic fiber transport systems under subpart DDDD. Pneumatic fiber transport systems are distinguished from primary and secondary tube dryers because heat is added to dryers specifically to remove moisture while the purpose of the higher temperatures used in fiber transport systems is to prevent cooling. Therefore, we have amended the definition of ''tube dryer'' as requested to ensure that pneumatic fiber transport systems are not classified as tube dryers.

Comment: One commenter requested that EPA modify all of the dryer definitions in subpart DDDD and appendix B to subpart DDDD by replacing ''at elevated temperature'' with ''by applying heat.''

Response: We agree with the commenter's suggested changes to the dryer definitions to clarify that heat is deliberately applied during drying processes. The final rule has been amended as requested by the commenter.

2. Affected Source and Direct-Fired Process Unit

Comment: One commenter requested that EPA consider modifications to the proposed amendments to the definitions of ''combustion unit'' and ''affected source.'' First, the definition of ''combustion unit'' should be modified (1) to include combustion units that direct-fire PCWP process units but are not used to combust HAP emissions, and (2) for consistency with broad references in the proposed amendments that define the source category. Alternatively, the commenter suggested a revision to the proposed amendment to the definition of ''affected source.''

Second, the use of the word ''directly'' in the definition of ''direct-fired process unit'' could exclude process heaters that indirectly heat a heat transfer media before the combustion exhaust is routed to the drying operation, where the remaining heat energy is used in direct-fire contact with the process material. The commenter stated that deleting the word ''directly'' from the definition of ''direct-fired process unit'' would not change the meaning of the definition because it would still include the phrase ''* * * such that the process material is contacted by the combustion exhaust.''

Response: After reviewing how the term ''combustion unit'' is used throughout subpart DDDD, we agree with the commenter's suggested amendment to the definition to ''combustion unit'' to clarify that combustion units can be used to direct-fire process units or to control process exhaust. The amended definition of ''affected source'' (which we are amending as proposed with no further revisions) includes only those combustion unit exhaust streams that direct-fire process units, and it should not be read to mean that all combustion units at the plant site are part of the PCWP affected source (and thereby exempt from the Boiler/Process Heaters rule). We also agree with the commenter that an exhaust stream that supplies indirect heat for other uses would be part of the PCWP affected source if it is eventually routed through the direct-fired dryers such that it too contacts the wood material and becomes a mixture of combustion gases and process gases. We have amended the definition of ''direct-fired process unit'' accordingly as suggested by the commenter. However, if the indirect heat exhaust stream does not routinely pass through the direct-fired dryers, then this exhaust stream would be subject to the final Boilers/Process Heaters rule.

3. Engineered Wood Products

Comment: One commenter requested several edits to the definition of ''engineered wood product.'' First, the commenter stated that the type of resin or glue and the designed use of the product should not be specified for consistency with the definitions for the other wood products. Second, the list of products should include parallel strand lumber. Although implicit in the rule since the definition of ''laminated veneer lumber'' includes parallel strand lumber, parallel strand lumber is the more commonly used term.

Response: We agree with the commenter that, for consistency with other definitions in subpart DDDD, the definition of ''engineered wood products'' need not mention specific resin types or the designed use of the products. We have also removed the reference to glue from the commenter's suggested definition because ''resin'' is defined elsewhere in subpart DDDD, and the definition of ''resin'' includes ''glue.'' We have also added the term ''parallel strand lumber'' to the definition of ''engineered wood products.'' Finally, we have revised the definition of ''laminated veneer lumber'' and added a new definition of ''parallel strand lumber'' to indicate that these are two terms for the same product.

Comment: One commenter requested that the definitions of ''LSL press'' and ''LVL press'' be revised to clarify that the material exiting these presses is a billet that must be sawn into LVL, LSL, or PSL and that not all LVL presses are heated. The commenter provided suggested revisions to these definitions.

Response: We agree with the commenter that LSL and LVL presses form billets that are subsequently cut into LSL and LVL products and amended the definitions to reflect that clarification. We further edited the definition of ''LVL press'' to more explicitly include PSL.

B. Applicability of the PCWP Rule to Lumber Kilns Drying Utility Poles

Comment: One commenter expressed support for EPA's proposal to expand the definition of lumber dry kilns to include kilns used to dry utility poles, and two commenters suggested definitions of ''lumber.''

Response: We requested both comments and additional data to either support or refute the treatment of kilns used to dry utility poles as lumber kilns subject to subpart DDDD, and we received one supporting comment and no additional data on this subject. Therefore, we have concluded that lumber kilns drying utility poles are subject to the rule (but have no control or work practice requirements), and we have added a definition of ''lumber'' to § 63.2292 based on commenters' suggestions.

C. Capture Efficiency Determination

Comment: One commenter had previously requested clarification from EPA regarding the use of the capture efficiency value and measuring capture efficiency on unenclosed, uncontrolled presses. The commenter supported EPA's adoption of the proposed amendment for line 10 of both table 4 to subpart DDDD and table 2B to appendix B to subpart DDDD but questioned how to handle fugitive emissions from a press enclosure or board cooler, which is important when using a partial enclosure to meet the low-risk criteria.

The commenter also stated that EPA should improve the consistency throughout the rule regarding emission rate determinations whether a press or cooler has a control device on it or not. The commenter stated that regardless of whether a control device is used, facilities should be allowed to use either the design specifications included in the definition of ''wood products enclosure'' or determine the percent capture efficiency of the enclosure to meet any of the compliance options and/or the LRD. The commenter requested that Lines 9 and 10 of both table 4 to subpart DDDD and table 2B to appendix B to subpart DDDD be combined into a single line with no distinction regarding whether emissions are treated in an add-on control device.

Response: The reconstituted wood products production-based compliance option (PBCO) applies only to uncontrolled presses. When determining compliance with the PBCO, it is necessary to compare total press emissions to the PBCO limit. The total press emissions include press emissions discharged through the press vents plus any emissions that are not collected by the press vents but are discharged elsewhere. To determine the percentage of press emissions discharged through the press vents, it is necessary to measure capture efficiency and emissions from the press vents. Then total press (or board cooler) emissions are determined as follows for comparison to the PBCO limit: Total press emissions (lb/MSF ¾″) = measured emissions (lb/MSF ¾″)/ capture efficiency.

Reconstituted wood products press emissions discharged through press vents and press emissions discharged elsewhere (e.g., fugitive emissions) are part of the emissions from a PCWP affected source, and therefore, must be included in the LRD for the affected source. The portion of the emissions discharged through the press vents (measured emissions) can be modeled in the LRD as a point source. The capture efficiency of the press must be measured, and then the portion of press emissions that are to be modeled as a fugitive source can be calculated as follows: Fugitive press emissions (lb/hr) = (measured press emissions (lb/hr)/ capture efficiency) − measured press emissions (lb/hr).

We disagree that the rows of table 4 to subpart DDDD and table 2B to appendix B to subpart DDDD pertaining to capture determination should be combined, but we have edited the second row pertaining to capture efficiency in each of these tables to address the commenter's concern. By definition, emissions must be routed to a control device in order for an enclosure to be a wood products enclosure or a Method 204 permanent total enclosure (PTE). The definitions of wood products enclosure and PTE were written for situations where emissions are captured and routed to a control device. However, we agree that it would be reasonable to assume 100 percent capture if a permanent enclosure is installed such that all the design criteria for a ''wood products enclosure'' or a PTE are met except for the requirement to discharge to a control device.

D. Incorporation by Reference of NCASI Method ISS/FP–A105.01

Comment: One commenter supported EPA's proposal the incorporate by reference NCASI Method ISS/FP–A105.01 as an alternative method for measuring emissions of acetaldehyde, acrolein, formaldehyde, methanol, phenol, and propionaldehyde.

Response: Today's final action amends 40 CFR 63.14 by revising paragraph (f) to incorporate by reference one test method developed by the National Council of the Paper Industry for Air and Stream Improvement (NCASI): Method ISS/FP–A105.01, Impinger Source Sampling Method for Selected Aldehydes, Ketones, and Polar Compounds, December 2005. The method is available from the NCASI, Methods Manual, P.O. Box 133318, Research Triangle Park, NC 27709–3318 or at *http://www.ncasi.org.* It is also available from the docket for today's final action (Docket ID No. EPA–HQ–OAR–2003–0048). This document was approved for incorporation by reference by the Director of the **Federal Register** in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

IV. Responses to Comments on SSM Issues

Comment: One commenter stated that there are several problems with the rule's SSM provisions. The provisions unlawfully permit sources to exceed emissions standards during SSM periods, are internally conflicting (paragraphs 63.2250(b) and 63.2271(b)), and limit public availability of sources' SSM plans.

Response: As stated in the notice of reconsideration and in the proposed amendments, where the PCWP rule's SSM provisions mirror the SSM provisions in the General Provisions (40 CFR, part 63, subpart A), EPA will address comments on those provisions in the reconsideration and amendment process for the General Provisions, unless PCWP sources are somehow affected differently than other sources. The EPA has addressed the issue of excess emissions during periods of SSM as part of the General Provisions rulemaking process as well as in the 2004 PCWP final rule's BID. The issue of public access is addressed in the 2005 General Provisions notice of reconsideration and proposed amendments (70 FR 43992, July 29, 2005), and it will be further addressed in the upcoming General Provisions final amendment and reconsideration notice.

In response to the comment that the final PCWP rule's SSM provisions are internally conflicting, we note that the recently proposed amendments to the General Provisions also included amendments to subpart DDDD. Instead of specifying that sources must demonstrate that they were acting in accordance with their SSM plan during periods of SSM, proposed § 63.2271 specifies that sources must demonstrate that they were acting in accordance with § 63.6(e) of the General Provisions during an SSM event. Therefore, when the General Provisions proposed amendments are finalized, most likely

in the Spring of 2006, there will no longer be any conflict within the PCWP rule's SSM provisions.

Comment: Two commenters discussed the proposed amendment to § 63.2250(a), the section that describes when the SSM provisions apply. One commenter mostly supported the proposed amendment but stated that § 63.2250(a) should not continue to differentiate between scheduled and unscheduled startups and shutdowns. In addition, the amendment does not resolve the confusion between scheduled and unscheduled startups and shutdowns. The commenter stated that although malfunctions can result in unscheduled startups and shutdowns, many unscheduled startups and shutdowns are considered to be normal operating practices by the industry rather than malfunctions. The proposed amendment fails to accurately clarify EPA's intent as stated in the preamble to the proposed amendments, and the proposed wording could inadvertently cause all unscheduled startups and shutdowns to be considered malfunctions. The commenter stated that the PCWP rule should not treat scheduled startups and shutdowns any differently from unscheduled startups and shutdowns.

Another commenter stated that the SSM provisions are overly broad, and the proposed amendment suggests extending the provisions to unscheduled startups and shutdowns resulting from malfunction events. The commenter stated that EPA will only worsen the problems with the SSM provisions by promulgating this amendment, particularly in cases in which the equipment ''malfunction'' is not causally linked to any concurrent pollution exceedance.

Response: We agree with the first commenter that the PCWP NESHAP should not differentiate between scheduled and unscheduled startups and shutdowns. The General Provisions do not treat scheduled startups and shutdowns any differently than unscheduled startups and shutdowns. Although it was not our intention to exclude unscheduled startups and shutdowns from § 63.2250(b), we realize that the promulgated language did appear to exclude them, and our proposed amendment to this language did not clarify our intent. Therefore, we are removing all occurrences of ''scheduled'' and ''unscheduled'' from § 63.2250(b). Sources should refer to § 63.6(e) of the General Provisions for guidance on complying with the General Provisions during periods of SSM.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA must determine whether the regulatory action is ''significant'' and, therefore, subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Executive Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that today's action is a ''significant regulatory action'' because it raises novel legal or policy issues. As such, this action was submitted to OMB for review under Executive Order 12866. Changes made in response to OMB suggestions or recommendations are documented in the public record (see **ADDRESSES** section of this preamble).

B. Paperwork Reduction Act

This action does not impose any new information collection burden. We are not promulgating any new paperwork (e.g., monitoring, reporting, recordkeeping) as part of today's final action. OMB has previously approved the information collection requirements contained in the final rule (40 CFR part 63, subpart DDDD) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501, and has assigned OMB control number 2060–0552, EPA ICR number 1984.02. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566–1672.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

C. Regulatory Flexibility Act

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

For purposes of assessing the impacts of today's action on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administrations' regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's action on small entities, EPA has concluded that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the proposed rule on small entities.'' 5 U.S.C. Sections 603 and 604. Thus, an agency may conclude that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect

on all of the small entities subject to the rule.

Today's action reduces the number of emissions tests (and costs associated with these tests) required for facilities to demonstrate that they are part of the low-risk subcategory, and provides facilities with additional time to complete the tests and LRD. We have therefore concluded that today's final rule will relieve regulatory burden for all small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed, under section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA's regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that today's action does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any 1 year. Although the final rule had annualized costs estimated to range from $74 to $140 million (depending on the number of facilities eventually demonstrating eligibility for the low-risk category), today's action does not add new requirements that would increase this cost. Thus, today's action is not subject to the requirements of sections 202 and 205 of the UMRA. In addition, EPA has determined that today's action does not significantly or uniquely affect small governments because it contains no requirements that apply to such governments or impose obligations upon them. Therefore, today's action is not subject to the requirements of section 203 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132 (64 FR 43255, August 10, 1999) requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. The EPA also may not issue a regulation that has federalism implications and that preempts State law unless EPA consults with State and local officials early in the process of developing the proposed regulation.

If EPA complies by consulting, Executive Order 13132 requires EPA to provide to OMB, in a separately identified section of the preamble to the rule, a federalism summary impact statement (FSIS). The FSIS must include a description of the extent of EPA's prior consultation with State and local officials, a summary of the nature of their concerns and EPA's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met. Also, when EPA transmits a draft final rule with federalism implications to OMB for review pursuant to Executive Order 12866, it must include a certification from EPA's Federalism Official stating that EPA has met the requirements of Executive Order 13132 in a meaningful and timely manner.

Today's action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. None of the affected facilities are owned or operated by State governments, and the requirements discussed in today's action will not supersede State regulations that are more stringent. Thus, Executive Order 13132 does not apply to today's action.

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

Executive Order 13175 (65 FR 67249, November 6, 2000) requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

Today's action does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. No affected facilities are owned or operated by Indian tribal governments. Thus, Executive Order 13175 does not apply to today's action.

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

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns the environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, EPA must evaluate the environmental

health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by EPA.

Today's action is not subject to the Executive Order because it is not ''economically significant'' and EPA does not believe that the environmental health or safety risks associated with the emissions addressed by this action present a disproportionate risk to children. This conclusion is based on two factors. First, the noncancer human health toxicity values we used in our analysis at promulgation (e.g., RfCs) are protective of sensitive subpopulations, including children. Second, if EPA determines that a chemical addressed by this regulation has the potential for a disproportionate impact on predicted cancer risks due to early-life exposure and acts through a mutagenic mode of action, it is recommended that the risk assessments developed for the purposes of this regulation employ applicable cancer potency adjustments as described in EPA's Supplemental Guidance for Assessing Susceptibility from Early-Life Exposure to Carcinogens. For purposes of this rulemaking, EPA has not determined that any of the pollutants in question has the potential for a disproportionate impact on predicted cancer risks due to early-life exposure.

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

Today's action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that today's action is not likely to have any adverse energy effects.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) of 1995 (Pub. L. 104–113; 15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory and procurement activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices) developed or adopted by one or more voluntary consensus bodies. The NTTAA directs EPA to provide Congress, through annual reports to OMB, with explanations when an agency does not use available and applicable voluntary consensus standards.

This action involves two technical standards. In addition to the standards EPA included in the promulgated rule, the EPA cites the following standards in today's final amendments: (1) NCASI Method ISS/FP–A105.01 (12/05), ''Impinger Source Sampling Method for Aldehydes, Ketones, And Polar Compounds''; and (2) EPA Method 207–A (proposed 12/8/97 for appendix M to 40 CFR part 51), ''Method for Measuring Isocyanates in Stationary Source Emissions.''

Consistent with the NTTAA, EPA conducted searches to identify voluntary consensus standards in addition to these methods. No applicable voluntary consensus standards were identified for EPA Method 207–A. The search and review results have been documented and are placed in the docket for the final rule.

One voluntary consensus standard was found that is potentially applicable to the NCASI method. The German standard VDI 3862 (12/00), ''Gaseous Emission Measurement-Measurement of Aliphatic and Aromatic Aldehydes and Ketones by 2,4-Dinitrophenyhydrazine (DNPH) Impinger Method,'' is a good impinger method for the sampling and analysis of aldehydes and ketones that includes the use of an external standard, field and analytical blanks, and repeatability tests. However, the VDI method is missing some key quality assurance/quality control (QA/QC) procedures that are included in the NCASI method. Specifically, VDI 3862 (12/00) is missing the use of internal standards, matrix spikes, and surrogate standards in the analytical step, as well as a duplicate sample run requirement, and sampling train QA/QC samples such as field, run, and sampling train spikes. Therefore, this VDI method, as written, is not acceptable as an alternative to the NCASI method for the purposes of today's rule amendments.

Table 4 to subpart DDDD of 40 CFR part 63 and table 2B to appendix B to subpart DDDD of 40 CFR part 63 in today's rule amendments list the testing methods included in the final PCWP NESHAP. Under §§ 63.7(f) and 63.8(f) of subpart A of the General Provisions, a source may apply to EPA for permission to use alternative test methods or alternative monitoring requirements in place of any required testing methods, performance specifications, or procedures.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). The final rule will be effective February 16, 2006.

List of Subjects for 40 CFR Part 63

Environmental protection, Administrative practice and procedures, Air pollution control, Hazardous substances, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: January 31, 2006.

Stephen L. Johnson,

Administrator.

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

PART 63—[AMENDED]

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

Authority: 42 U.S.C. 7401.

Subpart A—[Amended]

■ 2. Section 63.14 is amended by adding paragraph (f)(4) to read as follows:

§ 63.14 Incorporation by reference.

* * * * *

(f) * * *

(4) NCASI Method ISS/FP–A105.01, Impinger Source Sampling Method for Selected Aldehydes, Ketones, and Polar Compounds, December 2005, Methods Manual, NCASI, Research Triangle Park, NC, IBR approved for table 4 to subpart DDDD of this part and appendix B to subpart DDDD of this part.

* * * * *

Subpart DDDD—National Emission Standards for Hazardous Air Pollutants: Plywood and Composite Wood Products

■ 3. Section 63.2232 is amended by revising paragraph (b) to read as follows:

§ 63.2232 What parts of my plant does this subpart cover?

* * * * *

(b) The affected source is the collection of dryers, refiners, blenders, formers, presses, board coolers, and other process units associated with the manufacturing of plywood and composite wood products. The affected source includes, but is not limited to, green end operations, refining, drying operations (including any combustion unit exhaust stream routinely used to direct fire process unit(s)), resin preparation, blending and forming operations, pressing and board cooling operations, and miscellaneous finishing operations (such as sanding, sawing, patching, edge sealing, and other finishing operations not subject to other national emission standards for hazardous air pollutants (NESHAP)). The affected source also includes onsite storage and preparation of raw materials used in the manufacture of plywood and/or composite wood products, such as resins; onsite wastewater treatment operations specifically associated with plywood and composite wood products manufacturing; and miscellaneous coating operations (§ 63.2292). The affected source includes lumber kilns at PCWP manufacturing facilities and at any other kind of facility.

* * * * *

■ 4. Section 63.2233 is amended by revising paragraphs (b) and (c) to read as follows:

§ 63.2233 When do I have to comply with this subpart?

* * * * *

(b) If you have an existing affected source, you must comply with the compliance options, operating requirements, and work practice requirements for existing sources no later than October 1, 2008.

(c) If you have an area source that increases its emissions or its potential to emit such that it becomes a major source of HAP, you must be in compliance with this subpart by October 1, 2008 or upon initial startup of your affected source as a major source, whichever is later.

* * * * *

■ 5. Section 63.2250 is amended by revising paragraph (a) to read as follows:

§ 63.2250 What are the general requirements?

(a) You must be in compliance with the compliance options, operating requirements, and the work practice requirements in this subpart at all times, except during periods of process unit or control device startup, shutdown, and malfunction; prior to process unit initial startup; and during the routine control device maintenance exemption specified in § 63.2251. The compliance options, operating requirements, and work practice requirements do not apply during times when the process unit(s) subject to the compliance options, operating requirements, and work practice requirements are not operating, or during periods of startup, shutdown, and malfunction. Startup and shutdown periods must not exceed the minimum amount of time necessary for these events.

* * * * *

■ 6. Section 63.2252 is added to read as follows:

§ 63.2252 What are the requirements for process units that have no control or work practice requirements?

For process units not subject to the compliance options or work practice requirements specified in § 63.2240 (including, but not limited to, lumber kilns), you are not required to comply with the compliance options, work practice requirements, performance testing, monitoring, SSM plans, and recordkeeping or reporting requirements of this subpart, or any other requirements in subpart A of this part, except for the initial notification requirements in § 63.9(b).

■ 7. Section 63.2262 is amended by revising paragraph (d)(1) to read as follows:

§ 63.2262 How do I conduct performance tests and establish operating requirements?

* * * * *

(d) * * *

(1) Sampling sites must be located at the inlet (if emission reduction testing or documentation of inlet methanol or formaldehyde concentration is required) and outlet of the control device (defined in § 63.2292) and prior to any releases to the atmosphere. For control sequences with wet control devices (defined in § 63.2292) followed by control devices (defined in § 63.2292), sampling sites may be located at the inlet and outlet of the control sequence and prior to any releases to the atmosphere.

* * * * *

■ 8. Section 63.2269 is amended by revising the introductory text of paragraph (c) to read as follows:

§ 63.2269 What are my monitoring installation, operation, and maintenance requirements?

* * * * *

(c) Wood moisture monitoring. For each furnish or veneer moisture meter, you must meet the requirements in paragraphs (a)(1) through (3) and paragraphs (c)(1) through (5) of this section.

* * * * *

■ 9. Section 63.2292 is amended by revising the definitions for ''Affected source,'' ''Combustion unit,'' ''Fiberboard mat dryer,'' ''Laminated veneer lumber,'' ''Lumber kiln,'' ''Plywood,'' ''Plywood and composite wood products manufacturing facility,'' ''Press predryer,'' ''Tube dryer,'' and ''Rotary strand dryer''; and adding definitions for ''Direct-fired process unit,'' ''Engineered wood product,'' ''Lumber,'' ''Molded particleboard,'' and ''Parallel strand lumber'' to read as follows:

§ 63.2292 What definitions apply to this subpart?

* * * * *

Affected source means the collection of dryers, refiners, blenders, formers, presses, board coolers, and other process units associated with the manufacturing of plywood and composite wood products. The affected source includes, but is not limited to, green end operations, refining, drying operations (including any combustion unit exhaust stream routinely used to direct fire process unit(s)), resin preparation, blending and forming operations, pressing and board cooling operations, and miscellaneous finishing operations (such as sanding, sawing, patching, edge sealing, and other finishing operations not subject to other NESHAP). The affected source also includes onsite storage of raw materials used in the manufacture of plywood and/or composite wood products, such as resins; onsite wastewater treatment operations specifically associated with plywood and composite wood products manufacturing; and miscellaneous coating operations (defined elsewhere in this section). The affected source includes lumber kilns at PCWP manufacturing facilities and at any other kind of facility.

* * * * *

Combustion unit means a dryer burner, process heater, or boiler. Combustion units may be used for combustion of organic HAP emissions.

* * * * *

Direct-fired process unit means a process unit that is heated by the passing of combustion exhaust through the process unit such that the process material is contacted by the combustion exhaust.

* * * * *

Engineered wood product means a product made with lumber, veneers,

strands of wood, or from other small wood elements that are bound together with resin. Engineered wood products include, but are not limited to, laminated strand lumber, laminated veneer lumber, parallel strand lumber, wood I-joists, and glue-laminated beams.

* * * * *

Fiberboard mat dryer means a dryer used to reduce the moisture of wet-formed wood fiber mats by applying heat. A *fiberboard mat dryer* is a process unit.

* * * * *

Laminated veneer lumber (LVL) means a composite product formed into a billet made from layers of resinated wood veneer sheets or pieces pressed together with the grain of each veneer aligned primarily along the length of the finished product. *Laminated veneer lumber* is also known as parallel strand lumber (PSL).

Lumber means boards or planks sawed or split from logs or timber, including logs or timber processed for use as utility poles or other wood components. Lumber can be either green (non-dried) or dried. Lumber is typically either air-dried or kiln-dried.

Lumber kiln means an enclosed dryer operated by applying heat to reduce the moisture content of lumber.

* * * * *

Molded particleboard means a shaped composite product (other than a composite panel) composed primarily of cellulosic materials (usually wood or agricultural fiber) generally in the form of discrete pieces or particles, as distinguished from fibers, which are pressed together with resin.

* * * * *

Parallel strand lumber (PSL) means a composite product formed into a billet made from layers of resinated wood veneer sheets or pieces pressed together with the grain of each veneer aligned primarily along the length of the finished product. *Parallel strand lumber* is also known as laminated veneer lumber (LVL).

* * * * *

Plywood means a panel product consisting of layers of wood veneers hot pressed together with resin. Plywood includes panel products made by hot pressing (with resin) veneers to a substrate such as particleboard, medium density fiberboard, or lumber. Plywood products may be flat or curved.

Plywood and composite wood products (PCWP) manufacturing facility means a facility that manufactures plywood and/or composite wood products by bonding wood material (fibers, particles, strands, veneers, etc.) or agricultural fiber, generally with resin under heat and pressure, to form a panel, engineered wood product, or other product defined in § 63.2292. Plywood and composite wood products manufacturing facilities also include facilities that manufacture dry veneer and lumber kilns located at any facility. Plywood and composite wood products include, but are not limited to, plywood, veneer, particleboard, molded particleboard, oriented strandboard, hardboard, fiberboard, medium density fiberboard, laminated strand lumber, laminated veneer lumber, wood I-joists, kiln-dried lumber, and glue-laminated beams.

Press predryer means a dryer used to reduce the moisture and elevate the temperature by applying heat to a wet-formed fiber mat before the mat enters a hot press. A *press predryer* is a process unit.

* * * * *

Rotary strand dryer means a rotary dryer operated by applying heat and used to reduce the moisture of wood strands used in the manufacture of oriented strandboard, laminated strand lumber, or other wood strand-based products. A *rotary strand dryer* is a process unit.

* * * * *

Tube dryer means a single-stage or multi-stage dryer operated by applying heat to reduce the moisture of wood fibers or particles as they are conveyed (usually pneumatically) through the dryer. Resin may or may not be applied to the wood material before it enters the tube dryer. Tube dryers do not include pneumatic fiber transport systems that use temperature and humidity conditioned pneumatic system supply air in order to prevent cooling of the wood fiber as it is moved through the process. A *tube dryer* is a process unit.

* * * * *

■ 10. Table 4 to subpart DDDD of part 63 is revised to read as follows:

TABLE 4 TO SUBPART DDDD OF PART 63.—REQUIREMENTS FOR PERFORMANCE TESTS

For . . .	You must . . .	Using . . .
(1) each process unit subject to a compliance option in table 1A or 1B to this subpart or used in calculation of an emissions average under § 63.2240(c).	select sampling port's location and the number of traverse ports.	Method 1 or 1A of 40 CFR part 60, appendix A (as appropriate).
(2) each process unit subject to a compliance option in table 1A or 1B to this subpart or used in calculation of an emissions average under § 63.2240(c).	determine velocity and volumetric flow rate	Method 2 in addition to Method 2A, 2C, 2D, 2F, or 2G in appendix A to 40 CFR part 60 (as appropriate).
(3) each process unit subject to a compliance option in table 1A or 1B to this subpart or used in calculation of an emissions average under § 63.2240(c).	conduct gas molecular weight analysis	Method 3, 3A, or 3B in appendix A to 40 CFR part 60 (as appropriate).
(4) each process unit subject to a compliance option in table 1A or 1B to this subpart or used in calculation of an emissions average under § 63.2240(c).	measure moisture content of the stack gas	Method 4 in appendix A to 40 CFR part 60; OR Method 320 in appendix A to 40 CFR part 63; OR ASTM D6348–03 (IBR, see § 63.14(b)).
(5) each process unit subject to a compliance option in table 1B to this subpart for which you choose to demonstrate compliance using a total HAP as THC compliance option.	measure emissions of total HAP as THC	Method 25A in appendix A to 40 CFR part 60. You may measure emissions of methane using EPA Method 18 in appendix A to 40 CFR part 60 and subtract the methane emissions from the emissions of total HAP as THC.

TABLE 4 TO SUBPART DDDD OF PART 63.—REQUIREMENTS FOR PERFORMANCE TESTS—Continued

For . . .	You must . . .	Using . . .
(6) each process unit subject to a compliance option in table 1A to this subpart; OR for each process unit used in calculation of an emissions average under § 63.2240(c).	measure emissions of total HAP (as defined in § 63.2292).	Method 320 in appendix A to 40 CFR part 63; OR the NCASI Method IM/CAN/WP–99.02 (IBR, see § 63.14(f)); OR the NCASI Method ISS/FP–A105.01 (IBR, see § 63.14(f)); OR ASTM D6348–03 (IBR, see § 63.14(b)) provided that percent R as determined in Annex A5 of ASTM D6348–03 is equal or greater than 70 percent and less than or equal to 130 percent.
(7) each process unit subject to a compliance option in table 1B to this subpart for which you choose to demonstrate compliance using a methanol compliance option.	measure emissions of methanol	Method 308 in appendix A to 40 CFR part 63; OR Method 320 in appendix A to 40 CFR part 63; OR the NCASI Method CI/WP–98.01 (IBR, see § 63.14(f)); OR the NCASI Method IM/CAN/WP–99.02 (IBR, see § 63.14(f)); OR the NCASI Method ISS/FP–A105.01 (IBR, see § 63.14(f)).
(8) each process unit subject to a compliance option in table 1B to this subpart for which you choose to demonstrate compliance using a formaldehyde compliance option.	measure emissions of formaldehyde	Method 316 in appendix A to 40 CFR part 63; OR Method 320 in appendix A to 40 CFR part 63; OR Method 0011 in ''Test Methods for Evaluating Solid Waste, Physical/Chemical Methods'' (EPA Publication No. SW–846) for formaldehyde; OR the NCASI Method CI/WP–98.01 (IBR, see § 63.14(f)); OR the NCASI Method IM/CAN/WP–99.02 (IBR, see § 63.14(f)); OR the NCASI Method ISS/FP–A105.01 (IBR, see § 63.14(f)).
(9) each reconstituted wood product press at a new or existing affected source or reconstituted wood product board cooler at a new affected source subject to a compliance option in table 1B to this subpart or used in calculation of an emissions average under § 63.2240(c).	meet the design specifications included in the definition of wood products enclosure in § 63.2292; or determine the percent capture efficiency of the enclosure directing emissions to an add-on control device.	Methods 204 and 204A through 204F of 40 CFR part 51, appendix M, to determine capture efficiency (except for wood products enclosures as defined in § 63.2292). Enclosures that meet the definition of wood products enclosure or that meet Method 204 requirements for a permanent total enclosure (PTE) are assumed to have a capture efficiency of 100 percent. Enclosures that do not meet either the PTE requirements or design criteria for a wood products enclosure must determine the capture efficiency by constructing a TTE according to the requirements of Method 204 and applying Methods 204A through 204F (as appropriate). As an alternative to Methods 204 and 204A through 204F, you may use the tracer gas method contained in appendix A to this subpart.
(10) each reconstituted wood product press at a new or existing affected source or reconstituted wood product board cooler at a new affected source subject to a compliance option in table 1A to this subpart.	determine the percent capture efficiency	a TTE and Methods 204 and 204A through 204F (as appropriate) of 40 CFR part 51, appendix M. As an alternative to installing a TTE and using Methods 204 and 204A through 204F, you may use the tracer gas method contained in appendix A to this subpart. Enclosures that meet the design criteria (1) through (4) in the definition of wood products enclosure, or that meet Method 204 requirements for a PTE (except for the criteria specified in section 6.2 of Method 204) are assumed to have a capture efficiency of 100 percent. Measured emissions divided by the capture efficiency provides the emission rate.
(11) each process unit subject to a compliance option in tables 1A and 1B to this subpart or used in calculation of an emissions average under § 63.2240(c).	establish the site-specific operating requirements (including the parameter limits or THC concentration limits) in table 2 to this subpart.	data from the parameter monitoring system or THC CEMS and the applicable performance test method(s).

Appendix A to Subpart DDDD of Part 63—Alternative Procedure To Determine Capture Efficiency From Enclosures Around Hot Presses in the Plywood and Composite Wood Products Industry Using Sulfur Hexafluoride Tracer Gas

■ 11. Revise paragraphs 10.4 and 10.5 of section 10 to read as follows:

10.0 Calibration and Standardization.

* * * * *

10.4 Gas Chromatograph. Follow the pre-test calibration requirements specified in section 8.5.1.

10.5 Gas Chromatograph for Ambient Sampling (Optional). For the optional ambient sampling, follow the calibration requirements specified in section 8.5.1 or ASTM E 260 and E 697 and by the equipment manufacturer for gas chromatograph measurements.

* * * * *

■ 12. Revise appendix B to subpart DDDD to read as follows:

Appendix B to Subpart DDDD of Part 63—Methodology and Criteria for Demonstrating That an Affected Source Is Part of the Low-risk Subcategory of Plywood and Composite Wood Products Manufacturing Affected Sources

1. Purpose

This appendix provides the methodology and criteria for demonstrating that your affected source is part of the low-risk subcategory of plywood and composite wood products (PCWP) manufacturing facilities. You must demonstrate that your affected source is part of the low-risk subcategory using either a look-up table analysis (based on the look-up tables included in this appendix) or using a site-specific risk assessment performed according to the criteria specified in this appendix. This appendix also specifies how and when you must obtain approval of the low-risk demonstrations for your affected source and how to ensure that your affected source remains in the low-risk subcategory of PCWP facilities.

2. Who is eligible to demonstrate that they are part of the low-risk subcategory of PCWP affected sources?

Each new, reconstructed, or existing affected source at a PCWP manufacturing facility may demonstrate that they are part of the low-risk subcategory of PCWP affected sources. Section 63.2232 of 40 CFR part 63, subpart DDDD, defines the affected source and explains which affected sources are new, existing, or reconstructed.

3. What parts of my affected source have to be included in the low-risk demonstration?

Every process unit that is part of the PCWP affected source (as defined in § 63.2292 of 40 CFR part 63, subpart DDDD) and that emits one or more hazardous air pollutant (HAP) listed in table 1 to this appendix must be included in the low-risk demonstration. You are not required to include process units outside of the affected source in the low-risk demonstration.

4. What are the criteria for determining if my affected source is low risk?

(a) Determine the individual HAP emission rates from each process unit emission point within the affected source using the procedures specified in section 5 of this appendix.

(b) Perform chronic and acute risk assessments using the dose-response values, as specified in paragraphs (b)(1) through (3) of this section.

(1) For a look-up table analysis or site-specific chronic inhalation risk assessment, you should use the cancer and noncancer dose-response values listed on the Environmental Protection Agency (EPA) Air Toxics Web site (*http://www.epa.gov/ttn/atw/toxsource/summary.html*) to estimate carcinogenic and noncarcinogenic chronic inhalation risk, respectively.

(2) For site-specific acute inhalation risk assessment, you should use the acute exposure guidance level (AEGL–1) value for acrolein and the acute reference exposure level (REL) value for formaldehyde for estimating acute inhalation risk found at *http://www.epa.gov/ttn/atw/toxsource/summary.html.*

(3) You may use dose-response values more health-protective than those posted on the EPA Air Toxics Web site (*http://www.epa.gov/ttn/atw/toxsource/summary.html*) to facilitate ongoing certification (as required in section 13 of this appendix) that your affected source remains in the low-risk subcategory.

(c) Demonstrate that your affected source is part of the low-risk subcategory by estimating the maximum impacts of your affected source using the methods described in either section 6 of this appendix (look-up table analysis) or section 7 of this appendix (site-specific risk assessment) and comparing the results to the low-risk criteria presented in the applicable section.

5. How do I determine HAP emissions from my affected source?

(a) You must determine HAP emissions for every process unit emission point within the affected source that emits one or more of the HAP listed in table 1 to this appendix as specified in table 2A to this appendix. For each process unit type, table 2A to this appendix specifies whether emissions testing is required or if emissions estimation is allowed as an alternative to emissions testing. If emissions estimation is allowed according to table 2A, you must develop your emission estimates according to the requirements in paragraph (k) of this section. You may choose to perform emissions testing instead of emissions estimation. You must conduct HAP emissions tests according to the requirements in paragraphs (b) through (j) of this section and the methods specified in table 2B to this appendix. If you conduct fuel analyses, you must follow the requirements of paragraph (m) of this section. For each of the emission points at your affected source, you must obtain the emission rates in pounds per hour (lb/hr) for each of the pollutants listed in table 1 to this appendix.

(b) *Periods when emissions tests must be conducted.*

(1) You must not conduct emissions tests during periods of startup, shutdown, or malfunction, as specified in 40 CFR 63.7(e)(1).

(2) You must test under worst-case operating conditions as defined in this appendix. You must describe your worst-case operating conditions in your performance test report for the process and control systems (if applicable) and explain why the conditions are worst-case.

(c) *Number of test runs.* You must conduct three separate test runs for each test required in this section, as specified in 40 CFR 63.7(e)(3). Each test run must last at least 1 hour except for: testing of a temporary total enclosure (TTE) conducted using Methods 204A through 204F in 40 CFR part 51, appendix M, which require three separate test runs of at least 3 hours each; and testing of an enclosure conducted using the alternative tracer gas method in appendix A to 40 CFR part 63, subpart DDDD, which requires a minimum of three separate runs of at least 20 minutes each.

(d) *Sampling locations.* Sampling sites must be located at the emission point and prior to any releases to the atmosphere. For example, at the outlet of the control device, including wet control devices, and prior to any releases to the atmosphere.

(e) *Collection of monitoring data for HAP control devices.* During the emissions test, you must collect operating parameter monitoring system or continuous emissions monitoring system (CEMS) data at least every 15 minutes during the entire emissions test and establish the site-specific operating requirements (including the parameter limits or total hydrocarbon (THC) concentration limit) in table 2 to 40 CFR part 63, subpart DDDD, using data from the monitoring system and the procedures specified in paragraphs (k) through (o) of § 63.2262 of subpart DDDD of 40 CFR part 63.

(f) *Nondetect data.* You may treat emissions of an individual HAP as zero if all of the test runs result in a nondetect measurement and the conditions in paragraphs (1) and (2) of this section are met for the relevant test method. Otherwise, nondetect data (as defined in § 63.2292 of 40 CFR part 63, subpart DDDD) for individual HAP must be treated as one-half of the method detection limit.

(1) The method detection limit is less than or equal to 1 part per million by volume, dry (ppmvd) for pollutant emissions measured using Method 320 in appendix A to 40 CFR part 63; or Method 18 in appendix A to 40 CFR part 60; or the NCASI Method IM/CAN/WP–99.02 (incorporated by reference (IBR), see 40 CFR 63.14(f)); or NCASI Method ISS/FP–A105.01 (IBR, see 40 CFR 63.14(f); or ASTM D6348–03 (IBR, see 40 CFR 63.14(b)).

(2) For pollutants measured using Method 29 in appendix A to 40 CFR part 60, you analyze samples using atomic absorption spectroscopy (AAS) or another laboratory method specified in Method 29 in appendix A to 40 CFR part 60 with detection limits lower than or equal to AAS.

(g) For purposes of your low-risk demonstration, you must assume that 17

percent of your total chromium measured using EPA Method 29 in appendix A to 40 CFR part 60 is chromium VI. You must assume that 65 percent of your total nickel measured using EPA Method 29 in appendix A to 40 CFR part 60 is nickel subsulfide.

(h) You may use emission rates higher than your measured emission rates (e.g., emissions rates 10 times your measured emission rate) to facilitate ongoing certification (as required in section 13 of this appendix) that your affected source remains in the low-risk subcategory.

(i) *Use of previous emissions tests.* You may use the results of previous emissions tests provided that the following conditions are met:

(1) The previous emissions tests must have been conducted using the methods specified in table 2B to this appendix. Previous emission test results obtained using NCASI Method IM/CAN/WP–99.01 are acceptable.

(2) The previous emissions tests must meet the requirements in paragraphs (b) through (j) of this section.

(3) The subject process unit(s) must be operated in a manner (e.g., with raw material type, operating temperature, etc.) that would be expected to result in the same or lower emissions than observed during the previous emissions test(s) and the process unit(s) may not have been modified such that emissions would be expected to exceed (notwithstanding normal test-to-test variability) the results from previous emissions test(s).

(4) The previous emissions test(s) must have been conducted in 1997 or later.

(j) *Use of test data for similar process units.* If you have multiple similar process units at the same plant site, you may apply the test results from one of these process units to the other similar process units for purposes of your low-risk demonstration provided that the following conditions are met:

(1) You must explain how the process units are similar in terms of design, function, heating method, raw materials processed, residence time, change in material moisture content, operating temperature, resin type processed, age, and any other parameters that may affect emissions.

(2) If the process units have different throughput rates, then you must convert the emission test results to terms of pounds of HAP per unit throughput prior to applying the emissions test data to other similar process units.

(3) If one of the process units would be expected to exhibit higher emissions due to minor differences in process parameters, then you must explain and test the process unit that would be expected to exhibit greater emissions (for example, the unit with a slightly higher temperature set point, dryer processing furnish with slightly higher inlet moisture content, press processing thicker panels, unit with the greater throughput, considerably older unit, etc.).

(k) If emissions estimation is allowed, you must follow the procedures in (1) through (3) of this paragraph.

(1) You must use the emission factors or other emission estimation techniques specified in table 2A to this appendix when developing emission estimates.

(2) You must base your emission estimates on the maximum process unit throughput you will incorporate into your permit according to section 11(b) of this appendix.

(3) For process units with multiple emission points, you must apportion the estimate emissions evenly across each emission point. For example, if you have a process unit with two emission points, and the process unit is estimated to emit 6 lb/hr, you would assign 3 lb/hr to each emission point.

(l) *Testing of multiple stacks.* You may test one of multiple stacks for a process unit provided that the following conditions are met:

(1) The emissions are produced by the same process unit.

(2) The emissions originate from the same duct.

(3) The emissions are sufficiently mixed so that the gaseous pollutant concentrations from one stack are not expected to differ from concentrations from another stack.

(m) *Conducting a fuel analysis.* For process units that require testing of metals according to table 2A to this appendix, you may conduct a fuel analysis in lieu of emissions tests. You must follow the procedures described in § 63.7521 (a) and (c) through (e) of subpart DDDDD; § 63.7530(d)(1), (2), and (4) of subpart DDDDD, and line 2 of table 6 to subpart DDDDD. For purposes of this appendix, the total selected metals analyzed by fuel analysis are the metals included in table 1 to this appendix.

6. How do I conduct a look-up table analysis?

Use the look-up tables (tables 3 and 4 to this appendix) to demonstrate that your affected source is part of the low-risk subcategory, following the procedures in paragraphs (a) through (d) of this section.

(a) Using the emission rate of each HAP required to be included in your low-risk demonstration (determined according to section 5 of this appendix), calculate your total toxicity-weighted carcinogen and noncarcinogen emission rates for each of your emission points using Equations 1 and 2 of this appendix, respectively. Calculate your carcinogen and non-carcinogen weighted stack height using Equations 3 and 4 of this appendix, respectively.

$$TWCER = \sum \left(ER_i \times URE_i \right) \qquad \text{Eqn. 1}$$

TWCER = Toxicity-weighted carcinogenic emission rate for each emission point (lb/hr)/(μg/m^3)

ER_i = Emission rate of pollutant i (lb/hr)

URE_i = Unit risk estimate for pollutant i, 1 per microgram per cubic meter (μg/m^3)$^{-1}$

$$TWNER = \sum \left(ER_i / RfC_i \right) \qquad \text{Eqn. 2}$$

TWNER = Toxicity-weighted noncarcinogenic emission rate for each emission point (lb/hr)/(μg/m^3)

ER_i = Emission rate of pollutant i (lb/hr)

RfC_i = Reference concentration for pollutant i, micrograms per cubic meter (μg/m^3)

$$WHC = \sum_{ep=1}^{ep=n} \frac{TWCER_{ep}}{\sum_{ep=1}^{ep=n} TWCER_{ep}} \times H_{ep} \qquad \text{Eqn. 3}$$

WHC = Carcinogen weighted stack height for use in the carcinogen look-up table (table 3 to this appendix)

H = Height of each individual stack or emission point (m)

ep = Individual stacks or emission points

n = Total number of stacks and emission points

$$WHN = \sum_{ep=1}^{ep=n} \left[\frac{TWNER_{ep}}{\sum_{ep=1}^{ep=n} TWNER_{EP}} \right] \times H_{ep} \qquad \text{Eqn. 4}$$

WHN = Non-carcinogen weighted stack height for use in the non-carcinogen look-up table (table 4 to this appendix)
H = Height of each individual stack or emission point (m)
ep = Individual stacks or emission points
n = Total number of stacks and emission points

(b) *Cancer risk.* Calculate the total toxicity-weighted carcinogen emission rate for your affected source by summing the toxicity-weighted carcinogen emission rates for each of your emission points. Identify the appropriate maximum allowable toxicity-weighted carcinogen emission rate from table 3 to this appendix for your affected source using the carcinogen weighted stack height of your emission points and the minimum distance between any emission point at the affected source and the property boundary. If one or both of these values do not match the exact values in the look-up table, then use the next lowest table value. (Note: If your weighted stack height is less than 5 meters (m), you must use the 5 m row.) Your affected source is considered low risk for carcinogenic effects if your toxicity-weighted carcinogen emission rate, determined using the methods specified in this appendix, does not exceed the values specified in table 3 to this appendix.

(c) *Noncancer risk.* Calculate the total central nervous system (CNS) and respiratory target organ specific toxicity-weighted noncarcinogen emission rate for your affected source by summing the toxicity-weighted emission rates for each of your emission points. Identify the appropriate maximum allowable toxicity-weighted noncarcinogen emission rate from table 4 to this appendix for your affected source using the non-carcinogen weighted stack height of your emission points and the minimum distance between any emission point at the affected source and the property boundary. If one or both of these values do not match the exact values in the look-up table, then use the next lowest table value. (Note: If your weighted stack height is less than 5 m, you must use the 5 m row.) Your affected source is considered low risk for noncarcinogenic effects if your toxicity-weighted noncarcinogen emission rate, determined using the methods specified in this appendix, does not exceed the values specified in table 4 to this appendix.

(d) *Low-risk demonstration.* The EPA will approve your affected source as eligible for membership in the low-risk subcategory of PCWP affected sources if it determines that: (1) Your affected source is low risk for both carcinogenic and noncarcinogenic effects using the look-up table analysis described in this section and (2) you meet the criteria specified in section 11 of this appendix.

7. How do I conduct a site-specific risk assessment?

(a) Perform a site-specific risk assessment following the procedures specified in this section. You may use any scientifically-accepted peer-reviewed assessment methodology for your site-specific risk assessment. An example of one approach to performing a site-specific risk assessment for air toxics that may be appropriate for your affected source can be found in the ''Air Toxics Risk Assessment Guidance Reference Library, Volume 2, Site-Specific Risk Assessment Technical Resource Document.'' You may obtain a copy of the ''Air Toxics Risk Assessment Reference Library'' through EPA's air toxics Web site at *http://www.epa.gov/ttn/fera/risk_atra_main.html.*

(b) At a minimum, your site-specific risk assessment must:

(1) Estimate the long-term inhalation exposures through the estimation of annual or multi-year average ambient concentrations for the chronic portion of the assessment.

(2) Estimate the acute exposures for formaldehyde and acrolein through the estimation of maximum 1-hour average ambient concentrations for the acute portion of the assessment.

(3) Estimate the inhalation exposure of the individual most exposed to the affected source's emissions.

(4) Estimate the individual risks over a 70-year lifetime for the chronic cancer risk assessment.

(5) Use site-specific, quality-assured data wherever possible.

(6) Use health-protective default assumptions wherever site-specific data are not available.

(7) Contain adequate documentation of the data and methods used for the assessment so that it is transparent and can be reproduced by an experienced risk assessor and emission measurement expert.

(c) Your site-specific risk assessment need not:

(1) Assume any attenuation of exposure concentrations due to the penetration of outdoor pollutants into indoor exposure areas.

(2) Assume any reaction or deposition of the emitted pollutants during transport from the emission point to the point of exposure.

(d) Your affected source is considered low risk for carcinogenic chronic inhalation effects if your site-specific risk assessment demonstrates that maximum off-site individual lifetime cancer risk at a location where people live or congregate (e.g., school or day care center) is less than 1 in 1 million.

(e) Your affected source is considered low risk for noncarcinogenic chronic inhalation effects if your site-specific risk assessment demonstrates that every maximum off-site target-organ specific hazard index (TOSHI), or appropriate set of site-specific hazard indices based on similar or complementary mechanisms of action that are reasonably likely to be additive at low dose or dose-response data for mixtures, at a location where people live is less than or equal to 1.0.

(f) Your affected source is considered low risk for noncarcinogenic acute inhalation effects if your site-specific risk assessment demonstrates that the maximum off-site acute hazard quotients for both acrolein and formaldehyde are less than or equal to 1.0.

(g) The EPA will approve your affected source as eligible for membership in the low-risk subcategory of PCWP affected sources if it determines that: (1) your affected source is low risk for all of the applicable effects listed in paragraphs (d) through (f) of this section and (2) you meet the criteria specified in section 11 of this appendix.

8. What information must I submit for the low-risk demonstration?

(a) Your low-risk demonstration must include at a minimum the information specified in paragraphs (a)(1) through (5) of this section and the information specified in either paragraph (b) or (c) of this section.

(1) Identification of each process unit at the affected source.

(2) Stack parameters for each emission point including, but not limited to, the parameters listed in paragraphs (a)(2)(i) through (iv) below:

(i) Emission release type.

(ii) Stack height, stack area, stack gas temperature, and stack gas exit velocity.

(iii) Plot plan showing all emission points, nearby residences, and fenceline.

(iv) Identification of any HAP control devices used to reduce emissions from each process unit.

(3) Emission test reports for each pollutant and process unit based on the testing requirements and methods specified in tables 2A and 2B to this appendix, including a description of the process parameters identified as being worst case. You must submit your emissions calculations for each pollutant and process unit for which emissions estimates are developed. You must submit fuel analyses for each fuel and emission point which has been conducted, including collection and analytical methods used.

(4) Identification of the dose-response values used in your risk analysis (look-up table analysis or site-specific risk assessment), according to section 4(b) of this appendix.

(5) Identification of the controlling process factors (including, but not limited to, production rate, emission rate, type of control devices, process parameters documented as worst-case conditions during the emissions testing used for your low-risk demonstration) that will become Federally enforceable permit conditions used to show

that your affected source remains in the low-risk subcategory.

(b) If you use the look-up table analysis in section 6 of this appendix to demonstrate that your affected source is low risk, your low-risk demonstration must contain at a minimum the information in paragraphs (a) and (b)(1) through (4) of this section.

(1) Identification of the stack heights for each emission point included in the calculations of weighted stack height.

(2) Identification of the emission point with the minimum distance to the property boundary.

(3) Calculations used to determine the toxicity-weighted carcinogen and noncarcinogen emission rates and weighted stack heights according to section 6(a) of this appendix.

(4) Comparison of the values in the look-up tables (tables 3 and 4 to this appendix) to your toxicity-weighted emission rates for carcinogenic and noncarcinogenic HAP.

(c) If you use a site-specific risk assessment as described in section 7 of this appendix to demonstrate that your affected source is low risk (for carcinogenic and noncarcinogenic chronic inhalation and acute inhalation risks), your low-risk demonstration must contain at a minimum the information in paragraphs (a) and (c)(1) through (8) of this section.

(1) Identification of the risk assessment methodology used.

(2) Documentation of the fate and transport model used.

(3) Documentation of the fate and transport model inputs, including the information described in paragraphs (a)(1) through (4) of this section converted to the dimensions required for the model and all of the following that apply: meteorological data; building, land use, and terrain data; receptor locations and population data; and other facility-specific parameters input into the model.

(4) Documentation of the fate and transport model outputs.

(5) Documentation of exposure assessment and risk characterization calculations.

(6) Comparison of the maximum off-site individual lifetime cancer risk at a location where people live to 1 in 1 million, as required in section 7(d) of this appendix for carcinogenic chronic inhalation risk.

(7) Comparison of the maximum off-site TOSHI for respiratory effects and CNS effects at a location where people live to the limit of 1.0, as required in section 7(e) of this appendix for noncarcinogenic chronic inhalation risk.

(8) Comparison of the maximum off-site acute inhalation hazard quotient (HQ) for both acrolein and formaldehyde to the limit of 1.0, as required in section 7(f) of this appendix for noncancinogenic acute inhalation effects.

(d) The EPA may request any additional information it determines is necessary or appropriate to evaluate an affected source's low-risk demonstration.

9. Where do I send my low-risk demonstration?

You must submit your low-risk demonstration to the EPA for review and approval. Send your low-risk demonstration either by e-mail to *REAG@EPA.GOV* or by U.S. mail or other mail delivery service to U.S. EPA, Risk and Exposure Assessment Group, Emission Standards Division (C404–01), Attn: Group Leader, Research Triangle Park, NC 27711, and send a copy to your permitting authority. Your affected source is not part of the low-risk subcategory of PCWP facilities unless and until EPA notifies you that it has determined that you meet the requirements of section 11 of this appendix.

10. When do I submit my low-risk demonstration?

(a) *Existing affected sources.* If you have an existing affected source, you may complete and submit for approval your low-risk demonstration (including the emission test results, fuel analyses, and emission estimates required in this appendix) any time. Existing affected sources that are not approved by EPA as being part of the low-risk subcategory by October 1, 2008, must comply with the requirements of 40 CFR part 63, subpart DDDD from October 1, 2008, unless and until EPA approves them as part of the low-risk subcategory.

(b) *Sources in compliance with 40 CFR part 63, subpart DDDD.* If you operate an affected source that is already in compliance with 40 CFR part 63, subpart DDDD (including, but not limited to, an existing source, a new or reconstructed affected source starting up before September 28, 2004, or a new source starting up after September 28, 2004, but before February 16, 2006) and wish to become part of the low-risk subcategory, then you may complete and submit for approval your low-risk demonstration (including the emission test results, fuel analyses, and emission estimates required in this appendix) any time. Your affected source will become part of the low-risk subcategory when EPA determines that the requirements in section 11 of this appendix are met.

(c) New or reconstructed affected sources wanting to be part of the low-risk subcategory at startup must comply with the requirements of paragraphs (c)(1) through (c)(3) of this section.

(1)(i) You must complete and submit for review and approval a pre-startup low-risk demonstration no later than nine months prior to initial startup. The pre-startup low-risk demonstration must be based on the information (e.g., equipment types, estimated emission rates, etc.) that you will likely use to obtain your title V permit. You must base your pre-startup low-risk demonstration on the maximum emissions that will likely be allowed when you obtain your title V permit.

(ii) You must request that your affected source become part of the low-risk subcategory based on your pre-startup low-risk demonstration.

(iii) If EPA approves your pre-startup low-risk demonstration, then your affected source will be part of the low-risk subcategory upon approval of the pre-startup low-risk demonstration and you may start up your affected source without complying with the compliance options, operating requirements, and work practice requirements in 40 CFR part 63, subpart DDDD, provided that you operate your affected source consistently with the pre-startup low-risk demonstration until you meet the criteria in section 11 of this appendix based on your verification low-risk demonstration developed according to paragraph (c)(2) of this section. Failure to so operate will render approval of your pre-startup low-risk demonstration null and void from the date you startup your affected source.

(2)(i) You must complete and submit your verification low-risk demonstration, including the results from emission tests (or fuel analyses) required in this appendix, within 240 days following initial startup. The verification low-risk demonstration must demonstrate to EPA's satisfaction that the affected source is low risk. The verification low-risk demonstration may be used to change operating parameters ensuring low-risk status.

(ii) If you do not submit the verification low-risk demonstration as required, or the verification low-risk demonstration does not verify that the affected source is low risk, then approval of your pre-startup low-risk demonstration is null and void from the date you startup your affected source and you must comply immediately with subpart DDDD of 40 CFR part 63.

(3) To incorporate the low-risk parameters from your verification low-risk demonstration into your title V permit, you must submit your application for a significant modification to your title V permit within 1 year following initial startup, or earlier if so required under your State's permit program approved under 40 CFR part 70. The parameters that defined your affected source as part of the low-risk subcategory (including, but not limited to, production rate, emission rate, type of control devices, process parameters reflecting the emissions rates used for your low-risk demonstration, and stack height) must be submitted for incorporation as federally enforceable terms and conditions into your title V permit. You must provide written certification to the permitting authority that your affected source is operating consistently with its EPA-approved pre-startup low-risk demonstration and verification low-risk demonstration, as applicable, from startup until your title V permit revision is issued.

(d) New or reconstructed affected sources that want to operate consistently with a pre-startup low-risk demonstration at startup and become part of the low-risk subcategory based on EPA approval of their verification low-risk demonstration (rather than based on their pre-startup low-risk demonstration), must comply with the requirements in paragraphs (d)(1) through (d)(3) of this section.

(1)(i) You must complete and submit for review a pre-startup low-risk demonstration no later than nine months prior to initial startup. The pre-startup low-risk demonstration must be based on the information (e.g., equipment types, estimated emission rates, etc.) that you will likely use to obtain your title V permit. You must base your pre-startup low-risk demonstration on the maximum emissions that will likely be allowed when you obtain your title V permit.

(ii) If EPA concludes that your pre-startup low-risk demonstration is complete and

sufficiently shows that your affected source appears to be eligible for inclusion in the low-risk subcategory, then you must operate your affected source consistently with the pre-startup low-risk demonstration until EPA determines that you meet the criteria in section 11 of this appendix based on your verification low-risk demonstration developed according to paragraph (d)(2) of this section.

(2)(i) You must complete and submit for EPA review and approval your verification low-risk demonstration, including the results from emission tests (or fuel analyses) required in this appendix, within 240 days following initial startup. The verification low-risk demonstration must demonstrate to EPA's satisfaction that the affected source is low risk.

(ii) You will become part of the low-risk subcategory when EPA determines that you meet the criteria in section 11 of this appendix based upon your verification low-risk demonstration. If you do not submit the verification low-risk demonstration as required, or the verification low-risk demonstration does not verify that the affected source is low risk, then EPA will not approve your low-risk demonstration and you will remain subject to subpart DDDD of 40 CFR part 63.

(3) To incorporate the low-risk parameters from your verification low-risk demonstration into your title V permit, you must submit your application for a significant modification to your title V permit within 1 year following initial startup, or earlier if so required by your State's permit program approved by EPA under 40 CFR part 70. The parameters that defined your affected source as part of the low-risk subcategory (including, but not limited to, production rate, emission rate, type of control devices, process parameters reflecting the emissions rates used for your low-risk demonstration, and stack height) must be submitted for incorporation as federally enforceable terms and conditions into your title V permit. You must provide written certification to the permitting authority that your affected source is operating consistently with its pre-startup LRD and your verification LRD, as applicable, from startup until your title V permit revision is issued.

(e) *Area sources that become affected sources.* If you have an affected source that is an area source that increases its emissions or its potential to emit such that it becomes a major source of HAP before September 28, 2004, then you must complete and submit for approval your low-risk demonstration as specified in paragraph (a) of this section. If you have an affected source that is an area source that increases its emissions or its potential to emit such that it becomes a major source of HAP after September 28, 2004, then you must complete and submit for approval your low-risk demonstration as specified in paragraphs (b), (c) or (d) of this section, whichever applies.

11. How does my affected source become part of the low-risk subcategory of PCWP facilities?

For existing sources to be included in the low-risk subcategory, EPA must find that you meet the criteria in paragraphs (a) and (b) of this section. For new sources to be included in the low-risk subcategory, EPA must find that you meet the criteria in paragraph (a) of this section. Unless and until EPA finds that you meet these criteria, your affected source is subject to the applicable compliance options, operating requirements, and work practice requirements in 40 CFR part 63, subpart DDDD.

(a) Your demonstration of low risk must be approved by EPA.

(b) Following EPA approval, the parameters that defined your affected source as part of the low-risk subcategory (including, but not limited to, production rate, emission rate, type of control devices, process parameters reflecting the emissions rates used for your low-risk demonstration, and stack height) must be submitted for incorporation as federally enforceable terms and conditions into your title V permit. You must submit an application for a significant permit modification to reopen your title V permit to incorporate such terms and conditions according to the procedures and schedules of 40 CFR part 71 or the EPA-approved program in effect under 40 CFR part 70, as applicable.

12. What must I do to ensure my affected source remains in the low-risk subcategory of PCWP facilities?

You must meet the requirements in table 2 to 40 CFR part 63, subpart DDDD, for each HAP control device used at the time when you completed your low-risk demonstration. You must monitor and collect data according to § 63.2270 of subpart DDDD to show continuous compliance with your control device operating requirements. You must demonstrate continuous compliance with the control device operating requirements that apply to you by collecting and recording the monitoring system data listed in table 2 to 40 CFR part 63, subpart DDDD for the process unit according to §§ 63.2269(a), (b), and (d) of subpart DDDD; and reducing the monitoring system data to the specified averages in units of the applicable requirement according to calculations in § 63.2270 of subpart DDDD; and maintaining the average operating parameter at or above the minimum, at or below the maximum, or within the range (whichever applies) established according to section 5(e) of this appendix.

13. What happens if the criteria used in the risk determination change?

(a) You must certify with each annual title V permit compliance certification that the basis for your affected source's low-risk determination has not changed. You must submit this certification to the permitting authority. You must consider the changes in paragraphs (a)(1) through (5) of this section.

(1) Process changes that increase HAP emissions, including, but not limited to, a production rate increase, an emission rate increase, a change in type of control device, changes in process parameters reflecting emissions rates used for your approved low-risk demonstration.

(2) Population shifts, such as if people move to a different location such that their risks from the affected source increase.

(3) Unit risk estimate increases posted on the EPA Web site (*http://www.epa.gov/ttn/atw/toxsource/summary.html*) for the pollutants included in table 1 to this appendix.

(4) Reference concentration changes posted on the EPA Web site (*http://www.epa.gov/ttn/atw/toxsource/summary.html*) for the pollutants included in table 1 to this appendix.

(5) Acute dose-response value for formaldehyde or acrolein changes.

(b) If your affected source commences operating outside of the low-risk subcategory, it is no longer part of the low-risk subcategory. You must be in compliance with 40 CFR part 63, subpart DDDD as specified in paragraphs (b)(1) through (3) of this section. Operating outside of the low-risk subcategory means that one of the changes listed in paragraphs (a)(1) through (5) of this section has occurred and that the change is inconsistent with your affected source's title V permit terms and conditions reflecting EPA's approval of the parameters used in your low-risk demonstration.

(1) You must notify the permitting authority as soon as you know, or could have reasonably known, that your affected source is or will be operating outside of the low-risk subcategory.

(2) You must be in compliance with the requirements of 40 CFR part 63, subpart DDDD as specified in paragraph (b)(2)(i) or (ii) of this section, whichever applies.

(i) If you are operating outside of the low-risk subcategory due to a change described in paragraph (a)(1) of this section, then you must comply with 40 CFR part 63, subpart DDDD beginning on the date when your affected source commences operating outside the low-risk subcategory.

(ii) If you are operating outside of the low-risk subcategory due to a change described in paragraphs (a)(2) through (5) of this section, then you must comply with 40 CFR part 63, subpart DDDD no later than 3 years from the date your affected source commences operating outside the low-risk subcategory.

(3)(i) You must conduct performance tests no later than 180 calendar days after the applicable date specified in paragraph (b)(2) of this section.

(ii) You must conduct initial compliance demonstrations that do not require performance tests 30 calendar days after the applicable date specified in paragraph (b)(2) of this section.

(iii) For the purposes of affected sources affected by this section, you must refer to the requirements in paragraph (b) of this section instead of the requirements of § 63.2233 when complying with 40 CFR part 63, subpart DDDD.

14. What records must I keep?

(a) You must keep records of the information used in developing the low-risk demonstration for your affected source, including all of the information specified in section 8 of this appendix.

(b) You must keep records demonstrating continuous compliance with the operating requirements for control devices.

(c) For each THC CEMS, you must keep the records specified in § 63.2282(c) of 40 CFR part 63, subpart DDDD.

15. Definitions

The definitions in § 63.2292 of 40 CFR part 63, subpart DDDD, apply to this appendix. Additional definitions applicable for this appendix are as follows:

Agricultural fiber board press means a press used in the production of an agricultural fiber based composite wood product. An *agricultural fiber board press* is a process unit.

Agricultural fiberboard mat dryer means a dryer used to reduce the moisture of wet-formed agricultural fiber mats by applying heat. An *agricultural fiberboard mat dryer* is a process unit.

Ancillary processes mean equipment and process units that are part of the PCWP affected source that are not defined elsewhere in this section or in section 63.2292 of subpart DDDD. Ancillary processes at a specific facility do not include the equipment and process units identified as insignificant sources of HAP emissions by that facility, and they do not include equipment and process units subject to another standard under 40 CFR part 63. Ancillary processes may be or may not be HAP emissions sources.

Ancillary processes are process units.

Atmospheric refiner means a piece of equipment operated under atmospheric pressure for refining (rubbing or grinding) the wood material into fibers or particles. Atmospheric refiners are operated with continuous infeed and outfeed of wood material and atmospheric pressures throughout the refining process. An *atmospheric refiner* is a process unit.

Blending and forming operations means the process of mixing adhesive and other additives with the (wood) furnish of the composite panel and making a mat of resinated fiber, particles, or strands to be compressed into a reconstituted wood product such as particleboard, oriented strandboard, or medium density fiberboard. *Blending and forming operations* are process units.

Emission point means an individual stack or vent from a process unit that emits HAP required for inclusion in the low-risk demonstration specified in this appendix. Process units may have multiple emission points.

Fiber washer means a unit in which water-soluble components of wood (hemicellulose and sugars) that have been produced during digesting and refining are removed from the wood fiber. Typically wet fiber leaving a refiner is further diluted with water and then passed over a filter, leaving the cleaned fiber on the surface. A *fiber washer* is a process unit.

Finishing sander means a piece of equipment that uses an abrasive drum, belt, or pad to impart smoothness to the surface of a plywood or composite wood product panel and to reduce the panel to the prescribed thickness. A *finishing sander* is a process unit.

Finishing saw means a piece of equipment used to trim or cut finished plywood and composite wood products panels to a certain size. A *finishing saw* is a process unit.

Hardwood plywood press means a hot press which, through heat and pressure, bonds assembled hardwood veneers (including multiple plies of veneer and/or a substrate) and resin into a hardwood plywood panel. A *hardwood plywood press* is a process unit.

Hardwood veneer kiln means an enclosed dryer operated in batch cycles by applying heat to reduce the moisture content from stacked hardwood veneer. A *hardwood veneer kiln* is a process unit.

Hazard Index (HI) means the sum of more than one hazard quotient for multiple substances and/or multiple exposure pathways.

Hazard Quotient (HQ) means the ratio of the predicted media concentration of a pollutant to the media concentration at which no adverse effects are expected. For inhalation exposures, the HQ is calculated as the air concentration divided by the reference concentration (RfC).

Humidifier means a process unit used to increase the moisture content of hardboard following pressing or after post-baking. Typically, water vapor saturated air is blown over the hardboard surfaces in a closed cabinet. A *humidifier* is a process unit.

I-joist curing chamber means an oven or a room surrounded by a solid wall or heavy plastic flaps that uses heat, infrared, or radio-frequency techniques to cure the adhesive. An *I-joist curing chamber* is a process unit.

Log chipping means the production of wood chips from logs.

Log vat means a process unit that raises the temperature of the logs inside by applying a heated substance, usually hot water and steam, to the outside of the logs by spraying or soaking. A *log vat* is a process unit.

Look-up table analysis means a risk screening analysis based on comparing the toxicity-weighted HAP emission rate from the affected source to the maximum allowable toxicity-weighted HAP emission rates specified in tables 3 and 4 to this appendix.

LSL press means a composite wood product press that presses a loose mat of resinated strands into a billet by simultaneous application of heat and pressure. The billet is cut into laminated strand lumber after exiting the press. An *LSL press* is a process unit.

LVL or PSL press means a composite wood product press that presses resinated stacks of veneers into a solid billet by application of heat and/or pressure. The billet is cut into laminated veneer lumber or parallel strand lumber after exiting the press. An *LVL or PSL press* is a process unit.

Natural gas means a naturally occurring mixture of hydrocarbon and non-hydrocarbon gases found in geologic formations beneath the earth's surface. The principal hydrocarbon constituent is methane.

Paddle-type particleboard dryer means a dryer to which heat is applied to remove moisture from particles and paddles to advance materials through the dryer. This type of dryer removes moisture absorbed by particles due to high ambient temperature. A *paddle-type particleboard dryer* is a process unit.

Panel-trim chipper means a piece of equipment that accepts the discarded pieces of veneer or pressed plywood and composite wood products panels that are removed by finishing saws and reduces these pieces to small elements. A *panel-trim chipper* is a process unit.

Particleboard extruder means a heated die oriented either horizontally or vertically through which resinated particles are continuously forced to form extruded particleboard products. A *particleboard extruder* is a process unit.

Particleboard press mold means a press that consists of molds that apply heat and pressure to form molded or shaped particleboard products. A *particleboard press mold* is a process unit.

Propane means a colorless gas derived from petroleum and natural gas, with the molecular structure C_3H_8.

Radio-frequency veneer redryer means a dryer heated by radio-frequency waves that is used to redry veneer that has been previously dried. A *radio-frequency veneer redryer* is a process unit.

Reference Concentration (RfC) means an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime. It can be derived from various types of human or animal data, with uncertainty factors generally applied to reflect limitations of the data used.

Resin storage tank means any storage tank, container, or vessel connected to plywood and composite wood product production that holds resin additives (in liquid form) containing any of the HAP listed in table 2A to this appendix. A *resin storage tank* is a process unit.

Rotary agricultural fiber dryer means a rotary dryer operated by applying heat to reduce the moisture of agricultural fiber. A *rotary agricultural fiber dryer* is a process unit.

Softwood plywood press means a hot press which, through heat and pressure, bonds assembled softwood veneer plies and resin into a softwood plywood panel. A *softwood plywood press* is a process unit.

Softwood veneer kiln means an enclosed dryer operated in batch cycles by applying heat to reduce the moisture content from stacked softwood veneer. A *softwood veneer kiln* is a process unit.

Stand-alone digester means a pressure vessel used to heat and soften wood chips (usually by steaming) before the chips are sent to a separate process unit for refining into fiber. A *stand-alone digester* is a process unit.

Target organ specific hazard index (TOSHI) means the sum of hazard quotients for individual chemicals that affect the same organ or organ system (e.g., respiratory system, central nervous system).

Unit Risk Estimate (URE) means the upper-bound excess lifetime cancer risk estimated to result from continuous exposure to an agent at a concentration of 1 microgram per cubic meter ($\mu g/m^3$) in air.

Wastewater/process water operation means equipment that processes water in plywood or composite wood product facilities for

reuse or disposal. Wastewater/process water operations includes but is not limited to pumps, holding ponds and tanks, cooling and heating operations, settling systems, filtration systems, aeration systems, clarifiers, pH adjustment systems, log storage ponds, pollution control device water (including wash water), vacuum distillation systems, sludge drying and disposal systems, spray irrigation fields, and connections to POTW facilities. *Wastewater/process water operations* are process units.

Worst-case operating conditions means operation of a process unit during emissions testing under the conditions that result in the highest HAP emissions or that result in the emissions stream composition (including HAP and non-HAP) that is most challenging for the control device if a control device is used. For example, worst case conditions could include operation of the process unit at maximum throughput, at its highest temperature, with the wood species mix likely to produce the most HAP, and/or with the resin formulation containing the greatest HAP.

TABLE 1 TO APPENDIX B TO SUBPART DDDD OF 40 CFR PART 63.—HAP THAT MUST BE INCLUDED IN THE DEMONSTRATION OF ELIGIBILITY FOR THE LOW-RISK PCWP SUBCATEGORY

For your analysis of the following effects . . .	You must include the following HAP . . .
(1) Chronic inhalation carcinogenic effects	acetaldehyde, benzene, arsenic, beryllium, cadmium, chromium, lead, nickel, and formaldehyde.
(2) Chronic inhalation noncarcinogenic respiratory effects	acetaldehyde, acrolein, cadmium, formaldehyde, and methylene diphenyl diisocyanate (MDI).
(3) Chronic inhalation noncarcinogenic CNS effects	manganese, lead, and phenol.
(4) Acute inhalation	acrolein and formaldehyde.

TABLE 2A TO APPENDIX B TO SUBPART DDDD OF 40 CFR PART 63.—TESTING AND EMISSIONS ESTIMATION SPECIFICATIONS FOR PROCESS UNITS

Process unit type	Acetaldehyde	Acrolein	Formaldehyde	Phenol	Benzene	MDI	HAP metals from direct-fired process units [a]
Agricultural fiberboard mat dryers, Dry rotary dryers, Fiberboard mat dryer (heated zones), Green rotary dryers, Hardboard ovens, Hardwood veneer dryers (heated zones), Paddle-type particleboard dryers, Press predryers, Rotary agricultural fiber dryers, Rotary strand dryers, Softwood veneer dryers (heated zones), Veneer redryers (heated by conventional means).	Test	Test	Test	Test	Test	NA	Test or fuel analysis.
Atmospheric refiners, Conveyor strand dryers, Pressurized refiners.	Test	Test	Test	Test	Test	NA	NA.
Primary tube dryers, Secondary tube dryers.	Test	Test	Test	Test	Test	Test if processing furnish with MDI resin added prior to drying.	Test or fuel analysis.
Agricultural fiber board presses, Reconstituted wood products presses, Reconstituted wood product board coolers.	Test	Test	Test	Test	Test	Test if board contains MDI resin.	NA
Blending and forming operations—particleboard and MDF.	NA	NA	0.060 lb/ODT[b].	NA	NA	Engineering estimate if MDI resin used.	NA.
Blending and forming operations—OSB.	NA	NA	0.0036 lb/MSF 3/8″ press throughput.	Engineering estimate.	NA	Engineering estimate if MDI resin used.	NA.
Dry forming—hardboard	Engineering estimate.	NA	Engineering estimate.	Engineering estimate.	NA	NA	NA.
Fiber washers	0.015 lb/ODT	NA	0.0026 lb/ODT.	NA	NA	NA	NA.
Fiberboard mat dryer (fugitive emissions).	0.0055 lb/MSF 1/2″.	NA	0.031 lb/MSF 1/2″.	NA	NA	NA	NA.

TABLE 2A TO APPENDIX B TO SUBPART DDDD OF 40 CFR PART 63.—TESTING AND EMISSIONS ESTIMATION SPECIFICATIONS FOR PROCESS UNITS—Continued

Process unit type	Acetaldehyde	Acrolein	Formaldehyde	Phenol	Benzene	MDI	HAP metals from direct-fired process units [a]
Finishing sanders	0.0031 lb/MSF.	NA	0.0042 lb/MSF.	0.015 lb/MSF	NA	Engineering estimate if MDI resin used.	NA.
Finishing saws	0.00092 lb/MSF 3/8″.	NA	0.00034 lb/MSF 3/8″.	0.0057 lb/MSF.	NA	Engineering estimate if MDI resin used.	NA.
Hardwood plywood presses	NA	NA	0.0088 lb/MSF 3/8″.	0.016 lb/MSF 3/8″.	NA	NA	NA.
Hardwood veneer dryer (cooling zones).	0.058 lb/MSF 3/8″.	NA	0.013 lb/MSF 3/8″.	NA	NA	NA	NA.
Hardwood veneer kilns	0.067 lb/MSF 3/8″.	NA	0.016 lb/MSF 3/8″.	0.0053 lb/MSF 3/8″,.	NA	NA	NA.
Humidifiers	0.0018 lb/MSF 1/8″.	0.0087 lb/MSF 1/8″.	0.0010 lb/MSF 1/8″.	0.00057 lb/MSF 1/8″.	0.0000062 lb/MSF 1/8″.	NA	NA.
I-joist curing chambers	NA	NA	0.00018 lb/MLF.	NA	NA	Engineering estimate if MDI resin used.	NA.
Log vats	0.0047 lb/MSF 3/8″ removed from vat per hour.	NA	NA	NA	NA	NA	NA.
LSL presses	Engineering estimate.	NA	0.029 lb/1000 ft^3.	Engineering estimate.	NA	0.18 lb/1000 ft^3.	NA.
LVL presses	0.29 lb/1000 ft^3.	NA	0.79 lb/1000 ft^3.	NA	NA	NA	NA.
Lumber kilns	0.065 lb/MBF or conduct small-scale kiln testing according to appendix C to subpart DDDD.	0.009 lb/MBF or conduct small-scale kiln testing according to appendix C to subpart DDDD.	0.034 lb/MBF or conduct small-scale kiln testing according to appendix C to subpart DDDD.	0.010 lb/MBF or conduct small-scale kiln testing according to appendix C to subpart DDDD.	NA	NA	Engineering estimate.
Panel-trim chippers	0.00081 lb/MSF 3/8″ finished board production.	NA	0.00034 lb/MSF 3/8″ finished board production.	0.0019 lb/MSF 3/8″ finished board production.	NA	NA	NA.
Particleboard press molds, Particleboard extruders.	0.034 lb/MSF 3/4″.	0.0087 lb/MSF 3/4″.	0.64 lb/MSF 3/4″.	0.024 lb/MSF 3/4″.	0.0073 lb/MSF 3/4″.	NA	NA.
Radio-frequency veneer redryers.	0.0029 lb/MSF 3/8″.	NA	0.00065 lb/MSF 3/8″.	NA	NA	NA	NA.
Resin storage tanks—closed roof.	NA	NA	For tanks with resin containing formaldehyde, 0.001 lb/hr per tank OR model using TANKS software[c].	For tanks with resin containing phenol, 0.0002 lb/hr per tank OR model using TANKS software[c].	NA	For tanks with MDI resin, 0.0013 lb/hr per tank OR model using TANKS software[c].	NA.
Resin storage tanks—open roof.	NA	NA	Engineering estimate if resin contains formaldehyde.	Engineering estimate if resin contains phenol.	NA	Engineering estimate if resin contains MDI.	NA.
Softwood plywood presses	0.012 lb/MSF 3/8″.	NA	0.0054 lb/MSF 3/8″.	0.0022 lb/MSF 3/8″.	NA	NA	NA.
Softwood veneer dryers (cooling zones).	0.012 lb/MSF 3/8″.	NA	0.0028 lb/MSF 3/8″.	0.011 lb/MSF 3/8″.	NA	NA	NA.
Softwood veneer kilns	0.097 lb/MSF 3/8″.	0.012 lb/MSF 3/8″.	0.10 lb/MSF 3/8″.	0.020 lb/MSF 3/8″.	0.0078 lb/MSF 3/8″.	NA	NA.

TABLE 2A TO APPENDIX B TO SUBPART DDDD OF 40 CFR PART 63.—TESTING AND EMISSIONS ESTIMATION SPECIFICATIONS FOR PROCESS UNITS—Continued

Process unit type	Acetaldehyde	Acrolein	Formaldehyde	Phenol	Benzene	MDI	HAP metals from direct-fired process units [a]
Stand-alone digesters	0.030 lb/ODT	0.0024 lb/ODT.	0.0045 lb/ODT.	0.0012 lb/ODT.	NA	NA	NA.
Wastewater/process water operations.	Engineering estimate (such as WATER9[c] or other method).	Engineering estimate (such as WATER9[c] or other method).	Engineering estimate (such as WATER9[c] or other method).	Engineering estimate (such as WATER9[c] or other method).	Engineering estimate (such as WATER9[c] or other method).	NA	NA.
Wet forming—fiberboard and hardboard (without PF resin).	0.0075 lb/MSF ½″.	NA	0.0036 lb/MSF ½″.	NA	NA	NA	NA.
Wet forming—hardboard (PF resin).	0.0067 lb/ODT.	NA	0.00039 lb/ODT.	0.00075 lb/ODT.	NA	NA	NA.
Miscellaneous coating operations, Log chipping, Softwood veneer dryer fugitive emissions.	NA	NA	NA	NA	NA	NA	NA.
Other ancillary processes (not listed elsewhere in this table) that may emit HAP listed in this table.	Engineering estimate.	Engineering estimate.	Engineering estimate.	Engineering estimate.	Engineering estimate.	Engineering estimate.	Engineering estimate.

Test: Emissions testing must be conducted for the process unit and pollutant according to the test methods specified in table 2B to appendix B to subpart DDDD.

NA: Not applicable. No emission estimates or emissions tests are required for purposes of the low-risk demonstration.

lb/MSF: Pounds of HAP per thousand square feet of board of the inches thickness specified (e.g., lb/MSF ¾ = pounds of HAP per thousand square feet of ¾-inch board). See equation in § 63.2262(j) of subpart DDDD to convert from one thickness basis to another.

lb/ODT: Pounds of HAP per oven dried ton of wood material.

lb/MBF: Pounds of HAP per thousand board feet.

lb/MLF: Pounds of HAP per thousand linear feet

[a] Direct-fired process units firing natural gas or propane are NA; thus, no emissions estimates, emissions tests, or fuel analyses are required for the purposes of the low-risk demonstration.

[b] Estimation of formaldehyde emissions is only necessary for facilities that use resin containing formaldehyde.

[c] TANKS and WATER9 software is available at *http://www.epa.gov/ttn/chief/software/index.html.*

TABLE 2B TO APPENDIX B TO SUBPART DDDD OF 40 CFR PART 63.—EMISSION TEST METHODS

For . . .	You must . . .	Using . . .
(1) each process unit required to be tested according to table 2A to this appendix.	select sampling ports' location and the number of traverse points.	Method 1 or 1A of 40 CFR part 60, appendix A (as appropriate).
(2) each process unit required to be tested according to table 2A to this appendix.	determine velocity and volumetric flow rate; ...	Method 2 in addition to Method 2A, 2C, 2D, 2F, or 2G in appendix A to 40 CFR part 60 (as appropriate).
(3) each process unit required to be tested according to table 2A to this appendix.	conduct gas molecular weight analysis	Method 3, 3A, or 3B in appendix A to 40 CFR part 60 (as appropriate).
(4) each process unit required to be tested according to table 2A to this appendix.	measure moisture content of the stack gas	Method 4 in appendix A to 40 CFR part 60.
(5) each process unit required to be tested according to table 2A to this appendix.	measure emissions of acetaldehyde	NCASI Method IM/CAN/WP–99.02 (IBR, see 40 CFR 63.14(f)); OR Method 320 in appendix A to 40 CFR part 63; OR the NCASI Method ISS/FP–A105.01 (IBR, see § 63.14(f)); OR Method 0011 in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods" (EPA Publication No. SW–846); OR ASTM D6348–03[b] (IBR, see 40 CFR 63.14(b)).
(6) each process unit required to be tested according to table 2A to this appendix.	measure emissions of acrolein	NCASI Method IM/CAN/WP–99.02 (IBR, see 40 CFR 63.14(f)); OR Method 320 in appendix A to 40 CFR part 63; OR the NCASI Method ISS/FP–A105.01 (IBR, see § 63.14(f)); OR ASTM D6348–03[b] (IBR, see 40 CFR 63.14(b)).

TABLE 2B TO APPENDIX B TO SUBPART DDDD OF 40 CFR PART 63.—EMISSION TEST METHODS—Continued

For . . .	You must . . .	Using . . .
(7) each process unit required to be tested according to table 2A to this appendix.	measure emissions of formaldehyde	NCASI Method IM/CAN/WP–99.02 (IBR, see 40 CFR 63.14(f)); OR Method 320 in appendix A to 40 CFR part 63; OR the NCASI Method ISS/FP–A105.01 (IBR, see § 63.14(f)); OR the NCASI Method CI/WP–98.01; OR Method 316 in appendix A to 40 CFR part 63; OR Method 0011 in ''Test Methods for Evaluating Solid Waste, Physical/Chemical Methods'' (EPA Publication No. SW–846); OR ASTM D6348–03 [b] (IBR, see 40 CFR 63.14(b)).
(8) each process unit required to be tested according to table 2A to this appendix.	measure emissions of phenol	NCASI Method IM/CAN/WP–99.02 (IBR, see 40 CFR 63.14(f)); OR Method 320 in appendix A to 40 CFR part 63; OR the NCASI Method ISS/FP–A105.01 (IBR, see § 63.14(f)); OR the NCASI Method CI/WP–98.01; OR ASTM D6348–03 [b] (IBR, see 40 CFR 63.14(b)).
(9) each process unit required to be tested according to table 2A to this appendix.	measure emissions of benzene	Method 18 in appendix A to 40 CFR part 60; OR NCASI Method IM/CAN/WP–99.02 (IBR, see 40 CFR 63.14(f)); OR Method 320 in appendix A to 40 CFR part 63; OR ASTM D6348–03 [b] (IBR, see 40 CFR 63.14(b)).
(10) each process unit that processes material containing MDI resin required to be tested according to table 2A to this appendix.	measure emissions of MDI	Method 320 in appendix A to 40 CFR part 63; OR Method 207 in appendix M to 40 CFR part 51; OR Conditional Test Method (CTM) 031 which is posted on *http://www.epa.gov/ttn/emc/ctm.html*
(11) each direct-fired process unit [a] required to be tested according to table 2A to this appendix.	measure emissions of the following HAP metals: Arsenic, beryllium, cadmium, chromium, lead, manganese, and nickel..	Method 29 in appendix A to 40 CFR part 60 OR fuel analysis (see section 5(m) of this appendix).
(12) each reconstituted wood product press or reconstituted wood product board cooler with a HAP control device.	meet the design specifications included in the definition of wood products enclosure in § 63.2292 of subpart DDDD of 40 CFR part 63; or determine the percent capture efficiency of the enclosure directing emissions to an add-on control device.	Methods 204 and 204A through 204F of 40 CFR part 51, appendix M to determine capture efficiency (except for wood products enclosures as defined in § 63.2292). Enclosures that meet the definition of wood products enclosure or that meet Method 204 requirements for a PTE are assumed to have a capture efficiency of 100 percent. Enclosures that do not meet either the PTE requirements or design criteria for a wood products enclosure must determine the capture efficiency by constructing a TTE according to the requirements of Method 204 and applying Methods 204A through 204F (as appropriate). As an alternative to Methods 204 and 204A through 204F, you may use the tracer gas method contained in appendix A to subpart DDDD.
(13) each reconstituted wood product press or reconstituted wood product board cooler required to be tested according to table 2A to this appendix.	determine the percent capture efficiency	a TTE and Methods 204 and 204A through 204F (as appropriate) of 40 CFR part 51, appendix M. As an alternative to installing a TTE and using Methods 204 and 204A through 204F, you may use the tracer gas method contained in appendix A to subpart DDDD. Enclosures that meet the design criteria (1) through (4) in the definition of wood products enclosure, or that meet Method 204 requirements for a PTE (except for the criteria specified in section 6.2 of Method 204) are assumed to have a capture efficiency of 100 percent. Measured emissions divided by the capture efficiency provides the emission rate. Fugitive emissions are equal to the difference in the emission rate and measured emissions.

TABLE 2B TO APPENDIX B TO SUBPART DDDD OF 40 CFR PART 63.—EMISSION TEST METHODS—Continued

For . . .	You must . . .	Using . . .
(14) each process unit with a HAP control device required to be tested according to table 2A to this appendix.	establish the site-specific operating requirements (including the parameter limits or THC concentration limits) in table 2 to subpart DDDD.	data from the parameter monitoring system or THC CEMS and the applicable performance test method(s).

[a] Excludes direct-fired process units fired with only natural gas or propane.
[b] Provided that percent R as determined in Annex A5 of ASTM D6348–03 is equal or greater than 70 percent and less than or equal to 130 percent.

TABLE 3 TO APPENDIX B TO SUBPART DDDD OF 40 CFR PART 63.—MAXIMUM ALLOWABLE TOXICITY-WEIGHTED CARCINOGEN EMISSION RATE

[(lb/hr)/(μg/m³)]

Stack height (m)	Distance to property boundary (m)											
	0	50	100	150	200	250	500	1000	1500	2000	3000	5000
5	8.72E–07	8.72E–07	8.72E–07	9.63E–07	1.25E–06	1.51E–06	2.66E–06	4.25E–06	4.39E–06	4.39E–06	4.39E–06	5.00E–06
10	2.47E–06	2.47E–06	2.47E–06	2.47E–06	2.47E–06	2.61E–06	3.58E–06	5.03E–06	5.89E–06	5.89E–06	5.89E–06	6.16E–06
20	5.81E–06	5.81E–06	5.81E–06	5.81E–06	5.81E–06	5.81E–06	5.90E–06	7.39E–06	8.90E–06	9.97E–06	9.97E–06	1.12E–05
30	7.74E–06	7.74E–06	7.74E–06	7.74E–06	7.74E–06	7.74E–06	8.28E–06	9.49E–06	1.17E–05	1.35E–05	1.55E–05	1.61E–05
40	9.20E–06	9.20E–06	9.20E–06	9.20E–06	9.20E–06	9.20E–06	9.24E–06	1.17E–05	1.34E–05	1.51E–05	1.98E–05	2.22E–05
50	1.02E–05	1.02E–05	1.02E–05	1.02E–05	1.02E–05	1.02E–05	1.02E–05	1.36E–05	1.53E–05	1.66E–05	2.37E–05	2.95E–05
60	1.13E–05	1.13E–05	1.13E–05	1.13E–05	1.13E–05	1.13E–05	1.13E–05	1.53E–05	1.76E–05	1.85E–05	2.51E–05	3.45E–05
70	1.23E–05	1.23E–05	1.23E–05	1.23E–05	1.23E–05	1.23E–05	1.23E–05	1.72E–05	2.04E–05	2.06E–05	2.66E–05	4.07E–05
80	1.34E–05	1.34E–05	1.34E–05	1.34E–05	1.34E–05	1.34E–05	1.34E–05	1.92E–05	2.15E–05	2.31E–05	2.82E–05	4.34E–05
100	1.52E–05	1.52E–05	1.52E–05	1.52E–05	1.52E–05	1.52E–05	1.52E–05	1.97E–05	2.40E–05	2.79E–05	3.17E–05	4.49E–05
200	1.76E–05	1.76E–05	1.76E–05	1.76E–05	1.76E–05	1.76E–05	1.76E–05	2.06E–05	2.94E–05	3.24E–05	4.03E–05	5.04E–05

MIR=1E–06.

TABLE 4 TO APPENDIX B TO SUBPART DDDD OF 40 CFR PART 63.—MAXIMUM ALLOWABLE TOXICITY-WEIGHTED NONCARCINOGEN EMISSION RATE

[(lb/hr)/(μg/m³)]

Stack height (m)	Distance to property boundary (m)											
	0	50	100	150	200	250	500	1000	1500	2000	3000	5000
5	2.51E–01	2.51E–01	3.16E–01	3.16E–01	3.16E–01	3.16E–01	3.16E–01	3.46E–01	4.66E–01	6.21E–01	9.82E–01	1.80E+00
10	5.62E–01	5.62E–01	5.62E–01	5.62E–01	5.62E–01	5.62E–01	5.62E–01	5.70E–01	6.33E–01	7.71E–01	1.13E+00	1.97E+00
20	1.43E+00	1.43E+00	1.43E+00	1.43E+00	1.43E+00	1.43E+00	1.43E+00	1.43E+00	1.68E+00	1.83E+00	2.26E+00	3.51E+00
30	2.36E+00	2.36E+00	2.36E+00	2.36E+00	2.36E+00	2.36E+00	2.53E+00	3.04E+00	3.04E+00	3.33E+00	4.45E+00	5.81E+00
40	3.11E+00	3.11E+00	3.11E+00	3.11E+00	3.11E+00	3.11E+00	3.42E+00	4.04E+00	5.07E+00	5.51E+00	6.39E+00	9.63E+00
50	3.93E+00	3.93E+00	3.93E+00	3.93E+00	3.93E+00	3.93E+00	4.49E+00	4.92E+00	6.95E+00	7.35E+00	8.99E+00	1.25E+01
60	4.83E+00	4.83E+00	4.83E+00	4.83E+00	4.83E+00	4.83E+00	5.56E+00	6.13E+00	7.80E+00	1.01E+01	1.10E+01	1.63E+01
70	5.77E+00	5.77E+00	5.77E+00	5.77E+00	5.77E+00	5.77E+00	6.45E+00	7.71E+00	8.83E+00	1.18E+01	1.36E+01	1.86E+01
80	6.74E+00	6.74E+00	6.74E+00	6.74E+00	6.74E+00	6.74E+00	7.12E+00	9.50E+00	1.01E+01	1.29E+01	1.72E+01	2.13E+01
100	8.87E+00	8.87E+00	8.87E+00	8.87E+00	8.87E+00	8.87E+00	8.88E+00	1.19E+01	1.37E+01	1.55E+01	2.38E+01	2.89E+01
200	1.70E+01	1.70E+01	1.70E+01	1.70E+01	1.70E+01	1.70E+01	1.70E+01	2.05E+01	2.93E+01	3.06E+01	4.02E+01	4.93E+01

HI=1.

■ 13. Add appendix C to subpart DDDD to read as follows:

Appendix C to Subpart DDDD of Part 63—Considerations for a Small-Scale Kiln Emission Testing Program

1.0 Purpose

Emissions test data from small-scale lumber kilns can be used to reasonably approximate emissions from full-scale lumber kilns if representative lumber samples are dried and the venting characteristics of the small-scale kiln mimic those of the full-scale kiln. This appendix provides a list of considerations that must be taken into account by facilities conducting small-scale lumber kiln emissions testing to approximate emissions from their full-scale lumber kilns for purposes of the low-risk demonstration described under appendix B to subpart DDDD of part 63.

The considerations described in this appendix apply only for small-scale lumber kiln emissions testing conducted to provide data for the low-risk demonstration described under appendix B to subpart DDDD of part 63. Permitting authorities may require different procedures for testing or estimating lumber kiln emissions for purposes other than the low-risk demonstration described under appendix B to subpart DDDD of part 63.

2.0 Considerations for Lumber Samples

2.1 A written plan must be developed for obtaining representative lumber samples to use as charges at the small-scale kilns. The plan must discuss how the samples are selected and handled and the basis upon which they are considered to be representative. If possible, information on the harvest site, date harvested, segregation from other lumber (if segregated), and processing at the sawmill must be included. If this information is unavailable, a general description of the sawmill's wood procurement and processing practices must be provided. The affected source and testing laboratory must approve the written test plan before beginning the small-scale kiln testing.

2.2 Samples must not be subject to significant air drying during processing, shipping, or storage prior to charging into the small-scale kiln.

2.3 Enough lumber must be collected to provide for extra lumber charges in case of testing failures.

2.4 Information on the lumber used for each small-scale kiln charge must be reported including the items in paragraphs 2.4.1 though 2.4.4 of this section:

2.4.1 Total kiln charge, board feet,

2.4.2 Nominal dimensions of lumber dried (for example, 2x4s),

2.4.3 Moisture content (dry basis) of the green lumber, and

2.4.4 Moisture content (dry basis) of the kiln dried lumber.

3.0 Considerations for Kiln Operating Parameters

The small-scale kiln must operate in a similar manner to the full-scale kilns for items 3.1 through 3.3 of this section. The small-scale kiln must operate in a reasonably consistent manner from charge-to-charge for all items (3.1 through 3.5) listed in this section.

3.1 Air velocity through the kiln charge.

3.2 Temperature profiles or kiln schedules (wet-bulb/dry-bulb temperatures throughout the kiln cycle).

3.3 Ending moisture content (dry basis) of the lumber (may need to be mathematically adjusted for small-scale kilns).

3.4 Kiln venting profile (trend) for the sample event/kiln cycle (normalized to a board foot or thousand board feet).

3.5 Mass emission rate profile (trend) for the sample event/kiln cycle.

4.0 Considerations for Emission Sampling

4.1 Sample equipment must be able to sample gases with high moisture content.

4.2 You must accurately measure/calculate total kiln exhaust and exhaust moisture content. If direct measurements are impractical other methods used must be explicitly discussed in the report.

4.3 You must accurately measure the concentration of the compounds of concern either in the kiln exhaust or at a proper location within the kiln.

5.0 Considerations for Sample Intervals and Sampling Runs

5.1 A minimum of two full kiln cycles or batches must be tested to determine the emissions for a particular wood species or for a facility utilizing only one wood species.

5.2 You may use a single kiln cycle for emission values for wood species that require more than 3 days to dry.

5.3 Since kiln drying cycles typically exceed 20 hours, it is suggested that sampling be conducted in intervals throughout the drying cycle. Three hours provide a reasonable sample interval (sample run), but sampling equipment or manpower may dictate other schedules. Sampling equipment ''turnaround'' will result in gaps in the kiln emission data. The gaps must not exceed 45% of the kiln cycle. Data for the gaps occurring at certain periods of time in the drying cycle can be calculated by linear interpolation from the sampling values on either side of the gap. Other techniques may be required if the data gap occurs when the measured data exhibit high levels of variability. As a minimum, sampling intervals must include initial hours of the kiln operating cycle once the kiln has warmed to target wet bulb and/or dry bulb temperatures and begins venting, hours of kiln operation during the middle of the kiln drying cycle, and hours of kiln operation towards the end of the kiln drying cycle.

5.4 The final production-based mass emission rate for the small-scale kiln sample event is determined by integrating the area under the mass emission rate profile curve.

6.0 Considerations for Reporting

The emissions report must contain the information in paragraphs 6.1 through 6.9 of this section.

6.1 Graphical, charge-by-charge results for items 3.2, 3.4, and 3.5 above and numerical data for items 3.1 and 3.3. Describe how the full-scale kiln operates in comparison to the small-scale kiln in order to show that the full-scale kiln drying cycle was reasonably reproduced in the small-scale kiln.

6.2 A moisture balance by comparing the water loss (from the green versus dry lumber charge weight difference) to the water exhausted from the kiln (using the exhaust flow rate and moisture content of the exhaust).

6.3 A description of the sampling system and sampling methodology.

6.4 A summary and background data for all quality assurance measures required by the sampling methods.

6.5 Discussion of method detection limits and treatment of values below the detection limit.

6.6 An example of emission rate calculations.

6.7 Explanation or reference to the methodology used to calculate emissions to the target or desired ending lumber moisture content.

6.8 Information outlined in section 2.0 of this appendix, including a discussion of collection and handling of lumber samples.

6.9 Data and show calculations for developed emission factors.

7.0 Guidance

7.1 NCASI Technical Bulletin 845 provides a large amount of detail that can be of assistance in many phases of a small-scale kiln testing program. This report should be viewed as ''one way,'' not ''the only way'' to conduct testing.

7.2 Oregon State University, Mississippi State University, the University of Idaho, and others have published information regarding operation and testing of small-scale kilns. These publications are a very good source of information on small-scale kilns.

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Part III

Department of Health and Human Services

Office of the Secretary

45 CFR Parts 160 and 164

HIPAA Administrative Simplification: Enforcement; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Parts 160 and 164

RIN 0991–AB29

HIPAA Administrative Simplification: Enforcement

AGENCY: Office of the Secretary, HHS.

ACTION: Final rule.

SUMMARY: The Secretary of Health and Human Services is adopting rules for the imposition of civil money penalties on entities that violate rules adopted by the Secretary to implement the Administrative Simplification provisions of the Health Insurance Portability and Accountability Act of 1996, Public Law 104–191 (HIPAA). The final rule amends the existing rules relating to the investigation of noncompliance to make them apply to all of the HIPAA Administrative Simplification rules, rather than exclusively to the privacy standards. It also amends the existing rules relating to the process for imposition of civil money penalties. Among other matters, the final rule clarifies and elaborates upon the investigation process, bases for liability, determination of the penalty amount, grounds for waiver, conduct of the hearing, and the appeal process.

DATES: This final rule is effective on March 16, 2006.

FOR FURTHER INFORMATION CONTACT: Carol C. Conrad, (202) 690–1840.

SUPPLEMENTARY INFORMATION: On April 18, 2005, the Department of Health and Human Services (HHS) published a Notice of Proposed Rulemaking (proposed rule) proposing to revise the existing rules relating to compliance with, and enforcement of, the Administrative Simplification regulations (HIPAA rules) adopted by the Secretary of Health and Human Services (Secretary) under subtitle F of Title II of HIPAA (HIPAA provisions). 70 FR 20224. The proposed rule also proposed the adoption of new provisions relating to the imposition of civil money penalties on covered entities that violate a HIPAA provision or HIPAA rule. The comment period on the proposed rule closed on June 17, 2005. Forty-nine comments, principally from health care organizations, were received during the comment period.

In this final rule, HHS revises existing rules that relate to compliance with, and enforcement of, the HIPAA rules. These rules are codified at 45 CFR part 160, subparts C and E. In addition, this final rule adds a new subpart D to part 160. The new subpart D contains additional rules relating to the imposition by the Secretary of civil money penalties on covered entities that violate the HIPAA rules. The full set of rules to be codified at subparts C, D, and E of 45 CFR part 160 is collectively referred to in this final rule as the ''Enforcement Rule.'' Finally, HHS makes minor and conforming changes to subpart A of part 160 and subpart E of part 164.

The statutory and regulatory background of the final rule is set out below. A description of the provisions of the proposed rule, the public comments, and HHS's responses to the comments follows. The preamble concludes with HHS's analyses of impact and other issues under applicable law.

I. Background

A. Statutory Background

Subtitle F of Title II of HIPAA, entitled ''Administrative Simplification,'' requires the Secretary to adopt national standards for certain information-related activities of the health care industry. Under section 1173 of the Social Security Act (Act), 42 U.S.C. 1320d–2, the Secretary is required to adopt national standards for certain financial and administrative transactions, code sets, the security of health information, and certain unique health identifiers. In addition, section 264 of HIPAA, 42 U.S.C. 1320d–2 note, requires the Secretary to promulgate standards to protect the privacy of certain health information. Under section 1172(a) of the Act, 42 U.S.C. 1320d–1(a), the provisions of Subtitle F apply only to—

> The following persons:
> (1) A health plan.
> (2) A health care clearinghouse.
> (3) A health care provider who transmits any health information in electronic form in connection with a transaction referred to in section 1173(a)(1).

These entities are collectively known as ''covered entities.'' [1]

HIPAA requires certain consultations with industry as a predicate to the issuance of the HIPAA standards and provides that most covered entities have up to 2 years (small health plans have up to 3 years) to come into compliance with the standards, once adopted. Act, sections 1172(c) (42 U.S.C. 1320d–1(c)), 1175(b) (42 U.S.C. 1320d–4(b)). The statute establishes civil money penalties and criminal penalties for violations. Act, sections 1176 (42 U.S.C. 1320d–5), 1177 (42 U.S.C. 1320d–6). HHS enforces the civil money penalties, while the U.S. Department of Justice enforces the criminal penalties.

HIPAA's civil money penalty provision, section 1176(a) of the Act, 42 U.S.C. 1320d–5(a), authorizes the Secretary to impose a civil money penalty, as follows:

> (1) IN GENERAL. Except as provided in subsection (b), the Secretary shall impose on any person who violates a provision of this part [42 U.S.C. 1320d, *et seq.*] a penalty of not more than $100 for each such violation, except that the total amount imposed on the person for all violations of an identical requirement or prohibition during a calendar year may not exceed $25,000.
> (2) PROCEDURES. The provisions of section 1128A [42 U.S.C. 1320a–7a] (other than subsections (a) and (b) and the second sentence of subsection (f)) shall apply to the imposition of a civil money penalty under this subsection in the same manner as such provisions apply to the imposition of a penalty under such section 1128A.

For simplicity, we refer throughout this preamble to this provision, the related provisions at section 1128A of the Act, and other related provisions of the Act, by their Social Security Act citations, rather than by their U.S. Code citations.

Subsection (b) of section 1176 sets out limitations on the Secretary's authority to impose civil money penalties and also provides authority for waiving such penalties. Under section 1176(b)(1), a civil money penalty may not be imposed with respect to an act that ''constitutes an offense punishable'' under the related criminal penalty provision, section 1177 of the Act. Under section 1176(b)(2), a civil money penalty may not be imposed ''if it is established to the satisfaction of the Secretary that the person liable for the penalty did not know, and by exercising reasonable diligence would not have known, that such person violated the provision.'' Under section 1176(b)(3), a civil money penalty may not be imposed if the failure to comply was due ''to reasonable cause and not to willful neglect'' and is corrected within a certain time. Finally, under section 1176(b)(4), a civil money penalty may be reduced or entirely waived ''to the extent that the payment of such penalty would be excessive relative to the compliance failure involved.''

As noted above, section 1176(a) incorporates by reference certain

[1] An additional category of covered entities was added by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Pub. L. 108–173) (MMA). As added by MMA, section 1860D–31(h)(6)(A) of the Act, 42 U.S.C. 1395w–141(h)(6)(A), provides that a prescription drug card sponsor is a covered entity for purposes of applying part C of title XI and all regulatory provisions promulgated thereunder, including regulations (relating to privacy) adopted pursuant to the authority of the Secretary under section 264(c) of the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. 1320d–2 note).

provisions of section 1128A of the Act. Those provisions, as relevant here, establish a number of requirements with respect to the imposition of civil money penalties. Under section 1128A(c)(1), the Secretary may not initiate a civil money penalty action ''later than six years after the date'' of the occurrence that forms the basis for the civil money penalty. Under section 1128A(c)(2), a person upon whom the Secretary seeks to impose a civil money penalty must be given written notice and an opportunity for a determination to be made ''on the record after a hearing at which the person is entitled to be represented by counsel, to present witnesses, and to cross-examine witnesses against the person.'' Section 1128A also provides, at subsections (c), (e), and (j), respectively, requirements for: Service of the notice and authority for sanctions which the hearing officer may impose for misconduct in connection with the civil money penalty proceeding; judicial review of the Secretary's determination in the United States Court of Appeals for the circuit in which the person resides or maintains his/its principal place of business; and the issuance and enforcement of subpoenas by the Secretary. In addition, section 1128A of the Act contains provisions relating to liability for civil money penalties and what measures must be taken once they are imposed. For example, section 1128A(d) provides that the Secretary must take into account certain factors ''in determining the amount * * * of any penalty''; section 1128A(h) requires certain notifications once a civil money penalty is imposed; and section 1128A(*l*) makes a principal liable for penalties ''for the actions of the principal's agent acting within the scope of the agency.'' These provisions are discussed more fully below.

B. Regulatory Background

As noted above, section 1173 of the Act and section 264 of HIPAA require the Secretary to adopt a number of national standards to facilitate the exchange, and protect the privacy and security, of certain health information. The Secretary has already adopted many of these HIPAA standards by regulation. These regulations consist of the following: Health Insurance Reform: Standards for Electronic Transactions (Transactions Rule); Standards for Privacy of Individually Identifiable Health Information (Privacy Rule); Health Insurance Reform: Standard Unique Employer Identifier (EIN Rule); Health Insurance Reform: Security Standards (Security Rule); and HIPAA Administrative Simplification: Standard Unique Health Identifier for Health Care Providers (NPI Rule). Proposed standards for certain claims attachments were published on September 23, 2005 (70 FR 55990) and proposed standards for health plan identifiers are under development. The history of these and related rules is described in a proposed rule published on April 18, 2005 at 70 FR 20225–20226.

An interim final rule promulgating procedural requirements for imposition of civil money penalties, Civil Money Penalties: Procedures for Investigations, Imposition of Penalties, and Hearings (April 17, 2003 interim final rule), was published on April 17, 2003 (68 FR 18895), and was effective on May 19, 2003, with a sunset date of September 16, 2004 (as corrected at 68 FR 22453, April 28, 2003). The April 17, 2003 interim final rule adopted a new subpart E of part 160. The sunset date of the April 17, 2003 interim final rule was extended to September 16, 2005 on September 15, 2004 (69 FR 55515) and was further extended to March 16, 2006 on September 14, 2005 (70 FR 54293).

The authority for administering and enforcing compliance with the Privacy Rule has been delegated to the HHS Office for Civil Rights (OCR). 65 FR 82381 (December 28, 2000). The authority for administering and enforcing compliance with the non-privacy HIPAA rules has been delegated to the HHS Centers for Medicare & Medicaid Services (CMS). 68 FR 60694 (October 23, 2003).

II. Overview of the Proposed and Final Rules

A. The Proposed Rule

In the proposed rule, we proposed to bring together and adopt rules governing the implementation of the civil money penalty authority of section 1176 of the Act for all of the HIPAA rules. As previously noted, parts of the Enforcement Rule are already in place: subpart C of part 160 establishes certain investigative procedures for the Privacy Rule, and subpart E establishes interim procedures for investigations and for the imposition, and challenges to the imposition, of civil money penalties for all of the HIPAA rules. The proposed rule would complete the Enforcement Rule by (1) making subpart C applicable to all of the HIPAA rules; (2) adopting on a permanent basis most of the provisions of subpart E; and (3) addressing, among other issues, our policies for determining violations and calculating civil money penalties, how we will address the statutory limitations on the imposition of civil money penalties, and various procedural issues, such as provisions for appellate review within HHS of a hearing decision, burden of proof, and notification of other agencies of the imposition of a civil money penalty.

Several fundamental considerations shaped the proposed rule. First, there is one statutory provision for imposing civil money penalties on covered entities that violate the HIPAA rules; thus, the proposed rule sought to establish a uniform enforcement and compliance policy for all of the HIPAA rules to minimize the potential for confusion and burden and maximize the potential for fairness and consistency in enforcement. Second, the proposed rule sought to facilitate the movement from noncompliance to compliance by covered entities by extending to all of the HIPAA rules the regulatory commitment to promoting and encouraging voluntary compliance with the HIPAA rules that currently applies to the Privacy Rule, subpart C of part 160. Third, the proposed rule sought to minimize confusion with the procedures for investigations and hearings by building upon pre-existing Departmental procedures for investigations and hearings under section 1128A of the Act—the civil money penalty regulations of the Office of the Inspector General, which are codified at 42 CFR parts 1003, 1005, and 1006 (OIG regulations). Fourth, the proposed rule was intended to be clear and easy to understand. Finally, the proposed rule sought to provide the Secretary with reasonable discretion, particularly in areas where the exercise of judgment is called for by the statute or rules, and to avoid being overly prescriptive in areas where it would be helpful to gain experience with the practical impact of the HIPAA rules, to avoid unintended adverse effects.

We proposed to amend subpart A of part 160, which contains general provisions, to include a definition of ''person.'' With respect to subpart C of part 160, we proposed to incorporate several provisions currently found in subpart E and to make subpart C applicable to the non-privacy HIPAA rules. We also proposed to add to part 160 a new subpart D, which would establish rules relating to the imposition of civil money penalties, including those which apply whether or not there is a hearing. We also proposed to incorporate into subpart D several provisions currently found in subpart E. Proposed subpart E addressed the pre-hearing and hearing phases of the enforcement process. Many of the provisions of proposed subpart E were adopted by the April 17, 2003 interim final rule; we did not propose to change them substantively, although we

proposed to renumber them. Finally, a conforming change to the privacy standards in subpart E of part 164 was proposed.

B. The Final Rule

While the final rule adopts most of the provisions of the proposed rule without change, several significant changes to certain provisions of the proposed rule have been made in response to comments. We do not list variables in the final rule, as was proposed, to count the number of violations of an identical requirement or prohibition; rather, the final rule clarifies that the method for determining the number of such violations is grounded in the substantive requirement or prohibition violated. In addition, the ALJ will be able to review the number of violations determined as part of his or her review of the proposed civil money penalty. The provision for joint and several liability of the members of an affiliated covered entity is retained, unless it is established that another member of the affiliated covered entity was responsible for the violation. While we continue to treat section 1176(b)(1) as an affirmative defense, we provide that it may be raised at any time. We retain the provision for statistical sampling, but we provide that, where statistical sampling is used, HHS must provide a copy of the study on which its statistical findings are based with the notice of proposed determination. As a corollary, we provide that a respondent who intends to introduce evidence of its statistical expert at the hearing must provide the study prepared by its expert to HHS at least 30 days prior to the scheduled hearing. We also provide that a respondent will have 90, rather than 60, days in which to file its request for hearing. Other changes made by the final rule are described below.

The Enforcement Rule does not adopt standards, as that term is defined and interpreted under Subtitle F of Title II of HIPAA. Thus, the requirement for industry consultations in section 1172(c) of the Act does not apply. For the same reason, the statute's time frames for compliance, set forth in section 1175 of the Act, do not apply to the Enforcement Rule. Accordingly, the Enforcement Rule is effective on March 16, 2006.

III. Section-by-Section Description of the Final Rule and Response to Comments

We received 49 comments on the proposed rule. Many of these comments were from associations or interest groups involved in the health care industry. We also received comments from covered entities, a state agency, a law school class, and a number of individuals.

While the comments addressed most of the provisions of the proposed rule, the following 14 sections of the proposed rule received no comment: proposed §§ 160.400, 160.418, 160.500, 160.502, 160.506, 160.510, 160.514, 160.524, 160.526, 160.528, 160.530, 160.532, 160.544, and 160.550. We have, accordingly, not changed these sections in the final rule from what was proposed, and we do not discuss them below. The basis and purpose of sections that are unchanged from the proposed rule and are not discussed below are set out in the proposed rule published on April 18, 2005 at 70 FR 20240–20247 and, in certain cases, in the interim final rule published on April 17, 2003 at 68 FR 18895–18901.

A number of comments also expressed support for particular provisions. In most cases, we do not discuss these comments, with which we generally agree, below. Finally, certain comments raised issues concerning other HIPAA rules, such as allegations that a particular entity had violated the Privacy Rule or that particular provisions of a HIPAA rule create a hardship. Such issues are outside the scope of this rulemaking and, accordingly, are not addressed here.

A. Subpart A

Subpart A of the final rule adopts a new definition of the term ''person.'' This definition is placed in § 160.103, which contains definitions that apply to all of the HIPAA rules. Thus, the new definition of ''person'' applies to all of the HIPAA rules.

Proposed rule: We proposed to amend § 160.103 to add a definition of the term ''person'' to replace the definition of that term adopted by the April 17, 2003 interim final rule. We proposed to define the term ''person'' as ''a natural person, trust or estate, partnership, corporation, professional association or corporation, or other entity, public or private.'' As more fully explained at 70 FR 20227–20228, the proposed definition clarified, consistent with the HIPAA provisions, that the term includes States and other public entities.

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: We received one comment on this section, endorsing its application to all of the HIPAA rules.

Response: The definition of ''person'' in the final rule remains the same as proposed.

B. Subpart C—Compliance and Investigations

We amend subpart C to make the compliance and investigation provisions of the subpart—which at present apply only to the Privacy Rule—apply to all of the HIPAA rules. In addition, we include in subpart C the definitions that apply to subparts C, D, and E. We move to subpart C from subpart E the provisions relating to investigational subpoenas and inquiries. We also add to subpart C provisions prohibiting intimidation or retaliation that are currently found in the Privacy Rule but not in the other HIPAA rules. We change the title of this subpart to reflect the focus of this subpart within the larger Enforcement Rule. Aside from a change to § 160.306 and certain minor and conforming changes to §§ 160.300, 160.312, 160.314, and 160.316, we do not change the substance of the existing provisions of subpart C.

1. Section 160.300—Applicability

Proposed rule: We proposed to amend § 160.300 (along with § 160.304—Principles for achieving compliance; § 160.306—Complaints to the Secretary; § 160.308—Compliance reviews; and § 160.310—Responsibilities of covered entities) to make the provisions of subpart C applicable to all of the HIPAA rules, instead of applicable only to the Privacy Rule. The proposed rule would accomplish this by changing the present references in these sections from ''subpart E of part 164'' to the more inclusive, defined term, ''administrative simplification provision'' or ''administrative simplification provisions,'' as appropriate. As explained at 70 FR 20228, the purpose of this proposed change was to simplify and make uniform the compliance and enforcement process for the HIPAA rules.

Final rule: The final rule streamlines the provisions of the proposed rule by substituting the term ''provisions'' for the references to standards, requirements, and implementation specifications in § 160.300.

Comment: A number of comments endorsed the approach of having uniform compliance and enforcement provisions for the HIPAA rules, and no comments disagreed with this approach.

Response: The final rule retains the policy of the proposed rule, consistent with the expression of support for this approach in the public comment, but streamlines the language of the section.

Comment: A couple of comments asked whether ''affiliated entities'' were the same as ''hybrid entities,'' in terms of applying the rule.

Response: As described at § 164.105(b)(2)(i)(A), an affiliated covered entity consists of ''[l]egally separate covered entities [that] designate themselves (including any health care component of such covered entity) as a single affiliated covered entity * * * [where] all of the covered entities designated are under common ownership or control.'' Thus, an affiliated covered entity is comprised of more than one covered entity. By contrast, a hybrid entity is defined at § 164.103 as ''a single legal entity: (1) That is a covered entity; (2) Whose business activities include both covered and non-covered functions; and (3) That designates health care components in accordance with [the regulation].'' The Privacy and Security Rules apply to any covered entity in either arrangement. The issue of liability for a particular violation with respect to covered entities in an affiliated covered entity is discussed in connection with § 160.402(b) below.

2. Section 160.302—Definitions

Proposed rule: We proposed to move to § 160.302 three definitions that were adopted in the April 17, 2003 interim final rule at § 160.502: ''ALJ'' (Administrative Law Judge), ''civil money penalty or penalty'', and ''respondent.'' We also proposed to add to § 160.302 two terms which are used throughout subparts C, D, and E: ''administrative simplification provision'' and ''violation'' or ''to violate.'' We proposed to define the term ''administrative simplification provision'' in § 160.302 to mean any requirement or prohibition established by the HIPAA provisions or HIPAA rules: ''* * * any requirement or prohibition established by: (1) 42 U.S.C. 1320d–1320d–4, 1320d–7, and 1320d–8; (2) Section 264 of Public Law 104–191; or (3) This subchapter.'' We proposed to define a ''violation'' (or ''to violate'') to mean a ''failure to comply with an administrative simplification provision.'' As more fully explained at 70 FR 20228–20229, both definitions derive directly from the statutory language, and both definitions function consistently and fairly across the various HIPAA rules.

Final rule: The final rule adopts the provisions of the proposed rule.

a. ''Administrative Simplification Provision''

Comment: One comment expressed general support for the definitions. Another comment stated that the definition of ''administrative simplification provision'' should be revised to include only standards. The comment argued that this approach would be more consistent with the statute, which provides that covered entities must comply with standards, not requirements, prohibitions, or other restrictions set forth in the HIPAA rules.

Response: No change is made to the definition of ''administrative simplification provision.'' With respect to the second comment above, we do not agree that the definition of this term should be limited to standards. As discussed at 70 FR 20229, limiting the elements of the HIPAA rules that could be violated to those designated as standards would have the effect of, among other things, insulating from enforcement explicit statutory requirements and prohibitions (*e.g.*, the prohibitions at section 1175(a) of the Act, which the statute terms ''requirements'' and which the Transactions Rule treats as requirements but not standards). We do not agree that Congress intended such an effect. We note, moreover, that the statute explicitly provides for the adoption of implementation specifications. See section 1172(d) of the Act. Furthermore, we disagree with the contention that the statute does not contemplate that violations may be tied to requirements and prohibitions: section 1176(a)(1) speaks of ''violations of an identical requirement or prohibition.''

Comment: Several comments argued that this definition could lead to multiple violations from a single act and lead to more liability than covered entities could reasonably expect. It also was argued that this definition would render almost meaningless the statutory $25,000 cap on liability for violations of an identical provision in a calendar year.

Response: No examples were supplied to illustrate the concern as to how this definition would increase the anticipated liability of covered entities, so we can only respond generally. The prohibition in § 160.404(b)(2) on counting overlapping requirements twice should minimize any such effect. As for violations that might be implicated in a single act and not be insulated by § 160.404(b)(2), we see no reason why they should not be considered as separate violations, since covered entities must comply with all applicable requirements and prohibitions of the HIPAA provisions and rules. Also, the definition does not render the statutory cap meaningless; rather, the ''requirement or prohibition'' language of the definition is taken directly from the part of section 1176(a) that establishes the $25,000 statutory cap (''the total amount imposed on the person for all violations of an identical requirement or prohibition for a calendar year may not exceed $25,000''). Furthermore, for the reasons explained in the preamble to the proposed rule, none of the other possible formulations of what constitutes a ''provision of this part'' works uniformly and fairly across the HIPAA rules. Thus, we retain the definition of ''administrative simplification provision'' as proposed.

b. ''Violation'' or ''Violate''

Comment: One comment asked how the definition of ''violation'' would work with the addressable components of the Security Rule.

Response: With respect to the issue of how this term would apply to the addressable implementation specifications of the Security Rule, we provide the following guidance. Under § 164.306(d)(3)(ii), a covered entity must implement an addressable implementation specification if doing so is ''reasonable and appropriate.'' Where that condition is met, the addressable implementation specification is a requirement, and failure to implement the addressable implementation specification would, accordingly, constitute a violation. Where that condition is not met, the covered entity must document why it would not be reasonable and appropriate to implement the implementation specification and implement ''an equivalent alternative measure if reasonable and appropriate.'' In this latter situation, creating the documentation referred to is a requirement, and implementing an alternative measure is also a requirement, if doing so is reasonable and appropriate in the covered entity's circumstances; failure to take either required action would, accordingly, constitute a violation.

3. Section 160.304—Principles for Achieving Compliance

Proposed rule: We proposed to amend § 160.304 to make it applicable to all of the HIPAA rules; otherwise, we proposed to leave the rule substantively unchanged. Section 160.304 provides that the Secretary will, to the extent practicable, seek the cooperation of covered entities in obtaining compliance. Section 160.304 also provides that the Secretary may provide technical assistance to help covered entities voluntarily comply with the HIPAA rules.

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: Many comments supported HHS's approach to voluntary compliance and the use of a complaint-based process to identify and correct

noncompliance, on the grounds that it is the most efficient and effective way of obtaining compliance and realizing the benefits of the HIPAA rules. In addition, some contended that, given the confusion of many covered entities with many of the rules' requirements, it is an appropriate approach. However, one comment criticized HHS's reliance on voluntary compliance and informal resolution of complaints on the ground that the statute contemplates that violations of the HIPAA rules should be pursued in the same manner as fraud and abuse cases, that is, through the formal, adversarial process provided for by section 1128A(c). Another comment stated that HHS's reliance on voluntary compliance has led to lax enforcement and that reliance on a complaint-based system is a fundamentally flawed approach, particularly with respect to enforcement of the Privacy Rule, because HHS has provided insufficient education to consumers, and it is impossible for consumers to complain about a law about which they know very little. Several comments urged that OCR and CMS continue to provide educational materials and guidance to help covered entities comply with the HIPAA rules and to educate consumers about their rights under the Privacy Rule.

Response: We agree that encouraging voluntary compliance is the most effective and quickest way of obtaining compliance in most cases. We do not agree that encouraging voluntary compliance and seeking informal resolution of complaints in individual cases constitutes lax enforcement or that such an approach is inconsistent with our statutory obligations. Our experience to date with privacy complaints illustrates the effectiveness of our enforcement approach. As of October 31, 2005, OCR had received and initiated reviews of over 16,000 privacy complaints from health care consumers and others across the country. These complaints are widespread and diverse, not only geographically, but also with respect to the type of entity complained against, as well as the Privacy Rule issues raised by the complaints. Complaints are filed against all sizes and types of covered entities, from solo practitioners to hospitals and pharmacy chains, and from health insurance issuers to group health plans, for example. In addition, the complaints implicate a full range of Privacy Rule issues, from uses and disclosures of protected health information to individual rights to administrative requirements. The variation and expansiveness of the complaints provide HHS with a much broader approach to compliance than would a compliance review system, which likely would need to be targeted to larger institutions and/or a smaller set of concerns. Further, our experience with these cases—68 percent have been resolved or otherwise closed to date—indicates that generally we are receiving good cooperation from covered entities in quickly addressing compliance problems. Such resolutions bring the benefits of the HIPAA rules to consumers far more quickly than would a formalized, adversarial process, which would also be time-consuming and costly for both sides.

We also do not agree that the statute contemplates only a formalized, adversarial process; rather, it only requires such a process where a proposed civil money penalty is contested. It is important to note, moreover, that section 1176 contemplates that we would work with covered entities to help them achieve compliance, even when there is an allegation that the covered entity is in violation of the rules. Section 1176 provides that a civil money penalty may not be imposed if the failure to comply was due to reasonable cause and not willful neglect and is corrected within a certain period of time after the covered entity knew or should have known of the compliance failure, and that the Secretary may, in some circumstances, provide technical assistance to the covered entity during that period. Further, an approach that is primarily complaint-based does not limit our ability to perform compliance reviews when appropriate, and this has, in fact, occurred. We will continue to review the effectiveness of our enforcement approach and revise it, if needed. Notwithstanding our above approach, however, we will resort to civil money penalties, as needed, for matters that cannot be resolved by informal means.

Further, we disagree that persons affected by the Privacy Rule and the other HIPAA rules are unaware of their rights, as evidenced by the large number of complaints that HHS has received from consumers and covered and other entities. HHS has an ongoing program of providing information to the public and guidance to covered entities through the Internet, public speaking and educational events, and toll-free call-in lines. The millions of hits to our Web sites—*http://www.hhs.gov/ocr/hipaa* for the Privacy Rule and *http://www.cms.gov/hipaa/hipaa2* for the other HIPAA rules—suggest that covered entities and the public are increasingly aware of the application of the HIPAA rules to their business activities and lives, respectively, and are able to access the information we have made available. In addition, the American Health Information Management Association issued the results of their latest compliance survey in a report entitled ''The State of HIPAA Privacy and Security Compliance, April 2005,'' which indicated, with respect to the Privacy Rule, that over two-thirds of all hospital and health system patients had some or a complete understanding of their rights and the facility's responsibilities. Nonetheless, while such evidence is encouraging, we recognize that HHS must remain active in providing outreach and public education. We are committed to doing so, and thus, continue to develop educational material for consumers and industry guidance for covered entities.

Comment: One comment suggested that the Secretary commit to providing technical assistance to covered entities.

Response: We do not agree that the provision of technical assistance should be mandated. The statute (at section 1176(b)(3)(B)(ii)) makes the provision of technical assistance discretionary if the Secretary determines that the compliance failure was due to the covered entity's inability to comply. While OCR and CMS provide technical assistance in many cases, it is not necessary in all instances to provide such assistance in order to obtain compliance. Thus, it is inappropriate to mandate the provision of technical assistance.

Comment: One comment suggested amending § 160.304(b) to require ongoing reporting of complaints and resolutions to the healthcare industry. The goal in requiring reporting would be to educate covered entities regarding complaints that are found to be actual violations and encourage them to review their compliance. The comment stated that the current reports made by OCR to the National Committee on Vital and Health Statistics are not helpful since they only report the volume of complaints, not the nature of the complaints or whether a violation occurred.

Response: We do not believe mandatory reporting of complaints and resolutions is necessary. Both CMS and OCR currently have the ability to report to the public, including the healthcare industry, about complaints and their resolutions, and do so in summary form. We continue to present summaries of actions on complaints in various fora, including in public presentations, testimony, and in written documents. Our enforcement experience also informs our development of FAQs and guidance documents to explain certain

provisions and how to comply with them. In any event, covered entities should use their own internal complaint processes and experience to assess and improve their compliance and ability to serve the needs of their customers.

Comment: One comment suggested that the informal resolution process should allow HHS to render opinions on a covered entity's interpretation of the HIPAA rules. The comment expressed concern that a covered entity would not be able to resolve a compliance issue during the informal resolution process if it made a good faith, but incorrect, interpretation of a HIPAA rule. The comment suggested allowing HHS to render an opinion on the entity's interpretation to facilitate the informal resolution of compliance problems.

Response: As a general matter, we do not issue advisory opinions, but the informal resolution process will provide covered entities with information about HHS's interpretation of the HIPAA rules. Covered entities may also find guidance as to the proper interpretation of a HIPAA rule in the FAQs posted on the HHS website and technical assistance offered to the covered entities by HHS. Covered entities may also submit questions to HHS for consideration with respect to future FAQs and guidance.

4. Section 160.306—Complaints to the Secretary

Proposed rule: Section 160.306 provides for investigations of covered entities by the Secretary. It also outlines the procedure and requirements for filing a complaint against a covered entity. For example, it provides that a complaint must name the person that is the subject of the complaint and describe the acts or omissions believed to be violations. It also requires that complaints be filed within 180 days of when the complainant knew or should have known that the act or omission occurred, unless this time limit is waived for good cause. The proposed rule would have amended this section to apply it to all of the HIPAA rules, rather than exclusively to the Privacy Rule, but otherwise proposed no substantive changes to the section.

Final rule: The final rule adopts the provisions of the proposed rule, except that proposed § 160.306(c) is revised to require the Secretary to describe the basis of the complaint in the first written communication with the covered entity about the complaint.

Comment: One comment asked for clarification on when a complaint will be considered to have been timely filed in situations when a complainant should have known of the violation, thus triggering the 180-day time period for filing a complaint.

Response: Deciding whether or not a complaint was properly filed within the 180-day period will need to be determined in each case. For example, an individual who is informed through an accounting of disclosures that his or her health information was impermissibly disclosed would be considered to know of the violation at the time the individual receives the accounting. In any event, however, the 180-day period can be waived for good cause shown.

Comment: Two comments suggested that HHS be required to inform a covered entity of the specific basis for an investigation or compliance review. These comments suggested the best way to accomplish this goal would be to send a copy of the complaint to the covered entity. The comments stated that, without specific information as to the basis of the complaint, a covered entity will not be able to properly respond to the agency's request for information.

Response: Both CMS and OCR currently provide the basis for an investigation in the first written communication with a covered entity about a complaint. This policy will continue to be followed, and the final rule is revised to require it. It should be noted that provision of a description of the basis for the complaint does not circumscribe the investigation, if the investigation subsequently uncovers other compliance issues with respect to the covered entity.

We disagree that sending a copy of the complaint is necessary for a covered entity to adequately respond to the Secretary's inquiries. As noted above, covered entities receive a description of the basis for the complaint. Other information contained in the complaint, such as the complainant's identity, is not always relevant to the investigation. In some cases, in fact, it may be necessary to withhold such information to, for example, protect the complainant's privacy. In instances where it is necessary to provide the complainant's identity in order for the covered entity to properly respond to the investigation, the complainant is so informed before this information is released to the covered entity.

Comment: One comment suggested that the rule be revised to require that a complaint include the name of the covered entity that is the subject of the complaint.

Response: The rule, both as proposed and as adopted below, already requires that a complaint ''name the person that is the subject of the complaint.'' See § 160.306(b)(2).

Comment: In one comment, a covered entity complained that it had expended a great deal of time and money defending itself against what turned out to be a false allegation and asked that HHS put more effort into gathering detailed information from complainants and helping covered entities respond to complaints. Another comment criticized the rule for providing no way of sanctioning a person bringing a negligent or malicious complaint.

Response: We understand that it may take time and effort to establish that an allegation is unfounded. When complaints are received, we make every effort to determine if the complaint is legitimate, so as not to place undue burdens on covered entities. Further, covered entities are encouraged promptly to contact the OCR or CMS investigators handling their complaints to discuss the allegations once notice of an investigation is received by the covered entity. Doing so should help a covered entity avoid the expenditure of unnecessary time and funds on defending itself against baseless complaints. The statute provides no basis for our penalizing a person for bringing a negligent or malicious complaint, although remedies may exist at common law. However, as discussed below in connection with § 160.316, lack of good faith would typically be a matter that is looked at in the course of investigating a complaint.

Comment: One comment suggested that only individuals or personal representatives should have standing to file a complaint. The comment takes the position that one covered entity should not be able to bring a complaint against another.

Response: We disagree. The purpose of the complaint process is to bring violations to the attention of HHS, so that any noncompliance with the HIPAA rules may be corrected. Particularly with respect to the Transactions Rule, the persons or entities that are likely to be disadvantaged by the noncompliance of a covered entity are other covered entities. It would, accordingly, be inconsistent with the purpose of the complaint process to exclude such entities from it.

Comment: Two comments suggested that HHS be required to notify covered entities of a complaint within a specified time-frame.

Response: OCR and CMS make every effort to notify covered entities of complaints on a timely basis. However, we do not include a specific deadline for notifying covered entities of

complaints in the rule. The time needed to determine whether a complaint states issues that should be investigated can vary greatly, while fluctuations in the volume of complaints and other workload demands may also make meeting a specific deadline problematic.

Comment: One comment suggested that § 160.306(a)(2) should be amended to require that ''uses or disclosures'' be described in the complaint rather than ''acts or omissions.''

Response: The suggested change would not be appropriate. The provisions of this rule apply to all of the HIPAA rules, not just the Privacy Rule; the other HIPAA rules regulate actions other than uses and disclosures of protected health information. Moreover, even under the Privacy Rule, a violation may occur where no impermissible use or disclosure of protected health information has occurred. Failure to comply with a notice requirement under § 164.520 is an example of a violation that does not involve a use or disclosure of protected health information.

Comment: One comment suggested that the Secretary should be required to investigate all complaints and that failure to do so is inconsistent with section 1176(a) of the Act, which compels the Secretary to impose penalties for violations unless a statutory limitation applies. Imposing a deadline for beginning investigations was also suggested.

Response: The decision to investigate a complaint is based on the facts presented. Not all complaints need to be investigated. For example, in our experience, a substantial percentage of privacy complaints allege facts that fall outside of OCR's jurisdiction under HIPAA—*e.g.*, an action prior to the compliance date of the Privacy Rule or an action by an entity not covered by the Rule. Revising the rule to require the Secretary to investigate all complaints would be counterproductive and lead to an inefficient allocation of enforcement resources. Similarly, imposing a deadline for beginning an investigation is unrealistic: Some investigations may turn out to be more time-consuming than anticipated, delaying the start of other investigations. It is necessary to provide OCR and CMS with the flexibility to deal with variations in circumstances and resource constraints.

5. Section 160.308—Compliance Reviews

Proposed rule: The proposed rule provided that the Secretary may conduct compliance reviews to determine whether covered entities are complying with the applicable administrative simplification provisions.

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: Several comments asked HHS to outline the circumstances under which a compliance review would be undertaken or asked that the compliance review provision be eliminated from the rule. One comment suggested that compliance reviews be limited to evidence-based reviews. These comments expressed concern that the rule does not specifically define when a compliance review will be undertaken.

Response: Compliance reviews are conducted at the discretion of the Secretary. Outlining specific instances in which a compliance review will be conducted could have the counterproductive effect of skewing compliance efforts toward those aspects of compliance that had been identified as likely to result in a compliance review. It also does not seem advisable to limit, by rule, the circumstances under which such reviews may be conducted at this early stage of the enforcement program, when our knowledge of the types of violations that may arise is necessarily limited. We also do not agree that the provision for compliance reviews should be eliminated. There are situations where instances of potential noncompliance come to HHS's attention outside of the complaint process (*e.g.*, where media reports suggest that a violation has occurred), and HHS must have clear authority to investigate such situations.

Comment: A number of comments suggested that HHS detail the compliance review process and rules for notification of covered entities when they are being reviewed.

Response: The rule already contains procedures to be followed, and requirements to be met, that apply to compliance reviews. See §§ 160.304, 160.310, 160.312, 160.314, and 160.316. It is unnecessary to establish procedures comparable to the complaint filing procedures of § 160.306 for compliance reviews, since they are initiated by HHS. The concerns expressed by most of the comments on this topic—that HHS would undertake a compliance review without notice to the covered entity and without specifying the basis for, or the focus of, the review—are misplaced. Section 160.312 requires HHS to attempt to resolve violations found in a compliance review by informal means and to inform the covered entity in writing if a compliance review is or is not resolved by informal means. Failing to notify the covered entity of a compliance review or the basis for such a review is not consistent with our practice generally and would be unlikely to yield much information of use, resulting in an ineffective use of the covered entity's and the agency's resources.

Comment: One comment suggests that compliance reviews should be mandatory and should be initiated within a specified time period.

Response: The rule, as proposed and adopted, does not preclude establishing a compliance review program or schedule, but it does not require it either. One purpose of compliance reviews is to permit investigation when allegations or situations warranting investigation come to our attention outside of the complaint process. The necessity for a compliance review in a particular case or a program of scheduled compliance reviews is inherently unpredictable, and it is important to retain the administrative flexibility to address such situations. Mandating compliance reviews on a fixed basis or schedule would be an inefficient allocation of limited enforcement resources and would hamper the agency's ability to target resources at actual noncompliance problems as they arise.

Comment: One comment suggested that the rule contain provisions outlining the coordination and cooperation between CMS and OCR when a compliance review under more than one rule occurs.

Response: As with complaint-based investigations, CMS and OCR will coordinate and allocate responsibility for compliance reviews based upon the HIPAA provisions involved and the facts of the case. We do not consider it advisable to specify detailed rules in this regard, as the allocation of function and responsibility will depend on the facts of each case and the resources available at the time.

6. Section 160.310—Responsibilities of Covered Entities

Proposed rule: Section 160.310 addresses the responsibilities of a covered entity, such as providing records and compliance reports to the Secretary and cooperating during a compliance review or complaint investigation. Section 160.310(c) provides that a covered entity must permit HHS to have access during normal business hours to its facilities, books, records, and other information necessary to determine compliance, but provides that if the Secretary determines that ''exigent circumstances exist, such as when documents may be hidden or destroyed,'' the covered entity must permit access at any time without

notice. Section 160.310 also requires that the Secretary may not disclose protected health information obtained by the Secretary in the course of an investigation or compliance review except when necessary to ascertaining or enforcing compliance or as otherwise required by law. The proposed rule would amend this section to apply it to all of the HIPAA rules, rather than exclusively to the Privacy Rule, but otherwise proposed no substantive changes to the section.

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: A couple of comments asked HHS either to further define ''exigent circumstances,'' such as by limiting it to situations involving national security or by inserting specific examples of exigent circumstances in § 160.310(c)(1). One comment suggested that the rule be revised to require that the Secretary's determination that ''exigent circumstances'' exist be a ''reasonable'' one.

Response: The determination of what constitutes ''exigent circumstances'' will inevitably be fact-dependent. Specific language defining ''exigent circumstances'' is unnecessary, as the rule already provides a clarifying example and the principle underlying the provision is reasonably universal. We note that limiting the provision to situations where matters of national security are involved would most likely not cover the types of situations the provision is intended to cover—situations in which it is likely that the covered entity will seek to conceal or destroy evidence of noncompliance that HHS needs to carry out its statutory obligation to enforce the HIPAA rules.

Comment: Two comments asked for further guidance and notice of record retention requirements and another comment expressed concerns with the record retention requirements of the Privacy Rule.

Response: Record retention requirements applicable to the Privacy and Security Rules are spelled out in those rules; see, § 164.530(j) and § 164.316(b), respectively. We do not address these record retention requirements here, as this topic lies outside the scope of this rule.

The other HIPAA rules do not contain explicit record retention requirements, as such. However, it is likely that the documentation that would be relevant to showing compliance with those rules—such as health plan instructions to providers, software documentation, contracts, and systems processes—is kept as part of normal business practices. Covered entities should consider any other applicable laws, such as state law, in making such decisions.

7. Section 160.312—Secretarial Action Regarding Complaints and Compliance Reviews

Proposed rule: We proposed to revise § 160.312(a) to require that, where noncompliance is indicated, the Secretary would seek to reach by informal means a resolution of the matter that is satisfactory to the Secretary. Informal means could include demonstrated compliance, or a completed corrective action plan or other agreement. We proposed to revise § 160.312(a)(2) to require, where noncompliance is indicated and the matter is resolved by informal means, that HHS notify the covered entity in writing and, if the matter arose from a complaint, the complainant. Where noncompliance is indicated and the matter is not resolved by informal means, proposed § 160.312(a)(3)(i) would require the Secretary to so inform the covered entity and provide the covered entity an opportunity to submit, within 30 days of receipt of such notification, written evidence of any mitigating factors or affirmative defenses. To avoid confusion with the notice of proposed determination process provided for at proposed § 160.420, proposed § 160.312(a)(3)(ii) provided that, where the matter is not resolved by informal means and the Secretary finds that imposition of a civil money penalty is warranted, the formal finding would be contained in the notice of proposed determination issued under proposed § 160.420. We proposed to leave § 160.312(b) substantively unchanged.

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: One comment suggested that covered entities should be able to appeal the Secretary's findings during the informal resolution process and that the Secretary's decision to resolve a matter informally should not preclude the respondent from questioning the Secretary's interpretation or application of the rule in question.

Response: The purpose of the informal resolution process described in § 160.312 is to bring closure at an early stage to a matter where compliance is in issue and, thus, to obviate the need to issue a notice of proposed determination. Section 160.312 recognizes, however, that informal resolutions will not always be achieved. Where the agency and the covered entity are not able to resolve the matter informally, HHS (through OCR and/or CMS) will make a finding of noncompliance pursuant to § 160.420, which the covered entity may then challenge through the applicable procedures of subparts D and E. Nothing in the rule compels the covered entity to challenge the finding of noncompliance under § 160.420, but if the covered entity wishes to challenge such a finding, including the agency's interpretation or application of a rule, it must do so through the procedural avenue provided by subparts D and E. These procedures implement the requirement of section 1128A(c) of the Act that the Secretary may not make an adverse determination against a person until the person has been given written notice and an opportunity for a hearing on the record on the adverse determination.

Comment: One comment asked how informal resolution is possible, given HHS's position that, where a violation is found, a CMP must be imposed. Another comment expressed concern that the informal resolution process would allow covered entities to skirt penalties and the consequences of noncompliance with the HIPAA rules and suggested that the Secretary should not be compelled to reach a resolution through informal processes.

Response: These comments misunderstand our position as to the mandatory nature of the statute. The Secretary must impose a civil money penalty where a formal determination of a violation is made. However, many opportunities exist prior to this determination that allow the Secretary to exercise his discretion to not impose a penalty. This issue is discussed more fully in connection with § 160.402 below.

The second comment above also misconstrues § 160.312. Nothing in that section compels OCR or CMS to resolve matters informally. Indeed, § 160.312(a)(3) describes the actions to be taken ''[i]f the matter is not resolved by informal means * * *''.

Comment: One comment suggested that HHS and the covered entity should be required to put the informal resolution in writing.

Response: Both § 160.312(a)(2) and § 160.312(b) require that the resolutions contemplated in those sections be ''in writing.'' CMS and OCR currently document informal resolutions.

Comment: One comment suggested that the 30-day time period for a covered entity to submit to the Secretary evidence of mitigating factors or affirmative defenses should be extended.

Response: Thirty days should be sufficient for a covered entity to submit such evidence. The opportunity to provide additional evidence comes at

the end of investigation, and the covered entity should be gathering any evidence of mitigating factors or affirmative defenses during the investigation. In addition, the covered entity will have the opportunity to present such evidence to the ALJ if it chooses to appeal the Secretary's findings. Accordingly, we do not change this provision.

Comment: One comment suggested that a deadline should be imposed for HHS to notify the covered entity of its findings after an investigation.

Response: The time needed to finalize the agency's findings will depend on the complexity of the case, its outcome, and workload considerations. As these factors are inherently variable and unpredictable, we do not believe it would be advisable to impose fixed deadlines for taking the actions described in § 160.312.

Comment: One comment requested clarification of proposed § 160.312(a)(3)(ii), with respect to what action is referred to and the associated time frame.

Response: The action referred to is HHS's notification of the covered entity of its finding of noncompliance when it determines that the matter cannot be resolved informally. Section 160.312(a)(3)(ii) provides that, if HHS decides to impose a civil money penalty, it will send a notice of proposed determination to the covered entity pursuant to § 160.420. Thus, the intent of this provision is to clarify that, once OCR and/or CMS, as applicable, has determined that a violation has occurred, the matter cannot be resolved informally in a manner that is satisfactory to OCR and/or CMS, and a civil money penalty should be imposed, the agency's next step is to provide the formal notice required by section 1128A(c)(1), which in this rule is the notice of proposed determination under § 160.420. The rule imposes no specific deadline on the agency for sending this notice. However, it should be noted that if the notice is not sent within six years of the violation, pursuit of the civil money penalty would be precluded by section 1128A(c)(1), which is implemented in this rule by § 160.414.

Comment: One comment requested that § 160.312(a)(3) be revised to afford complainants the opportunity to express, in writing, the impact of the violation.

Response: The suggested change is unnecessary, since nothing in the rule precludes a complainant from providing such information to the agency at any point in the process. Complainants frequently describe, in their complaints or in the course of OCR's or CMS's initial contacts with the complainants, the impact of the alleged violation. HHS also may request such information from the complainant where, for example, it bears on the amount of the penalty to be imposed.

8. Section 160.314—Investigational Subpoenas and Inquiries

Proposed rule: The text of proposed § 160.314 was adopted by the April 17, 2003 interim final rule as § 160.504. We proposed to move this section to subpart C, consistent with our overall approach of organizing subparts C, D, and E to reflect the stages of the enforcement process. We proposed to include in the introductory language of proposed § 160.314(a) a sentence which states that, for the purposes of paragraph (a), a person other than a natural person is termed an ''entity.'' We proposed not to modify § 160.314(b)(1), (2) and (8) from the provisions of the April 17, 2003 interim final rule at paragraphs (b)(1)–(3) of § 160.504. However, we proposed to add new paragraphs (3) through (7) and (9) to § 160.314(b) and also to add a new paragraph (c). The proposed new paragraphs at §§ 160.314(b)(3)–(b)(7) would permit representatives of HHS to attend and ask questions at the inquiry, give a witness the opportunity to clarify his answers on the record after being questioned by HHS, require any objections or claims of privilege to be asserted on the record, and permit HHS to seek enforcement of the subpoena through the federal district court if a witness refuses to answer non-privileged questions or produce requested documents or items. Further, proposed § 160.314(c) provided that, consistent with § 160.310, testimony and other evidence obtained in an investigational inquiry may be used by HHS in any of its activities and may be used or offered into evidence in any administrative or judicial proceeding. Together, these additions would clarify the manner in which investigational inquiries will be conducted, and how testimony given, and evidence obtained, during such an investigation may be used.

Final rule: The final rule adopts the provisions of the proposed rule, except that paragraph (a) is revised to clarify that investigational subpoenas may issue when a compliance review is conducted.

Comment: A few comments requested that this section provide for the protection of privileged documents when subpoenaed by the Secretary. Comments also suggested that covered entities should have the ability to challenge a subpoena issued by the Secretary.

Response: The rule, as proposed and adopted, provides a process for a subpoenaed witness to challenge the subpoena and/or assert privilege. Under section 205(e) of the Act, made applicable by section 1128A(j)(1) of the Act, the federal district court in which a person charged with contumacy or refusal to obey a subpoena resides or transacts business has jurisdiction upon application of HHS. As provided in § 160.314(a)(5), HHS may seek to enforce the subpoena in such cases through action in the relevant federal district court, which would presumably hear the basis for the witness's refusal to obey or claim of privilege in connection with a motion to quash under Fed. R. Civ. P. 45(c)(3). (28 U.S.C. Appendix).

Comment: Several comments requested that the scope of the subpoenas issued by the Secretary be limited to the investigation and that the Secretary not be allowed to pursue open-ended inquiries.

Response: Section 205(d) of the Act, which is made applicable by section 1128A(j)(1), provides that a subpoena may issue for ''the production of any evidence that relates to any matter under investigation or in question before [the Secretary].'' Moreover, the federal courts subject the exercise of an agency's administrative subpoena authority to a reasonableness analysis. In *U.S.* v. *Powell,* 397 U.S. 481 (1964), the holding of which was extended to all administrative subpoena authorities in *Securities and Exchange Commission* v. *Jerry T. O'Brien, Inc.,* 467 U.S. 735, 741–42 (1984), the U.S. Supreme Court articulated a standard for the judicial review of administrative subpoenas that requires that the investigation be conducted pursuant to a legitimate purpose and that the information requested under the subpoena is relevant to that purpose. HHS is required to comply with this standard in the exercise of the subpoena authority under this section.

Comment: One comment asked that covered entities be given notice of investigational inquiries directed at them.

Response: In general, we would expect that an investigational subpoena would be used where a covered entity has failed to respond to HHS's requests for information in the course of an investigation conducted under § 160.306. In such a case, the covered entity will have been previously notified of the investigation pursuant to § 160.306(c). Similarly, a subpoena would typically be issued in connection with a compliance review under § 160.308 where the covered entity had

failed to respond to HHS's prior requests for information. Thus, we do not expect the element of surprise to be present, which appears to be the concern underlying these comments. We clarify in § 160.314(a) that this section also applies to compliance reviews.

Comment: One comment suggested that § 160.314(a) be revised to state that the admissibility of written statements obtained by HHS during an investigational inquiry is subject to 45 CFR 160.518 and 160.538.

Response: We do not consider the suggested language necessary. Sections 160.518 and 160.538 apply to the exchange and admission of written statements. Should OCR or CMS seek to have written statements obtained during an investigation admitted into evidence, those statements would be subject to the requirements of §§ 160.518 and 160.538.

Comment: One comment asked for clarification as to who may amend a transcript and whether the Secretary has the discretion to limit a witness's amendment of his or her testimony transcript.

Response: Under § 160.314(b)(9), both sides may propose corrections to the transcript, and any proposed corrections are attached to the transcript; the transcript itself is not altered. Section 160.314(b)(9)(i) provides that, if a witness is provided with a copy of the transcript, the witness may submit written proposed corrections to the transcript, or, if the witness is afforded only the opportunity to inspect the transcript, the witness may propose corrections to the transcript at the time of inspection. In either case, the witness's proposed corrections are attached to the transcript. Similarly, under § 160.314(b)(9)(ii), the Secretary's proposed corrections are attached to the transcript. The purpose of the proposed corrections is to make the transcript ''true and accurate.'' See § 160.314(b)(9)(i). Under this process, then, HHS would not be changing the witness's proposed corrections; HHS would, at most, be proposing different corrections.

Comment: One comment suggested that § 160.314 be revised to require HHS to provide for the same protection of protected health information that is required of covered entities when HHS receives protected health information during an investigation.

Response: Section 160.310(c)(3) explicitly protects the confidentiality of protected health information received by HHS ''in connection with an investigation or compliance review under this subpart.'' Although these protections are not the same as those required of covered entities with respect to protected health information, in some respects they are more stringent, given the limited circumstances for which the information may be disclosed under this provision. Because § 160.314 is now part of the subpart, the restriction of § 160.310(c)(3) applies to protected health information received during an investigational inquiry. See § 160.314(c), which provides that testimony and other evidence obtained in an investigational inquiry may only be used ''[c]onsistent with § 160.310(c)(3) * * *''.

Comment: One comment asked for clarification of the ''good cause'' limitation on a witness's ability to inspect the official transcript of their testimony.

Response: This provision derives from the Administrative Procedure Act, which requires, at 5 U.S.C. 555(c), that ''[a] person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.'' The ''good cause'' language of this provision has been explained as follows:

> The * * * grant[] to agencies of the right to inhibit access to testimony in nonpublic investigatory proceedings were in recognition that such investigations, ''like those of a grand jury, might be thwarted in certain cases if not kept secret, and that if witnesses were given a copy of their transcript, suspected violators would be in a better position to tailor their own testimony to that of the previous testimony, and to threaten witness about to testify with economic or other reprisals.''

LaMorte v. *Mansfield,* 438 F.2d 448, 451 (2d Cir. 1971) (quoting *Commercial Capital Corp.* v. *S.E.C.,* 360 F.2d 856, 858 (7th Cir. 1966)).

Comment: Several comments suggested that evidence obtained during an investigation by HHS should be used only within the scope of that investigation, not for other matters, as provided for by § 160.314(c).

Response: Section 160.314(c) mirrors the OIG rule. The concept that HHS may use evidence obtained in an investigation for matters outside the scope of the investigation is not novel. While we would expect to be careful in using such information for other purposes, we are legally obligated to take appropriate action if we obtain clear evidence of wrongdoing.

9. Section 160.316—Refraining From Intimidation or Retaliation

Proposed rule: Proposed § 160.316, which was taken from § 164.530(g)(2) of the Privacy Rule, would prohibit covered entities from threatening, intimidating, coercing, discriminating against, or taking any other retaliatory action against individuals or other persons (including other covered entities) who complain to HHS or otherwise assist or cooperate in the enforcement processes created by this rule. The intent of this addition to subpart C was to make these non-retaliation provisions applicable to all of the HIPAA rules, not just the Privacy Rule. A conforming change to § 164.530(g) of the Privacy Rule was proposed, to cross-reference proposed § 160.316.

Final rule: The final rule adopts the provisions of the proposed rule, except that the verb ''harass'' is inserted in the introductory language of this section. The related revision to § 164.530(g) is adopted without change.

Comment: Two comments asked HHS to strengthen the prohibition on retaliation and intimidation. The comments express concern that the current provision is not a sufficient deterrence to covered entities, particularly payers. One comment suggested that the language be revised to read in pertinent part as follows: ''A covered entity may not threaten * * * including not threaten to reduce or eliminate payment, intimidate, coerce, harass, discriminate against, or take any other retaliatory action against any individual or other person * * * including suspending or terminating participation in a Medicaid program and/or in any other program or network or reducing or eliminating payment for * * *''. Another comment suggested that persons who engage in prohibited retaliation or intimidation should be considered to have ''knowingly'' violated the statute and be subject to criminal penalties under section 1177 of the Act.

Response: We agree with the comment that the actions covered in the suggested language would constitute intimidation or retaliation under the appropriate facts, but we think that such claims may be made under the existing language. However, while harassment is encompassed by the phrase ''other retaliatory action'' in this section, since harassment is a form of pressure that is sufficiently different from, and as objectionable as, the other intimidating or retaliatory acts that are specifically mentioned, we clarify the section by including it in the text of the regulation;

the text of the final rule is revised accordingly.

The statute does not make retaliation or intimidation the subject of a criminal penalty under section 1177, and we cannot expand the scope of the criminal provision by regulation. Accordingly, we do not adopt this suggestion.

Comment: One comment suggested amending the section to require that a complaint be filed in good faith under § 160.306 and that the same change be made to the remaining language in proposed § 164.530(g). The comment stated that covered entities should not be prohibited from firing employees who file false complaints and that covered health care providers should not be prohibited from terminating the provider-patient relationship where the patient files a false complaint.

Response: The good faith of a complainant is currently evaluated by OCR to the extent it bears upon determining whether a compliance failure appears to have occurred and the extent to which the complaint should be investigated. We do not read the rule as prohibiting the firing of an employee or the termination of a provider-patient relationship where other legitimate grounds for such action exist; whether such grounds exist would be a matter to be ascertained in the course of the investigation.

Comment: Two comments asked HHS to provide examples of retaliation and/or outline procedures or criteria for how the occurrence of retaliation will be investigated and determined. One comment asked that the rule stipulate that an act be considered to be one of retaliation or intimidation only if it occurred after the filing of a complaint.

Response: Complaints regarding retaliation or intimidation will be handled in the same manner as investigations regarding other possible violations of the HIPAA rule, as § 160.316 is considered an administrative simplification provision for the purposes of imposing a civil money penalty. Because such situations are likely to be quite varied and factually complex, we are reluctant to preclude consideration of events prior to the filing of a complaint that may be relevant to a claim of retaliation or intimidation. We, thus, retain the language as proposed.

C. Subpart D—Imposition of Civil Money Penalties

Subpart D of the final rule addresses the issuance of a notice of proposed determination to impose a civil money penalty and other actions that are relevant thereafter, whether or not a hearing is requested following the issuance of the notice of proposed determination. It also contains provisions on identifying violations, calculating civil money penalties for such violations, and establishing affirmative defenses to the imposition of civil money penalties. It, thus, implements the provisions of section 1176, as well as related provisions of section 1128A. As noted above, many provisions of subpart D are based in large part upon the OIG regulations, but we adapt the language of the OIG regulations to reflect issues presented by, or the authority underlying, the HIPAA rules.

1. Section 160.402—Basis for a Civil Money Penalty

Section 160.402 sets forth the rules concerning the basis for liability for a civil money penalty. It includes the rules for determining liability if more than one covered entity is responsible for a violation and where an agent of a covered entity is responsible for a violation.

a. Section 160.402(a)—General Rule

Proposed rule: Proposed § 160.402(a) would require the Secretary to impose a civil money penalty on any covered entity which the Secretary determines has violated an administrative simplification provision, unless the covered entity establishes that an affirmative defense, as provided for by § 160.410, exists. This provision is based on the language in section 1176(a) that ''* * * the Secretary shall impose on any person who violates a provision of this part a penalty * * *''. A ''provision of this part'' is considered to be a requirement or prohibition of the HIPAA statute or rules. See the discussion of ''administrative simplification provision'' under § 160.302 above.

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: A number of comments suggested that the words ''the Secretary will impose a civil money penalty * * *'' are too strict. Some comments expressed concern that this language could jeopardize HHS's ability to resolve a matter informally; other comments questioned how this language was consistent with the provisions for voluntary compliance (§ 160.304), informal resolution (§ 160.312), and settlement (§ 160.416). Most of these comments suggested that the rule give the Secretary discretion to impose a civil money penalty instead of making it mandatory.

Response: Section 160.402(a) states the general rule of section 1176(a): If the Secretary determines that a covered entity has violated an administrative simplification provision, he will impose a civil money penalty unless a basis for not imposing a penalty under section 1176(b) exists. The use of the words ''shall impose'' in section 1176(a) is more than the mere conveyance of authority to the Secretary to exercise his discretion where he has made a formal determination that a covered entity has violated an administrative simplification provision. Under the procedures set forth in this final rule, the formal determination is proposed in a notice of proposed determination under § 160.420. A covered entity may request administrative review by an administrative law judge of this determination. If the covered entity does not so request, the proposed determination becomes final.

Many opportunities will precede a determination of a violation, however, that will permit the Secretary to exercise his discretion to not impose a penalty. As set forth in § 160.304, the principle for achieving compliance is to seek voluntary compliance by covered entities. To implement this principle in complaints and compliance reviews, § 160.312 provides that the Secretary will attempt to reach resolution by informal means prior to proposing a determination under § 160.420 that a covered entity has violated an administrative simplification provision. If resolution satisfactory to the Secretary is reached by informal means, the Secretary may exercise his discretion to close the matter without formally proposing a determination under § 160.420. The Secretary is also authorized by section 1128A(f) of the Act, which is incorporated by reference in section 1176, to exercise discretion to settle any matter. Thus, under §§ 160.416 and 160.514, settlements of civil money penalties which have been proposed or are being challenged through the administrative hearing process are possible. The Secretary also has discretion to waive civil money penalties, in whole or in part, in certain cases under § 160.412.

The general rule stated in § 160.402(a) that the Secretary will impose a civil money penalty upon a covered entity if the Secretary determines that the covered entity has violated an administrative simplification provision is not at odds with the Secretary's authority to exercise his discretion pursuant to §§ 160.304, 160.312, 160.412, 160.416, and 160.514. However, these exercises of Secretarial discretion require actions by covered entities. When a covered entity acts, or fails to act, in ways that do not allow the exercise of Secretarial discretion not to

impose a penalty, the Secretary will impose a civil money penalty upon the covered entity if the Secretary determines that the covered entity has violated an administrative simplification provision.

Comment: One comment complained that § 160.402(a) does not allow for early termination of frivolous complaints. The comment stated that covered entities are locked into paying a civil money penalty or initiating an expensive and elaborate defense to the complaint.

Response: It is our expectation that complaints that are frivolous will be resolved at an early stage of the informal resolution process under § 160.312. A covered entity can facilitate this process by cooperating with the OCR or CMS investigators on a timely basis.

Comment: One comment suggested that § 160.402(a) be revised to require HHS to issue a finding that informal resolution is not sufficient and that a civil money penalty is necessary.

Response: The provision suggested would be redundant. The notice of proposed determination under § 160.420 essentially fulfills this function, in that it must state the grounds upon which the Secretary has decided to impose the penalty.

b. Section 160.402(b)—Violations by More Than One Covered Entity

Proposed rule: Proposed § 160.402(b) provided that, except with respect to covered entities that are members of an affiliated covered entity, if the Secretary determines that more than one covered entity was responsible for violating an administrative simplification provision, the Secretary will impose a civil money penalty against each such covered entity. Based on the statutory language in section 1176(a), which states that the Secretary ''* * * shall impose a penalty * * *'' when there is a determination that an entity has violated a HIPAA provision, this provision would apply to any two or more covered entities (other than members of an affiliated covered entity, discussed below), including, but not limited to, those that are part of a joint arrangement, such as an organized health care arrangement. The preamble to the proposed rule noted that the determination of whether or not an entity is responsible for the violation would be based on the facts and that, while simply being part of a joint arrangement would not, in and of itself, make a covered entity responsible for a violation by another entity in the joint arrangement, it could be a factor considered in the analysis. See 70 FR 20231.

Proposed § 160.402(b)(2) provided that each covered entity that is a member of an affiliated covered entity would be jointly and severally liable for a civil money penalty for a violation by the affiliated covered entity. An affiliated covered entity is a group of covered entities under common ownership or control, which have elected to be treated as if they were one covered entity for purposes of compliance with the Security and Privacy Rules. *See* § 164.105(b).

Final rule: The final rule provides that a member of an affiliated covered entity is jointly and severally liable for a violation by the affiliated covered entity, unless it is established that another member of the affiliated covered entity was responsible for the violation.

Comment: Proposed § 160.402(b) was opposed by many on the ground that it was unfair to make one covered entity liable for a violation committed by another covered entity. A number of comments stated that this provision was particularly unfair, when coupled with the requirement of proposed § 160.426 that the public be notified of civil money penalties imposed, in that a covered entity that was not responsible for the violation in question could bear the reputational injury associated with such notification, due to the operation of proposed § 160.402(b). One comment pointed out that violations may not be system-wide, but may be limited to one member of the affiliated covered entity; in such a situation, it would not be fair to penalize the other members of the affiliated covered entity.

Response: We agree with these comments to a certain extent and have changed the final rule accordingly. We agree that, if responsibility for a violation can be shown to lie with one member of an affiliated covered entity, that member should be held liable for the violation. Thus, we have provided that a covered entity member of an affiliated covered entity may avoid liability if it is established that another member was responsible for the violation. We suspect that in most cases, which member was responsible for the violation will be clear—for example, if four of five members of a covered entity distributed privacy notices but the fifth member did not, the violations of the notice distribution requirement of § 164.520 would be attributed to the fifth member. In such cases, the objections to publication described above are beside the point, because liability follows responsibility.

However, we do not agree that the inability to assign specific responsibility for a violation to one or more members of an affiliated covered entity should shield all of its members from liability. We doubt that such situations will arise often, but they may arise where the affiliated covered entity has failed to take a required act—for example, where the affiliated covered entity has failed to appoint a privacy officer. In such a case, all of the members of the affiliated covered entity bear a share of the responsibility for the failure to act, since any of them could have presumably taken action to bring the group, as a whole, into compliance. It is, thus, not unreasonable that all members of the affiliated covered entity should be jointly and severally liable for the consequent penalty. Moreover, absent joint and several liability, each member of the affiliated covered entity would be separately liable for the penalty for the violation, *e.g.*, the failure to appoint a privacy officer. Thus, the removal of joint and several liability may result in greater liability for the members of an affiliated covered entity in some cases.

Comment: Several comments argued that there is no statutory authority for holding the members of an affiliated covered entity jointly and severally liable, in that the statute requires that the penalty ''shall be imposed on any person who violates a provision * * *'' and, thus, does not authorize imposition of a penalty on a person who has not violated a provision of the statute or rules. One comment argued that proposed § 160.402(b) would violate the due process clause by imposing liability on entities not responsible for a violation.

Response: These objections are misplaced. Where, as will usually be the case, responsibility for the violation is evident and the responsible party is charged with the violation, they are obviously not relevant. In the case of other violations, where the responsibility for the violation is shared by the members of the affiliated covered entity, as in where the affiliated covered entity fails to take required actions, they are likewise not relevant. Since each covered entity member of the affiliated covered entity is responsible for complying with the rule in question, responsibility for the failure to act may be properly imputed to each member. Moreover, since an affiliated covered entity is a type of joint undertaking, it is reasonable to impute responsibility to the members of the affiliated covered entity, as is typically done with joint ventures.

Comment: Several comments argued that proposed § 160.402(b) uses a legal fiction of the Privacy and Security Rules to create liability where liability would not otherwise exist and substitutes this fiction for the corporate form and structure that establish the basis for enterprise liability under U.S. law.

Another comment stated that this section is inconsistent with the provision of the HIPAA rules (§ 160.105(b)) that defines an affiliated covered entity as an entity comprised of ''legally separate'' entities.

Response: We disagree. The affiliated covered entity concept is more than a legal fiction. It is an operational approach to discharging certain compliance responsibilities. When covered entities create an affiliated covered entity, they mutually agree to conduct their business in a certain manner and hold themselves out to the world as a joint undertaking. While the Privacy and Security Rules do not prescribe detailed requirements for how an affiliated covered entity must be organized, the level of cooperation such an undertaking necessitates, the requirement for designation, and the requirement of common ownership or control mean that the participating members will have entered into an agreement of some sort, whether formal or informal. We, thus, think that it is properly viewed as a joint venture.

The fact that an affiliated covered entity is composed of ''legally separate'' entities is beside the point. Joint and several liability, as a concept, is imposed on legally separate entities. See, *e.g.*, Black's Law Dictionary (8th ed. 2004), liability.

Comment: A number of comments argued that the provision for joint and several liability would discourage covered entities from setting up affiliated covered entities. One comment stated that proposed § 160.402(b) represents a change in position by HHS, in that the preamble to the Privacy Rule, on which many covered entities relied, stated that covered entities that formed an affiliated covered entity are ''separately subject to liability under this rule.''

Response: Section 160.402(b), as adopted, should allay the concerns expressed by these comments with respect to the potential exposure to liability for the members of affiliated covered entities. We think that, in most cases, which member of an affiliated covered entity is responsible for a violation will be obvious; where this is the case, HHS would seek to impose the civil money penalties on that member. Even if it is not obvious from the violation itself who the responsible party is, a covered entity may adduce evidence to establish that responsibility for the violation lies elsewhere, and, if this is shown, avoid liability. In any event, the establishment of an affiliated covered entity is not mandated by either the Privacy Rule or the Security Rule. Rather, establishing an affiliated covered entity is a business decision to be made by the covered entities involved. The affiliated covered entity arrangement carries with it certain benefits for the member entities; any increased exposure to potential liability under this rule, assuming there is one, should be part of the business calculus.

In addition, we do not agree that § 160.402(b) is inconsistent with the position taken in the preamble to the Privacy Rule. Our prior statement was intended to provide notice that liability for violations by an affiliated covered entity would devolve onto the member covered entities of an affiliated covered entity, rather than being attributed to the affiliated covered entity itself, so that member covered entities could not avoid liability by arguing that the affiliated covered entity had committed the violation in question. It was not intended to indicate the bases upon which that liability would be determined, which is the purpose of § 160.402(b).

Comment: A couple of comments supported the policy of holding the members of an affiliated covered entity jointly and severally liable. One comment supported holding all covered entities in an affiliated covered entity liable for the violations of one as an efficient mechanism for highlighting the seriousness of violations of the HIPAA rules.

Response: For the reasons set forth above, we have not adopted this policy in the final rule, insofar as responsibility for a violation can be determined.

Comment: Two comments requested clarification of the maximum amount of the penalty that will be assessed against an affiliated covered entity when one of its members has been found noncompliant.

Response: Where responsibility for a violation is allocated to individual covered entities, each covered entity determined to be responsible for the violation would be liable for violations of an identical requirement or prohibition in a calendar year up to the statutory maximum of $25,000. If responsibility for particular violations cannot be determined, so that the members of the affiliated covered entity are jointly and severally liable for the violation, the maximum that would be imposed for violations of an identical requirement or prohibition in a calendar year would be $25,000.

Comment: Several comments requested clarification of the statement in the preamble to the proposed rule that membership in an organized health care arrangement ''could be a factor considered in the analysis'' in determining the liability of a member of such arrangement for a violation. Of particular concern was the potential liability of a hospital for the actions of physicians with privileges; one comment noted that the hospital exercises little control over medical staff in such situations. One comment requested that the final rule clarify that membership in an organized health care arrangement would not increase a covered entity's exposure to liability.

Response: As we noted in the preamble to the proposed rule, the members of an organized health care arrangement would be individually—not jointly and severally—liable for any violation of the HIPAA rules. What our preamble statement intended to indicate was that HHS might have to look carefully at how the organized health care arrangement operated in determining which member(s) of the organized health care arrangement was responsible for a particular violation, if that was not clear at the outset.

c. Section 160.402(c)—Violations Attributed to a Covered Entity

Proposed rule: Proposed § 160.402(c) provided that a covered entity can be held liable for a civil money penalty based on the actions of any agent, including a workforce member, acting within the scope of the agency. This provision derives from section 1128A(*l*) of the Act, which is made applicable to HIPAA by section 1176(a)(2) of the Act. Section 1128A(*l*) states that ''a principal is liable for penalties * * * under this section for the actions of the principal's agents acting within the scope of the agency.'' Under the proposed rule, a covered entity could be liable for a civil money penalty for a violation by any agent acting within the scope of the agency, including a workforce member. (''Workforce'' is defined at § 160.103 as ''employees, volunteers, trainees, or other persons whose conduct in the performance of work for a covered entity is under the direct control of such entity, whether or not they are paid by the covered entity.'') The proposed rule excepted covered entities from liability for actions of a business associate agent that violate the HIPAA rules, if the covered entity was in compliance with the HIPAA rules governing business associates at §§ 164.308(b) and 164.502(e). Proposed § 160.402(c) also provided that the Federal common law of agency would apply to determine agency issues under this provision.

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: A number of comments supported the provision of proposed § 160.402(c) relating to business

associates and requested that it be retained in the final rule.

Response: We agree and have done so.

Comment: One comment requested clarification of the liability of a covered entity for a violation committed by a non-covered entity who is not a business associate or workforce member, such as researchers, medical device vendors, and non-covered providers who have treatment privileges and access to protected health information at a covered entity's facility. The comment argued that, depending on the circumstances, such persons may or may not be considered agents.

Response: In general, a ''violation'' cannot occur, if the act in question is not done by a covered entity or its agent, because only covered entities are subject to the HIPAA rules. For example, if a permitted or required disclosure of protected health information is made by a covered entity to a person or entity that is not a workforce member or business associate, the covered entity would not generally be responsible for that person's or entity's subsequent use or disclosure of the information. Thus, if a hospital that is a covered entity discloses protected health information to a non-covered health care provider with privileges for treatment of a patient, the hospital would not be liable for a subsequent use or disclosure by that provider, as long as the hospital is not also involved in that use or disclosure. If the provider is an agent of the hospital, however, the hospital's liability will be determined in accordance with § 160.402(c).

Comment: We requested comment in the proposed rule on whether there are categories of workforce members whom it would be inappropriate to treat as agents under § 160.402(c). A number of comments suggested that independent contractors, volunteers, and students under the supervision of an academic institution be excluded from the definition of an agent for whose acts the covered entity could be liable, provided that the covered entity has given the requisite training to such persons. The comments indicated that generally covered entities have less control over such persons than they have over employees.

Response: Whether a person is sufficiently under the control of a covered entity and acting within the scope of the agency has to be determined on the facts of each situation, but § 160.402(c) creates a presumption that a workforce member is an agent of the covered entity for the member's conduct under the HIPAA rules, such as using and disclosing protected health information. With regard to whether an independent contractor is a member of the covered entity's workforce, the question would be whether the covered entity had direct control over the independent contractor in the performance of its work for the covered entity. See § 160.103 (definition of ''workforce''). If the covered entity does not have direct control over such persons, they do not fall within the definition of ''workforce.'' Where persons, such as independent contractors, who are not under the direct control of the covered entity perform a function or activity that involves the use or disclosure of individually identifiable health information or a function or activity regulated by this subchapter on behalf of a covered entity, such persons would fall within the definition of ''business associate,'' and the covered entity would be required to comply with the business associate provisions of the Privacy and Security Rules with regard to such persons. Because of the direct control requirement in the definition of workforce, we think it is appropriate for a covered entity to be liable for a violative act of an independent contractor who is a member of the workforce, that is, who is under the direct control of the covered entity.

With respect to volunteers and trainees, we note that, while covered entities may have less control over these persons, they do control their performance of activities that are governed by the HIPAA rules, such as access to protected health information. In regard to privacy, a covered entity is required to train these categories of workforce members as necessary and appropriate for these volunteers and trainees to carry out their functions within the covered entity. 45 CFR 164.530(b). This requirement allows a covered entity to adapt its training to a volunteer's or trainee's scope of duties. For example, a volunteer who files laboratory results in a medical record will require training that is different and more extensive than the training given to a volunteer in the lobby gift shop of a hospital. Section 160.402(c) is consistent with these distinctions. The acts of volunteers and trainees will be examined on a case-by-case basis to determine if they are acting as agents within the scope of their agency. Thus, we think that it is appropriate to treat volunteers and trainees as persons for whose acts a covered entity may be liable, if they act as agents for the covered entity and violate the HIPAA rules within the scope of their agency.

Comment: One comment recommended that the rule be revised to make covered entities liable for violations committed by business associates. The comment suggested that, if a covered entity is not liable for the actions of its business associates, covered entities will outsource the handling of protected health information to avoid liability.

Response: We included the business associate exception in proposed § 160.402(c)(1)–(3) to make this rule consistent with the business associate provisions in the Privacy and Security Rules. Changing the business associate provisions in the Privacy and Security Rules is outside the scope of this rulemaking. (See the extensive discussion about business associates in the Privacy Rule and Security Rule preambles at 65 FR 82503–82507 and 82640–82645, 67 FR 53251–53253, and 68 FR 8358–8361). The satisfactory assurances that are required in written contracts or arrangements between covered entities and their business associates are intended to protect the confidentiality of protected health information handled by business associates. If a covered entity fails to comply with the business associate provisions in the Privacy and Security Rules, such as by not entering into the requisite contracts or arrangements, or by not taking reasonable steps to cure a breach or end a violation that is known to the covered entity, the covered entity may be liable for the actions of a business associate agent. We, therefore, decline to follow the recommendation.

Comment: Two comments suggested that HHS limit its use of the Federal common law of agency because its application may make a covered entity liable for the actions of a person, such as an independent contractor, for whom the covered entity is not liable under state law.

Response: As we stated above, covered entities must comply with the business associate provisions of the Privacy and Security Rules for independent contractors who are not under the direct control of the covered entity and who perform a function or activity that involves the use or disclosure of individually identifiable health information or a function or activity regulated by ''this subchapter'' (*i.e.,* the HIPAA rules) on behalf of a covered entity. If a covered entity complies with the business associate provisions, the exception from liability in § 160.402(c) will be applicable. The purpose of establishing the Federal common law of agency to determine when a covered entity is vicariously liable for the acts of its agents is to achieve nationwide uniformity in the implementation of the HIPAA rules by covered entities and nationwide

consistency in the enforcement of these rules by HHS. The comments reinforced our conclusion that reliance on state law could introduce inconsistency in the implementation of the HIPAA rules by covered entities in different states. Thus, we retain the Federal common law of agency as the standard by which agency questions in specific cases will be determined.

Comment: Two comments requested clarification of how this section will apply to insurance agents, brokers, and consultants.

Response: Insurance agents, brokers, and consultants who are not members of the covered entity's workforce but with whom the covered entity shares protected health information will generally fall within the definition of ''business associate'' at § 160.103. A covered entity that complies with the business associate provisions of the Privacy and Security Rules would not be liable for a violation of those rules by the business associate pursuant to the liability exception in § 160.402(c). It is also possible that the insurance agent, broker, or consultant may be the covered entity's agent in some, but not all, of his or her activities. An agent or broker may be working on behalf of an employer to arrange insurance coverage for its employees and not on behalf of the health insurance issuer that is a covered entity. In cases where the liability exception for business associates is not available or not met, the determination of whether an insurance agent, broker, or consultant is an agent of a covered entity and was acting within the scope of the agency will be made based on the facts of each situation.

Comment: One comment argued that covered entities should not be liable for acts of employees outside the scope of their employment. Another comment suggested that covered entities should not be liable for the actions of agents who have been informed of the covered entity's HIPAA compliance policies, yet act contrary to them. Another suggested that a covered entity should not be liable for the acts of agents who, although authorized to disclose protected health information, disclose it for purposes of sale or with intent to do harm.

Response: Section 160.402(c), as proposed and adopted, provides that a covered entity is liable for the acts of an agent acting ''within the scope of the agency.'' This provision necessarily implies that a covered entity is not liable for its agent's acts outside the scope of the agency (as determined under the federal common law of agency). With regard to the comments that suggest that unauthorized conduct by an agent is outside the scope of the agency, the Federal common law of agency will be applied to the facts of each case to determine whether the covered entity is liable for the conduct, even though it was unauthorized.

Comment: Two comments expressed concern with the role of a Privacy Officer and his or her liability under this part and the covered entity's liability for the actions of a Privacy Officer who is a business associate. One comment suggested that the Privacy Officer should not incur any additional liability merely by being designated the Privacy Officer. The other comment requested clarification as to a covered entity's liability when the covered entity directly controls a Privacy Officer, if the Privacy Officer is a business associate.

Response: As stated above, the facts of each case will determine the liability of covered entities for wrongful conduct of its agents under the HIPAA rules. As a general matter, we think that a Privacy Officer is an officer of a covered entity for the purposes of the Privacy Rule and, thus, will likely be the covered entity's agent. As stated in § 160.402, a covered entity is liable for the acts of its agent acting within the scope of its agency and, thus, is liable for any penalties that result from those acts. However, if a Privacy Officer is a business associate of the covered entity, the liability exception in § 160.402(c) may apply. A covered entity that is in compliance with the business associate provisions of the Privacy and Security Rules will not be liable for a violation of those rules by the business associate.

2. Section 160.404—Amount of a Civil Money Penalty

Proposed rule: Under proposed § 160.404(a), the penalty amount would be determined through the method provided for in proposed § 160.406, using the factors set forth in proposed § 160.408, and subject to the statutory caps reflected in proposed § 160.404(b) and any reduction under proposed § 160.412. The proposed regulation would not establish minimum penalties. Proposed § 160.404 would follow the language of the statute and establish the maximum penalties for a violation and for violations of an identical requirement or prohibition during a calendar year, as set forth in the statute—up to $100 per violation and up to $25,000 for violations of an identical requirement or prohibition in a calendar year. Proposed § 160.404(b) provided that the term ''calendar year'' means the period from January 1 through the following December 31.

Under proposed § 160.404(b)(2), a violation of a more specific requirement or prohibition, such as one contained within an implementation specification, could not also be counted, for purposes of determining civil money penalties, as an automatic violation of a broader requirement or prohibition that entirely encompasses the more specific one. That is, the Secretary could impose a civil money penalty for violation of either the general or the specific requirement, but not both. Proposed § 160.404(b)(2) would not apply where a covered entity's action results in violations of multiple, differing requirements or prohibitions within the same HIPAA rule or in violations of more than one HIPAA rule. Proposed § 160.404(b)(2) also would not preclude assessing civil money penalties for multiple violations of an identical requirement or prohibition, up to the statutory cap.

Final rule: The final rule adopts the provisions of the proposed rule. Changes to the provisions referenced in this section are discussed in connection with those provisions.

Comment: While most comments that addressed proposed § 160.404(b)(2) supported it, several comments suggested that a single set of facts or single activity should not result in the finding of more than one violation, even of different subparts. According to the comments, covered entities should not be assessed penalties for violating more than one provision if all violations arise out of the same facts or incident. One comment suggested that penalties should not be doubly assessed for overlapping provisions in other subparts unless gross misconduct or willful negligence was involved.

Response: We do not count an act that violates overlapping provisions of a subpart as more than one violation because provisions that are duplicative in a subpart were written that way as a drafting convenience and were not intended to establish separate legal obligations. This rationale, however, does not apply where the legal obligations are found in different subparts. Further, the different subparts implement different statutory standards and, thus, impose separate legal obligations. For example, where a covered entity re-sells its used computers without scrubbing the hard drives that contain protected health information, this act may violate several separate legal obligations under the Security and Privacy Rules: (1) The media re-use requirement of § 164.310(d)(2)(ii); (2) the safeguards requirement of § 164.530(c); and (3) to the extent that the protected health

information on the drives is accessible by persons to whom it could not permissibly be disclosed, §§ 164.308(a)(4)(i) and 164.502(a). In such a situation, the act has violated requirements or prohibitions of different rules promulgated pursuant to different provisions of the statute, and it is appropriate that such violations be treated separately. Thus, we decline to extend § 160.404(b)(2) as suggested.

Further, the same facts may evidence noncompliance with more than one non-overlapping provision of a subpart and, thus, may result in multiple violations for which a penalty may be assessed. For example, a covered entity that makes an impermissible use of protected health information may also, by virtue of the impermissible use, have violated the Privacy Rule's minimum necessary and/or reasonable safeguard provisions.

We also note that, in some cases, a violation of one requirement or prohibition may produce consequential violations, and such cases would not come within § 160.404(b)(2). For example, § 164.308(a) requires covered entities to conduct security risk analyses. The security risk analysis is the foundation of the covered entity's security risk management plan and is one of the bases which it must take into account in deciding not to implement addressable implementation specifications under the Security Rule. If a covered entity does not do a security risk analysis, it has no basis for not implementing the addressable implementation specifications under the Security Rule, and any failure to implement such specifications could, thus, be considered a violation. Thus, while the failure to conduct the security risk analysis would be a violation, albeit a continuing one, of just one provision, it would necessarily result in other violations, to the extent the covered entity failed to implement the addressable implementation specifications of the Security Rule.

Comment: One comment suggested that the costs incurred by the covered entity as a result of the violation should be considered in calculating the amount of the penalty.

Response: We do not adopt this suggestion for several reasons. First, we are not certain what costs the comment is suggesting be considered—the costs associated with committing the violation, the costs associated with correcting the violation, or both. Second, the factors to be considered in determining the amount of the penalty for a violation are set out at section 1128A(d) and are implemented in this rule by § 160.408. ''Costs incurred by the covered entity as a result of the violation'' is not a concept that fits squarely within any of the statutory factors. Third, to the extent consideration of such costs is reasonable, it would seem to be relevant only to the criterion for waiver under § 160.412 (''the extent that payment of the penalty would be excessive relative to the violation''); insofar as that criterion weighs the seriousness of the effect of the violation, costs associated with correcting the violation might in certain circumstances be a relevant factor to be considered.

3. Section 160.406—Number of Violations

Proposed rule: Proposed § 160.406 would establish the general rule that the Secretary will determine the number of violations of an identical requirement or prohibition by a covered entity by applying any of the variables of action, person, or time, as follows: (1) The number of times the covered entity failed to engage in required conduct or engaged in a prohibited act; (2) the number of persons involved in, or affected by, the violation; or (3) the duration of the violation, counted in days. Paragraph (a) of this section would require the Secretary to determine the appropriate variable or variables for counting the number of violations based on the specific facts and circumstances related to the violation, and take into consideration the underlying purpose of the particular HIPAA rule that is violated. More than one variable could be used to determine the number of violations (for example, the number of people affected multiplied by the time (number of days) over which the violation occurred). The Secretary would have discretion in determining which variable or variables were appropriate for determining the number of violations. The preamble to the proposed rule noted that, under this proposal, the policy for determining which variable(s) to use for which type of violation would be developed in the context of specific cases rather than established by regulation and that subsequent cases would be decided consistently with prior similar cases.

Final rule: The final rule eliminates the provision for variables and provides that the number of violations of an identical requirement or prohibition (termed ''identical violations'') will be determined based on the nature of the covered entity's obligation to act or not act under the provision violated, such as its obligation to act in a certain manner, or within a certain time, or with respect to certain persons. With respect to continuing violations, a separate violation will be deemed to occur on each day such a violation continues.

Comment: While two comments supported the proposal, many comments challenged the variable approach of proposed § 160.406 to determining the number of violations. In particular, several comments expressed concern over the broad discretion provided to the Secretary to determine the number of violations, particularly in light of the fact that the proposed rule would have prohibited the ALJ from reviewing the Secretary's choice of variable(s). Further, some comments were concerned that the Secretary could use multiple variables to determine the number of violations. It was argued that the proposed approach was unfair in that it (1) did not allow covered entities to predict the amount of a civil money penalty that would result from a violation, and (2) could maximize the penalty to the statutory cap in virtually any case, which could result in very harsh penalties for relatively minor offenses. Other comments argued that the variable approach was inconsistent with the policy of proposed § 160.404(b)(2), prohibiting the double counting of overlapping regulatory requirements, or was inconsistent with HHS's general approach to voluntary compliance. It was suggested, for example, that HHS instead could establish one particular calculation method for each HIPAA rule or specify the types of violations for which HHS would use a particular method.

Comments also criticized the variable approach as inconsistent with the definition of ''violation,'' arguing that the person and time variables have no logical relationship to a failure to comply, and thus, would not be appropriate for counting violations. Specifically, it was argued that since a ''violation'' is defined as a failure to comply with a requirement or prohibition, by definition a violation is a failure to take a required action or a failure to refrain from doing a prohibited act, and, thus, is not defined by the period of time during which such action or inaction occurs or by the number of people who may be affected by it. Further, several comments argued that the action/inaction variable was the only one that was consistent with the statute, so that penalizing covered entities by using other variables would be penalizing them for violations that, by definition, do not exist, which would be inconsistent with Congressional intent, as expressed in section 1176(a), and inappropriate as a matter of public policy. It was also argued that the time and person variables look at qualitative issues and attempt to measure the

importance of an act or omission; they do not measure where an act is quantitatively extensive—i.e., repeated or prolonged. It was argued that qualitative considerations are treated, under the statute, as aggravating or mitigating factors, not as questions of the quantity of violations, as is done under the variable approach.

Response: It was not our intent to suggest that the variables we proposed would be employed in a manner unrelated to the nature of the underlying violation, as assumed by many of the comments. However, since we agree that the manner in which the number of identical violations should be determined will depend on the nature of the provision violated, and the provision for variables was confusing and susceptible to misinterpretation, we have eliminated the explicit requirement to use the person, time, and action variables. The final rule instead makes clear that the Secretary will determine the number of identical violations based on the nature of the obligation of the covered entity to act (or not act) under the provision violated. While we agree, in principle, that the definition of ''violation'' looks to an action or a failure to act as the essence of a violation, defining what particular act or failure to act constitutes the specific violation in question will necessarily require looking at the substantive provision involved and determining what the covered entity was legally obligated to do. We do not agree, in this regard, that the elements of ''people'' and ''time'' are always irrelevant to a failure to comply or that consideration of these elements would result in double counting of violations. Rather, the precise nature of the covered entity's obligation will, as discussed below, in many cases be a function of to whom the obligation is owed or the manner in which it must be performed or other elements. Thus, we include in the regulation examples of elements that should be considered, as appropriate, in construing a provision to determine a covered entity's obligation thereunder. We believe that this approach, under which the number of violations is grounded in the language of the provision violated, is wholly consistent with the statutory scheme.

In many cases, applying this principle should not be difficult. For example, the Privacy Rule requires that covered entities have contracts or other arrangements in place with its business associates to assure the privacy of protected health information, and specifies what must (and may not) be included in the contract or other arrangement to do so. See § 164.504(e). Two such provisions are that the contract may not authorize the business associate to use or further disclose the information in a manner that would violate the Privacy Rule, if done by the covered entity, and that the contract must provide that the business associate will use appropriate safeguards to prevent use or disclosure of the information other than as provided for by the contract. See § 164.504(e)(2)(i) and 164.504(e)(2)(ii)(B). If a covered entity enters into five contracts with business associates that authorize the business associates to use protected health information in a manner not permitted by the Privacy Rule and that do not require the business associates to use appropriate safeguards to protect the information, the covered entity will have committed five violations of each of the two separate requirements. Similarly, the Transactions Rule prohibits covered entities from entering into trading partner agreements that would change the use of a data element in a standard or add data elements not contained in the standard. See § 162.915(a), (b). If a health plan were, by trading partner agreement, to require 200 providers to use a data element in a given transaction in a manner that was inconsistent with the standard, and also required the use of another data element that was not part of the standard, we would view each inconsistent requirement in the trading partner agreement as a separate violation. The regulation prohibits the adoption of certain terms in trading partner agreements, so each noncompliant term in each agreement would constitute a separate violation, resulting in 200 violations of each of these requirements.

With respect to the transactions standards themselves, however, we anticipate defining the requirement violated to be the requirement to conduct a standard transaction. While one could view each required data element in a transaction as a separate requirement, because the Implementation Guide for each transaction is incorporated by reference into the regulation, one could also view the underlying Implementation Guides as functioning simply to describe what constitutes compliance in a particular case, rather than establishing separate compliance requirements. While we believe that either interpretation of the Transactions Rule is permissible, we expect to take the latter view of the Rule, to facilitate the predictability of determining violations under that Rule. Thus, we would count each noncompliant transaction as a single violation, regardless of the number of missing data elements. For example, if a health plan is found to have conducted 200 eligibility transactions which are missing several required data elements, the health plan would have committed 200 violations of one identical requirement (i.e., the requirement at § 162.923(a) to conduct a covered transaction as a standard (i.e., compliant) transaction).

In some cases, determining how many times a provision has been violated will be a function of the number of individuals or other entities affected, because the covered entity's obligation is to act in a certain manner with respect to certain persons. We include the term ''persons'' in the list of examples in § 160.406 to make clear that such consideration may be appropriate. It may include not only individuals, but also other covered entities, their workforce members, or trading partners, where the obligation in question relates to such types of persons. For example, assume that a covered entity impermissibly allows a workforce member to access the protected health information of 20 patients whose information is stored on a computer file. The question is whether this set of facts constitutes one violation or 20 violations of § 164.502(a), which prohibits impermissible uses or disclosures of protected health information. Since the covered entity has an obligation with respect to each patient to protect his or her protected health information, the sharing of the 20 patients' protected health information with the employee constitutes a separate impermissible use, or violation, of § 164.502(a) with respect to each patient.

Some provisions embody a requirement or prohibition that is of an ongoing nature or for which timeliness is an element of compliance. We characterize violations of such a requirement or prohibition as continuing violations. In such cases, the covered entity's obligation to act continues over time, and, if it fails to take the required action, that failure to comply also continues over time. Thus, there needs to be a way of determining how such compliance failures are measured. We have decided to count such failures in days, as each day represents a new opportunity to correct the compliance failure. Accordingly, we have included, in the second sentence of § 160.406, language that establishes that continuing violations will be counted by days for purposes of determining how many violations of an identical requirement or prohibition occurred.

For example, the Security Rule requires covered entities to implement many types of policies and procedures. Under § 164.308(a)(4)(i), for example, a covered entity is required to implement policies and procedures for authorizing access to electronic protected health information that are consistent with the applicable requirements of the Privacy Rule. The implementation of such policies and procedures is an ongoing obligation and, thus, any failure to adopt them is a continuing violation. As another example, a covered entity generally is required by § 164.524 to act on a request by an individual for access to his or her protected health information no later than 30 days after the request is received. Thus, each day beyond the 30-day period a covered entity fails to provide such access would be a separate violation.

In contrast, situations in which the violation is a discrete act would not be continuing violations. The transaction example above illustrates violations that are discrete acts. Similarly, where a health plan violates § 162.925(a)(2) by rejecting transactions because they are standard transactions, each rejection would constitute a discrete act. The example above of the workforce member who impermissibly accesses protected health information likewise is an example of violations that are discrete acts.

As explained above, determining the number of violations in a particular case will depend, necessarily, on the precise provision violated and a covered entity's obligations thereunder. The examples above should assist covered entities in understanding their potential liability. These examples also illustrate that determining the number of violations may implicate a number of elements depending on the underlying provision violated, such as whether a covered entity had an obligation with respect to each person, or the amount of time that had elapsed with respect to a continuing violation, or a combination of these or other elements. While the final rule does not adopt the variable approach of the proposed rule, it does not preclude consideration of multiple elements in determining what constitutes the violation and, thus, the number of violations.

Comment: Several comments challenged the preamble statement that future cases would be decided consistently with prior similar cases. One comment suggested that giving HHS discretion to determine the variables used in counting violations, yet saying that future cases will be consistent with past use of variable in similar violations, creates conflict. Other comments asked whether and how a covered entity would be able to challenge the selection of variable(s) based on the variables used in similar cases, if the facts of prior cases were not publicized, so that covered entities could determine how prior violations had been counted. Thus, comments requested that tracking of decided cases and the use of variables for each provision be assigned to a central entity within HHS, or that this information be made available to covered entities via the HHS Web sites.

Response: With respect to the comments regarding the preamble statement in the proposed rule that future cases would be decided consistently with prior similar cases, we clarify that the number of violations of a particular provision will be determined in a similar manner each time a case presents a violation of that particular provision, with due regard to the individual facts and circumstances of the case. In addition, as discussed below, the final rule eliminates the prohibition on ALJ review of the Secretary's choice of variable. Thus, under the final rule, the ALJ may review the Secretary's method of determining the number of violations for consistency or other purposes. With respect to a covered entity's ability to challenge the Secretary's method of determining the number of violations, HHS will make available for public inspection and copying final decisions imposing civil money penalties and may publish such decisions on its HIPAA Web sites. (This is discussed below in connection with § 160.426.) Thus, covered entities will be able to ascertain the application of the penalty provisions where penalties are imposed.

Comment: One comment suggested that there be a limit on the number of violations determined based upon the monetary impact the fine will have on the covered entity.

Response: A change is not necessary, as the statute and regulation already provide two points at which the financial impact of a civil money penalty on a covered entity may be considered—in connection with (1) the statutory factors (section 1128A(d), implemented in this rule by § 160.408) and (2) waiver (section 1176(b)(4), implemented in this rule by § 160.412).

Comment: Two comments suggested that the Secretary should consider whether or not the covered entity has enacted and completed a corrective action plan when determining the number of violations.

Response: Completion of a corrective action plan does not relate to determining the number of occurrences of a violation, so we do not include it as part of § 160.406. However, HHS would consider any such action prior to imposition of a civil money penalty for purposes of determining whether there is a basis for informal resolution of the complaint. In addition, this fact is taken into account in determining whether the penalty should be imposed at all, insofar as it pertains to the ''reasonable cause'' defense under section 1176(b)(3) and § 160.410(b)(3), since an element of that defense is whether the ''failure to comply'' has been corrected.

4. Section 160.408—Factors Considered in Determining the Amount of a Civil Money Penalty

Proposed rule: Section 1176(a)(2) states that, with some exceptions, the provisions of section 1128A of the Act shall apply to the imposition of a civil money penalty under section 1176 ''in the same manner as'' such provisions apply to the imposition of a civil money penalty under section 1128A. Section 1128A(d) requires that—

> In determining the amount of * * * any penalty, * * * the Secretary shall take into account—
>
> (1) The nature of the claims and the circumstances under which they were presented,
>
> (2) The degree of culpability, history of prior offenses and financial condition of the person presenting the claims, and
>
> (3) Such other matters as justice may require.

While the factors listed in section 1128A(d) were drafted to apply to violations involving claims for payment under federally funded health programs, HIPAA violations usually will not concern claims. Thus, we proposed to tailor the section 1128A(d) factors to the HIPAA rules and break them into their component elements for ease of understanding and application, as follows: (1) The nature of the violation; (2) the circumstances under which the violation occurred; (3) degree of culpability; (4) history of prior offenses; (5) financial condition of the covered entity; and (6) such other matters as justice may require. Proposed § 160.408 provided detailed factors, within the categories stated above, to consider in determining the amount of a civil money penalty. However, the proposed rule would not label any of these factors as aggravating or mitigating. Rather, proposed § 160.408 listed factors that could be considered either as aggravating or mitigating in determining the amount of the civil money penalty. The proposed approach would allow the Secretary to choose whether to consider a particular factor and how to consider each factor as appropriate in each

situation to avoid unfair or inappropriate results. It also would leave to the Secretary's discretion the decision regarding when aggravating and mitigating factors will be taken into account in determining the amount of the civil money penalty.

Final rule: The final rule adopts the provisions of the proposed rule, with a minor clarification. Section 160.408(d) is revised to clarify that the prior history to be considered relates to prior compliance with, and violations of, the administrative simplification provisions.

Comment: A number of comments supported the provision for mitigating factors and urged that it be retained in the final rule.

Response: We agree and have done so. See § 160.408 below.

Comment: A number of comments raised concerns or recommendations related to a covered entity's history of compliance. For example, several urged that HHS consider as a factor whether the covered entity has initiated correction action, and whether such action was performed independently and prior to contact from HHS. Some comments also requested that HHS consider any evidence of a covered entity's good faith attempts to comply with the administrative simplification requirements or that HHS take into consideration a history of prior controls. One comment stated that the phrase ''history of prior offenses'' in proposed § 160.408(d) was vague and requested that HHS revise the provision to clarify that it refers only to prior violations by a covered entity of the HIPAA rules, and not to prior offenses unrelated to the HIPAA rules. Another comment expressed concern with the provision at proposed § 160.408(d)(4), which would allow HHS to consider as a factor in determining the amount of a civil money penalty how the covered entity has responded to prior complaints, as well as the preamble statement that such factor could include complaints raised by individuals directly to the covered entity. The comment argued that the manner in which a covered entity responded to previous complaints about matters unrelated to the violation at issue, or to complaints raised by individuals, may be irrelevant and unfairly prejudicial.

Response: With respect to corrective action by a covered entity, HHS would consider any such action prior to imposition of a civil money penalty for purposes of determining whether there is a basis for informal resolution of a complaint. In addition, corrective actions of the covered entity are taken into account in determining whether the covered entity has established an affirmative defense to the violation as provided for under § 160.410(b)(3). Nonetheless, where the corrective action is taken in response to a complaint from an individual, the final rule at § 160.408(d)(4) provides the Secretary with authority to consider such corrective action as a factor in determining a civil money penalty.

With respect to a covered entity's good faith attempt to comply with the HIPAA provisions and rules, we agree that such actions could be mitigating factors depending on the circumstances and, thus, have revised the rule to clarify that a covered entity's history of prior compliance generally may be considered, which could include, as appropriate, prior violations, as well as prior compliance efforts. In addition, we agree that § 160.408(d) should apply only to violations of the HIPAA rules, and not to offenses of other provisions of law. Accordingly, we have revised the language of § 160.408(d) to substitute the term ''violations''—which is defined at § 160.302 as a failure to comply with an administrative simplification provision—for the term ''offenses'' in the proposed rule.

Finally, we disagree that only those prior violations that are relevant to the issue at hand should be considered. While greater attention may be given to those violations that are similar in nature to the violation at issue, a covered entity's history of HIPAA compliance generally is relevant to determining whether the amount of a civil money penalty should be increased or decreased.

Comment: One comment urged that the size of the covered entity not be used as a factor in determining the amount of a civil money penalty, arguing that larger covered entities should not be subject to greater penalties for violations identical to those of smaller entities. The comment stated that, depending on the way the number of violations is calculated, larger covered entities are already subject to greater risk since more patients potentially could be affected by one act or omission. Another comment asked what financial information would be required of a respondent to make a showing of its financial condition and whether, given that section 1128A provides that the Secretary shall take into account financial condition, the burden is on HHS to do so even if the respondent does not. Another comment asked how the financial condition of a covered entity is to be assessed.

Response: With respect to the first comment, no change is made in the final rule. The size of the covered entity is relevant in considering, under § 160.408(e)(1), whether a covered entity experienced financial difficulties affecting its ability to comply, and under § 160.408(e)(2), whether the imposition of a civil money penalty would jeopardize a covered entity's ability to provide or pay for health care. In response to the second comment, the showing that a covered entity must make of its financial condition will vary depending on the circumstances. However, a respondent may provide whatever information it believes relevant to such a determination should it desire that HHS consider the entity's financial condition as a mitigating factor. Should a respondent fail to raise financial condition as a mitigating factor (or any other mitigating factor), however, HHS is under no obligation to raise the issue. See § 160.534(b)(1)(ii).

With respect to how financial condition is assessed, the Departmental Appeals Board (Board) has considered this issue in other cases litigated under section 1128A. The Board has said that an inquiry into a provider's financial condition should be focused on whether the provider can pay the civil money penalty without being put out of business. See Milpitas Care Center, DAB No. 1864 (2003). In Capitol Hill Community Rehabilitation and Specialty Care Center, DAB CR 469 (1997), aff'd, DAB No. 1629 (1997), the Board construed a regulation (42 CFR 488.438(f)(2)) that lists a facility's ''financial condition'' as one of the factors that must be considered in deciding the amounts of civil money penalties. The Board stated that, while the term ''financial condition'' is not defined in the regulations, the plain meaning of the term is that a facility's ''financial condition'' is its overall financial health. Thus, the relevant question to be considered in deciding whether a facility's financial condition would permit it to pay civil money penalties is whether the penalty amounts would jeopardize the facility's ability to survive as a business entity.

Comment: One comment argued that proposed § 160.408 should establish that HHS can only consider mitigating factors to determine the amount of the civil money penalty and not as a basis for waiving the penalty altogether. The comment stated that proposed § 160.410 already establishes circumstances under which HHS may not impose a fine, and it would be unreasonable to extend those circumstances.

Response: The final rule does not expand the circumstances under which the Secretary is prohibited from imposing, or may waive, a civil money penalty under §§ 160.410 and 160.412,

respectively. The factors in § 160.408 may be applied to determine, as appropriate, whether to increase or decrease the amount of a civil money penalty.

Comment: One comment expressed concern that the overlap of certain variables in proposed § 160.406 with factors in proposed § 160.408 (*e.g.*, the variable for the duration of the violation counted in days versus the factor for the time period during which the violation occurred) could result in compounding the penalty.

Response: We disagree that providing for both counting continuing violations in days and taking time into account under § 160.408 is inappropriate. The provision for counting continuing violations in days relates to determining how many times violation of an identical provision occurred; the provision for considering the time period of the violation is one element, among others, that may constitute a mitigating or aggravating factor in determining the amount of a civil money penalty. While it is true that length of time will tend to operate in the same direction (*i.e.*, to reduce or enlarge the penalty) with respect to each of these elements of the penalty calculation, these two elements are different in nature, and time is relevant to both.

Comment: One comment that supported the list of factors in proposed § 160.408 nonetheless recommended that we better describe the factors in the preamble. Another comment requested examples of what may be included in the factor of ''[s]uch other matters as justice may require'' proposed at § 160.408(f).

Response: With respect to the first comment, the factors themselves are particularized and, thus, are fairly self-explanatory. However, where questions about the factors were raised in the public comments, we have provided further guidance in our responses in this preamble. With respect to the ''such matters as justice may require'' factor, many different circumstances have been cited for consideration in prior cases in other areas in which this factor applies. For example, ALJs have been asked to consider the following types of circumstances under this factor: the respondent's trustworthiness, the respondent's lack of veracity and remorse, measurable damages to the government, indirect or intangible damages to the government, the effect of the penalty on respondent's rehabilitation, and unprompted diligence in correcting violations.

5. Section 160.410—Affirmative Defenses to the Imposition of a Civil Money Penalty

Section 160.410 implements sections 1176(b)(1)–(3) of the Act. These sections specify certain limitations on when civil money penalties may be imposed. Paragraphs (1), (2), and (3) of section 1176(b) each state that, if the conditions described in those paragraphs are met, a penalty may not be imposed under subsection (a) of section 1176. Under section 1176(b)(1), a civil money penalty may not be imposed with respect to an act if the act constitutes a criminal offense punishable under section 1177 of the Act. Under section 1176(b)(2), a civil money penalty may not be imposed if it is established to the satisfaction of the Secretary that the person who would be liable for the penalty did not know, and by exercising reasonable diligence would not have known, that such person violated the provision. Under section 1176(b)(3), a civil money penalty may not be imposed if the failure to comply was due to reasonable cause and not to willful neglect and is corrected within a certain period. The period of time to correct a failure to comply may be extended as determined appropriate by the Secretary based on the nature and extent of the failure to comply.

Proposed rule: Proposed § 160.410 would characterize the limitations under section 1176(b)(1), (2), and (3) as ''affirmative defenses,'' to make clear that they must be raised in the first instance by the respondent. In order not to preclude the raising of affirmative defenses that could legitimately be raised, the introductory text of proposed § 160.410 would permit a respondent to offer affirmative defenses other than those provided in section 1176(b).

Under proposed § 160.410(a), several terms relevant to the affirmative defenses would be defined: ''Reasonable cause,'' ''reasonable diligence,'' and ''willful neglect.'' ''Reasonable cause'' would be defined as ''circumstances that make it unreasonable for the covered entity, despite the exercise of ordinary business care and prudence, to comply with the administrative simplification provision violated.'' ''Reasonable diligence'' would be defined as ''the business care and prudence expected from a person seeking to satisfy a legal requirement under similar circumstances.'' ''Willful neglect'' would be defined as ''conscious, intentional failure or reckless indifference to the obligation to comply with the administrative simplification provision violated.''

Proposed § 160.410(b)(1) simply referred to section 1177.[2] Proposed § 160.410(b)(2) generally tracked the statutory language, but also provided that whether or not a covered entity possesses the requisite knowledge to make this affirmative defense inapplicable would be ''determined by the federal common law of agency.'' The text of proposed § 160.410(b)(3) used the defined term ''reasonable diligence'' and, thus, would build on the analysis conducted under proposed § 160.410(b)(2). Proposed § 160.410(b)(3)(ii)(B) would follow the statutory language and would permit the Secretary to use the full discretion provided by the statute in extending the statutory cure period.

Final rule: The final rule adopts the provisions of the proposed rule. A related change is made to § 160.504(c), as discussed below.

a. Section 160.410(b)—General Rule

Comment: One comment asked whether a covered entity could challenge in a hearing the reasonableness of the Secretary's finding that an affirmative defense has not been sufficiently established.

Response: A respondent may challenge in a hearing the finding in a notice of proposed determination that an affirmative defense has not been established. See § 160.534(b)(1)(i), which provides that the respondent bears the burden of proof with respect to affirmative defenses.

Comment: Two comments noted that the preamble to the proposed rule (70 FR 20237) would allow a covered entity to raise affirmative defenses in addition to those listed under § 160.410(b), but that the text of the proposed rule would not allow for additional defenses. They asked that the final rule be revised to allow a covered entity to present affirmative defenses not expressly listed in § 160.410(b). One comment contended, however, that § 160.410 would allow covered entities too many opportunities to avoid a penalty.

Response: The introductory text of § 160.410(b) permits other affirmative defenses to be raised by using the phrase ''including the following.'' While we do not delineate what additional affirmative defenses might be raised, the ''[e]xcept as provided in subsection (b)''

[2] Section 1177(a) provides that a person who knowingly and in violation of this part uses or causes to be used a unique health identifier, obtains individually identifiable health information relating to an individual, or discloses individually identifiable health information relating to another person shall be punished as provided in subsection (b). Section 1177(b) sets out three levels of penalties that vary depending on the circumstances under which the offense was committed.

language of section 1176(a)(1) suggests that they are limited. Nonetheless, the statute clearly contemplates at least one defense other than the limitations set out at section 1176(b)—the statute of limitations provision at section 1128A(h). Statutes of limitations defenses are typically treated as affirmative defenses, see Fed. R. Civ. P. 8(c). (28 U.S.C. Appendix). Thus, we believe that provision for other affirmative defenses that may be fairly implied from the HIPAA provisions or section 1128A must be made and, accordingly, have done so.

We do not eliminate the affirmative defenses that may be raised and that are provided for by § 160.410, as suggested by the final comment above. We have no authority to eliminate a limitation that the statute imposes on our authority to impose civil money penalties, whether or not it has the effect complained of.

Comment: One comment suggested that § 160.410(b) should be revised to state that the Secretary ''shall not'' impose a civil money penalty. The comment stated that if a covered entity establishes an affirmative defense, the Secretary should not have discretion to impose a penalty as indicated by the current wording ''may not impose.''

Response: We do not make the suggested change, because the present wording accomplishes what the comment urges. The phrase ''may not impose'' means, in this context, ''is not permitted to impose.'' We do not change the language here, as it is consistent with the usage in the HIPAA rules generally, and we do not wish to suggest an inconsistency or a different meaning for similar prohibitions in other HIPAA rules.

b. Section 160.410(b)(1)—''Criminal Offense'' Affirmative Defense

Comment: Several comments expressed concern that covered entities are being forced to incriminate themselves if they raise the affirmative defense under § 160.410(b)(1) in the request for hearing under § 160.504. These comments stated that covered entities should be able to raise this defense after a case has been referred to the Department of Justice, on the theory that section 1176(b)(1) operates as a jurisdictional bar to the imposition of a civil money penalty. One comment cited the Memorandum for Alex M. Azar II and Timothy J. Coleman from Stephen G. Bradbury, Re: Scope of Criminal Enforcement Under 42 U.S.C. 1320d–6 (June 1, 2005) (Justice Memorandum). The Justice Memorandum is available at *http://www.usdoj.gov/olc/hipaa_final.htm*. The comment cited the Justice Memorandum for the proposition that this section of the statute operates as an absolute bar to imposition of a civil money penalty, rather than as an affirmative defense. Several comments argued that the burden of establishing that the limitation of section 1176(b)(1) applied should be on HHS, not on the respondent, as a matter of fairness.

Response: We continue to be of the view that the statute is structured to make the limitation of section 1176(b)(1) a defense that must be raised by the respondent. The fact that meeting the condition described in this subsection operates to bar the imposition of a civil money penalty does not distinguish it from the limitations provided for by sections 1176(b)(2) and 1176(b)(3), and those sections of the statute clearly are defenses which the respondent should raise. Moreover, the burden of establishing that section 1176(b)(1) applied could never be on HHS, as that would require HHS to carry the burden of proving a fact that would defeat its claim; it is the respondent, not HHS, who, in the context of the hearing, will be the proponent of the claim that the act for which a civil money penalty is sought is a criminal offense.

However, we recognize that section 1176(b)(1) could potentially present a situation of some difficulty for a respondent, where the Department of Justice is considering a referral related to the violations on which the civil money penalty action has been brought. While the requirement that civil money penalties be authorized by the Department of Justice before they are brought should prevent such situations from arising, we cannot assume that they will never arise. Accordingly, we provide that, unlike the other affirmative defenses, which are waived if not raised in the request for hearing, this affirmative defense may be raised at any time during the administrative proceedings, to permit respondents to better manage such legal risks, should they ever arise. Provision for this is made in § 160.504(c), and a conforming change is made to § 160.548(e).

Comment: One comment stated that the fact of referral to the Department of Justice should constitute conclusive evidence that the act is one ''punishable'' under section 1177, even if the Department of Justice declines to prosecute (so that the act is not ''punished'' under section 1177).

Response: We do not agree. Referral to the Department of Justice constitutes, at most, our preliminary assessment that the act in question may be subject to criminal prosecution. The Department of Justice may not agree with our preliminary assessment and may return the case to us for administrative action.

Comment: One comment requested that knowledge under section 1177 be defined.

Response: ''Knowingly'' is the term used in section 1177 of the Act (''A person who knowingly and in violation of this part * * *''). According to the Office of Legal Counsel of the United States Department of Justice, '' 'the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense.' '' Justice Memorandum, at 11, quoting *U.S.* v. *Bryan*, 524 U.S. 184, 193 (1998).

c. Section 160.410(b)(2)—''Lack of Knowledge'' Affirmative Defense

Comment: One comment asks HHS to clarify the definition of knowledge required for a civil money penalty to be imposed.

Response: Under section 1176(b)(2), a civil money penalty may not be imposed for a violation ''if it is established to the satisfaction of the Secretary that the person liable for the penalty did not know * * * that such person violated the provision.'' As we observed at 70 FR 20237—

> This language on its face suggests that the knowledge involved must be knowledge that a ''violation'' has occurred, not just knowledge of the facts constituting the violation. * * * We, thus, interpret this knowledge requirement to mean that the covered entity must have knowledge that a violation has occurred, not just knowledge of the facts underlying the violation.

Comment: One comment asked whether, if a covered entity were found not to be liable because the knowledge of an agent could not be imputed to it, the individual committing the violation would be held liable for the penalty.

Response: The Enforcement Rule provides that only a covered entity is liable for a civil money penalty under section 1176. See § 160.402(a) and the definition of ''respondent'' at § 160.302.

Comment: One comment contended that the phrase ''to the satisfaction of the Secretary'' should be stricken from proposed § 160.410(b)(2). The comment stated that this phrase would preclude the covered entity from raising an argument before the ALJ that the Secretary did not properly consider their affirmative defenses before imposing a penalty. Another comment asked whether this phrase makes the finding totally discretionary and, thus, unreviewable by the ALJ.

Response: This language is statutory, as may be seen at section 1176(b)(2), set out above. Further, as discussed above, a respondent may raise affirmative defenses in a hearing. Where so raised,

the ALJ's decision as to whether the covered entity lacked knowledge would become the decision of the Secretary, unless reversed on subsequent appeal.

Comment: One comment asked, with respect to imputing knowledge to the covered entity, who would be considered to be a ''responsible officer or manager'' and whether a Privacy Officer is considered a ''responsible officer or manager.''

Response: With respect to who would be considered to be a responsible officer or manager and whether a Privacy Officer would be considered a responsible officer or manager, see the discussion above under § 160.402(c).

Comment: One comment asked whether, if a Privacy Officer mitigates or corrects a violation, that action would satisfy the requirement that a responsible officer or manager be made aware of the violation.

Response: We are unsure what the precise concern of this comment is, as the issue of knowledge typically would arise in the context of the ''lack of knowledge'' affirmative defense. That defense requires, for its application, that the covered entity not have actual or constructive knowledge of the violation. If the violation has been corrected, as the comment suggests, one would normally presume that the covered entity knew of the violation, making the lack of knowledge defense unavailable. Under the scenario posed by the comment, as we understand it, the issue would be whether the elements of the ''reasonable cause'' affirmative defense were present.

d. Section 160.410(b)(3)—''Reasonable Cause'' Affirmative Defense

Comment: One comment asked that the word ''corrected'' in § 160.410(b)(3)(ii) be changed to ''mitigated,'' because not all violations can be fully corrected.

Response: We agree with the comment that not all violations of the HIPAA rules can be fully corrected, in the sense of being undone or fully remediated. However, we do not agree that the term ''corrected,'' which is the term used by the statute, need be read so narrowly. Rather, the statute speaks of the ''failure to comply'' being corrected. Thus, the term ''corrected,'' as used in the statute, could include correction of a covered entity's noncompliant procedure by making the procedure compliant. In any event, since the term ''corrected'' is the term used in the statute, we employ it in the rule below.

Comment: One comment requested clarification as to how a covered entity could ask for an extension of time to cure a violation under § 160.410(b)(3)(ii)(B).

Response: The covered entity should make this request in writing to, as applicable, CMS or OCR. The request should state when the violation will be corrected and the reasons that support the need for additional time.

Comment: One comment asked that the 30-day cure period be extended by an additional 30 days.

Response: The initial cure period is, by statute, 30 days. However, section 1176(b)(3)(B)(i) permits the Secretary to extend the initial cure period ''as determined appropriate by the Secretary based on the nature and extent of the failure to comply.'' Section 160.410(b)(3)(ii)(B) adopts, and does not expand upon, this statutory language. Thus, HHS could extend the cure period for an additional 30 days (or some greater or lesser period), if it were determined appropriate to do so.

6. Section 160.412—Waiver

Section 1176(b)(4) of the Act provides for waiver of a civil money penalty in certain circumstances. Section 1176(b)(4) provides that, if the failure to comply is ''due to reasonable cause and not to willful neglect,'' a penalty that has not already been waived under section 1176(b)(3) ''may be waived to the extent that the payment of such penalty would be excessive relative to the compliance failure involved.'' If there is reasonable cause and no willful neglect and the violation has been timely corrected, the imposition of the civil money penalty would be precluded by section 1176(b)(3). Therefore, waiver under this section would be available only where there was reasonable cause for the violation and no willful neglect, but the violation was not timely corrected.

Proposed rule: Proposed § 160.412 did not propose to elaborate on the statute in any material way. This provision would provide the Secretary with the flexibility to utilize the discretion provided by the statutory language as necessary.

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: One comment suggested that this section be removed entirely. The comment stated that section 1176(b)(4) authorizes, but does not compel, the Secretary to allow for waiver of civil money penalties. The comment argued that waiver is an unnecessary avenue for covered entities to avoid penalties, as the statute and the proposed rule would provide so many other avenues by which a covered entity could avoid being penalized for violations.

Response: As was more fully discussed at 70 FR 20239, the statute, in our view, creates a statutory right for covered entities to request a waiver, where a violation is due to reasonable cause and not willful neglect, but has not been corrected within the statutory cure period (including any extensions thereof). While the grant of a waiver is within the agency's discretion, the statute clearly contemplates that covered entities may request a waiver in such circumstances and that HHS must consider the request. Accordingly, we do not make the change suggested.

7. Section 160.414—Limitations

Proposed rule: Proposed § 160.414 was adopted by the April 17, 2003 interim final rule as § 160.522. We proposed to move this section, which sets forth the six-year limitation period provided for in section 1128A(c)(1), from subpart E to subpart D, because this provision applies generally to the imposition of civil money penalties and is not dependent on whether a hearing is requested. We also proposed to change the language of this provision so that the date of the occurrence of the violation is the date from which the limitation is determined.

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: One comment requested clarification of record retention requirements and their interaction with the time limitation on bringing an enforcement action.

Response: The issue raised by this comment is discussed in connection with § 160.310 above.

Comment: One comment suggested shortening the time period to two years in the interest of accomplishing compliance faster and making record-keeping less burdensome for covered entities.

Response: The six-year limitations period of § 160.414 is provided for by statute (section 1128A(c)(1) of the Act), and, thus, is not within our power to change by regulation. Insofar as this comment suggests changing the record retention requirements of the Privacy and Security Rules, the requested change is outside the scope of this rulemaking.

8. Section 160.416—Authority To Settle

Proposed rule: Proposed § 160.416 was adopted by the April 17, 2003 interim final rule as § 160.510. We proposed to move this section, which addresses the authority of the Secretary to settle any issue or case or to compromise any penalty imposed on a covered entity, from subpart E to subpart D, because this provision

applies generally to the imposition of civil money penalties, and is not dependent on whether a hearing is requested. No change was proposed to the text of the provision.

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: One comment expressed concern that this provision does not provide for alternative dispute resolution. The comment urged HHS to remain committed to the informal resolution process.

Response: We provide in the rule that HHS will attempt to resolve compliance issues informally, for the reasons discussed above and in the preamble to the proposed rule. Where this process is insufficient to resolve the matter, the statute requires provision of a formal hearing process, if a hearing is requested. We note that under their current procedures, the ALJ and/or the Departmental Appeals Board routinely afford parties the opportunity to engage in alternative dispute resolution.

Comment: Two comments suggested removing § 160.416 from the final rule, on the ground that it is inappropriate to give the Secretary this authority without oversight.

Response: We do not adopt this suggestion. The statute explicitly gives the Secretary the authority to compromise penalties, which would typically be done through settlement of the case. See section 1128A(f).

9. Section 160.420—Notice of Proposed Determination

Proposed rule: The text of proposed § 160.420 was adopted by the April 17, 2003 interim final rule as § 160.514. We proposed to move this section from subpart E, which sets out the procedures and rights of the parties to a hearing, to subpart D, because the notice provided for in this section must be given whenever a civil money penalty is proposed, regardless of whether a hearing is requested. No changes, other than conforming changes, were proposed to paragraphs (a)(1) and (a)(3), (a)(4), or to paragraph (b). We proposed to revise paragraph (a)(2) by adding that, in the event the Secretary employs statistical sampling techniques under § 160.536, the sample relied upon and the methodology employed must be generally described in the notice of proposed determination. A new paragraph (a)(5) would require the notice to describe any circumstances described in § 160.408 that were considered in determining the amount of the proposed penalty; this provision would correspond to § 1003.109(a)(5) of the OIG regulations. Paragraph (a)(5) of § 160.514 of the April 17, 2003 interim final rule would be renumbered as § 160.420(a)(6).

Final rule: We adopt the section as proposed, except that, where HHS bases the proposed penalty in part on statistical sampling, a copy of the report of the agency's statistical expert, rather than just a description of the study and the sampling technique used, must be provided with the notice of proposed determination.

Comment: One comment requested clarification as to whether the notice of proposed determination serves as the notice required by the statute.

Response: Yes, the notice provided for by § 160.420—the notice of proposed determination—implements the requirement for notice of section 1128A(c)(1).

Comment: One comment recommended that the final rule retain § 160.420(a)(5) to ensure that covered entities have sufficient information as to why the penalty was imposed.

Response: This has been done. See § 160.420(a)(5) below.

Comment: Several comments requested that the rule specify that the notice of proposed determination will be sent to the covered entity's Privacy Officer or another designated officer.

Response: This issue is discussed below in connection with § 160.504.

Comment: Several comments stated that, if HHS bases its proposed penalty on statistical sampling, the notice of proposed determination should include a copy of the study relied upon, so that a covered entity has adequate notice and time to prepare its defense.

Response: We agree and have made the requested change.

10. Section 160.422—Failure To Request a Hearing

Proposed rule: The text of proposed § 160.422 was adopted by the April 17, 2003 interim final rule as § 160.516. We proposed to add language (''and the matter is not settled pursuant to § 160.416'') to recognize that the Secretary and the respondent may agree to a settlement after the Secretary has issued a notice of proposed determination. We also proposed that the penalty be final upon receipt of the penalty notice, to make clear when subsequent actions, such as collection, may commence.

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: Several comments suggested that a provision should be added allowing the time frame to request a hearing to be extended when the notice of proposed determination is not received by the appropriate person within the covered entity.

Response: This issue is discussed in connection with § 160.504 below.

11. Section 160.424—Collection of Penalty

Proposed rule: The text of § 160.424 was adopted by the April 17, 2003 interim final rule as § 160.518. We proposed to move this section, which addresses how a final penalty is collected, from subpart E to subpart D, because this provision applies generally to the imposition of civil money penalties and is not dependent upon whether a hearing is requested. The rule provides that once a proposed penalty becomes final, it will be collected by the Secretary, unless compromised. The Secretary may bring a collection action in the Federal district court for the district in which the respondent resides, is found, or is located. The penalty amount, as finally determined, may be collected by means of offset from Federal funds or state funds owing to the respondent. Matters that were, or could have been, raised in a hearing or in an appeal to the U.S. Circuit Court of Appeals may not be raised as a defense to the collection action.

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: One comment asked what interest rate will accrue, if a penalty is not paid promptly by the covered entity.

Response: Under the Federal Claims Collection rules, interest is calculated as provided by 31 U.S.C. 3717. See 31 CFR 901.9.

Comment: One comment asked whether, if a penalty is assessed against a hybrid entity, the part of the entity responsible for the violation would pay the penalty or the entire hybrid entity would pay the penalty.

Response: As noted above, a hybrid entity is, by definition, a single legal entity. Where a penalty is assessed against a covered entity that has designated itself as a hybrid entity, the legal entity that is the covered entity is responsible for payment of the penalty. How the covered entity allocates the penalty payment as a matter of internal accounting is a business decision of the covered entity.

Comment: One comment asked whether, if an agency with the same structure as a Medicaid agency is assessed a penalty, federal dollars can be withheld in lieu of payment of the penalty.

Response: Yes. Section 1128A(f) provides for setoff of penalty amounts against Federal or state agency funds then or later owing to the person penalized.

Comment: One comment suggests that the Secretary does not have the

authority to preclude issues from being raised in a civil action in federal court. The comment suggests removing § 160.424(d) from the final rule.

Response: Section 160.424(d) merely states the well-recognized principle that, where an administrative remedy exists, a plaintiff must exhaust that remedy as a precondition to raising the issue in question in court.

12. Section 160.426—Notification of the Public and Other Agencies

Proposed rule: We proposed to require notification of the public generally whenever a proposed penalty became final, in order to make the information available to anyone who must make decisions with respect to covered entities. The regulatory language would provide for notification in such manner as the Secretary deems appropriate, which would include posting to an HHS Web site and/or the periodic publication of a notice in the **Federal Register**.

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: Several comments argued that the provision for notification of the public in proposed § 160.426 would extend beyond the scope of the Secretary's statutory authority under section 1128A(h), since section 1128A(h) specifies only that certain types of organizations and agencies to be notified. They urged that the requirement be eliminated.

Response: We disagree that the requirement for public notification is unauthorized. It is true that § 160.426 establishes the means by which HHS may carry out its obligation to notify various agencies and organizations under section 1128A(h). However, the basis for the public notice portion of § 160.426 lies not in section 1128A(h), as the comments assumed, but in the Freedom of Information Act (FOIA), 5 U.S.C. 552.

FOIA requires final opinions and orders made in adjudication cases to be made available for public inspection and copying. See 5 U.S.C. 552(a)(2)(A). The adjudicatory process [3] set forth in the Enforcement Rule begins with the service upon the respondent of a notice of proposed determination under § 160.420. This proposed penalty becomes final if the respondent fails to contest it in the time and manner provided in § 160.504(b). If the respondent does contest the proposed penalty, the final agency order is the decision of the ALJ, or the Board, as the case may be. While it is true that section 1128A(h) does not require that such notice be given to the public, neither does it prohibit such wider dissemination of that information, and nothing in section 1128A(h) suggests that it modifies the Secretary's obligations under FOIA. FOIA requires making final orders or opinions available for public inspection and copying by ''computer telecommunication * * * or other electronic means,'' which would encompass putting them up on the Department's Web site, and further provides that, absent actual and timely notice, in order for the Department to rely upon final opinions that affect a member of the public or to cite them as precedent against a party, the opinions or orders must be indexed and made available electronically. See 5 U.S.C. 552(a)(2).

Comment: Many comments objected to the requirement for public notice. Comments argued that since final decisions of the Departmental Appeals Board are available under FOIA, there is no need for further notice to the public. Further, it was stated that many HIPAA violations, particularly of the Transactions Rule, are very technical in nature and the public may be unable to understand the nature of such violations. Accordingly, public notification may injure the reputation of covered entities and cause them to lose business, while the reputational injury attendant on public notification may be wholly disproportionate to the violations involved. Also, comments argued that entities that are members of an affiliated covered entity and that are held liable for the actions of others under § 160.402(b) may be unfairly labeled as noncompliant. Finally, comments stated that covered entities may have to expend additional resources to fight complaints, because the public notification provision would give competitors an incentive to use the complaint process to gain an unfair business advantage.

Response: Final decisions of the ALJs and the Departmental Appeals Board are made public via the Board's Web site. *See http://www.hhs.gov/dab/search.html.* Such postings, however, would not include penalties that become final because a request for hearing was not filed under § 160.422. Notices of proposed determination under § 160.420 that become final because a hearing has not been timely requested, would likewise be made available for such public inspection and copying as final orders. By making the entire final opinion or order available to the public, the facts underlying the penalty determination and the law applied to those facts will be apparent. Given that information, the public may discern the nature and extent of the violation as well as the basis for imposition of the civil money penalty on the covered entity. Finally, the process established for the review and investigation of complaints should identify those without merit, or over which HHS has no jurisdiction under the HIPAA provisions, but, in any event, we doubt that the notification provisions of this section will increase the likelihood that complaints will be filed.

Comment: One comment suggested that, rather than mandating the provision of notice to the public, the rule should give the Secretary discretion to determine when public notification is prudent, as doing so may not be appropriate in all instances—for example, where there is an ongoing investigation or a technical failure is involved. A number of comments urged HHS to publish violations of HIPAA without the name of the covered entity. They argued that this approach would enable covered entities to understand how OCR and CMS apply the HIPAA rules in particular circumstances and would, thus, encourage voluntary compliance.

Response: As noted, under FOIA, we must make final orders and opinions available for public inspection and copying. FOIA permits the Secretary to withhold information whose release could, for instance, reasonably be expected to interfere with prospective or ongoing law enforcement proceedings, but such exemption does not apply where, as in the case of such final opinions and orders, they are made after the conclusion of such proceedings. *See* 5 U.S.C. 552(b)(7)(A). While FOIA permits the deletion of identifying details to prevent a clearly unwarranted invasion of personal privacy, identifying the name(s) of the covered entities against whom penalties are imposed would not be such an invasion of personal privacy.

Comment: One comment suggested that the rule be revised to require covered entities to notify the Secretary and potentially affected individuals when there is a suspected breach of the Privacy Rule. The comment also suggested that HHS make available a list of violations organized by entity, including the number of persons affected by each violation. One comment asked that all final decisions of the ALJ or the Board, including those to not assess a penalty, be made public,

[3] Under the Administrative Procedure Act, ''adjudication means agency process for the formulation of an order.'' 5 U.S.C. 551(7). An ''order means the whole or part of a final disposition * * * of an agency in a matter other than rule making * * *''. 5 U.S.C. 551(6).

so that covered entities could present a better defense in the future based on past decisions to not impose a penalty in a similar situation. Another comment supported the proposal to notify the public of final penalties, on the ground that the public should be aware of violations, particularly of the Privacy Rule. Another comment suggested that complainants should be notified when a penalty is imposed.

Response: As noted, final opinions or orders imposing penalties will be made available to the public for inspection and copying. Given that this information will be public, we do not accept the other comments above.

Comment: One comment stated that the public notification rule should not apply to, or include, matters referred to the Department of Justice. Another comment asked that HHS confirm that the public notification provision would not apply to informal resolutions.

Response: In neither of the above situations has a final order on a penalty proposed under § 160.420 been entered. Consequently, neither situation would come within the public notification requirement of § 160.426.

Comment: Several comments expressed concern that publication of a penalty could occur prematurely, before all of the covered entity's appeals had been exhausted. They requested clarification as to when a penalty is considered final for purposes of notification. A couple of comments stated that the penalty should be considered to be final, for purposes of the public notification, when all court appeals have been exhausted.

Response: A civil money penalty is considered to be final, for purposes of notification, when it is a final agency action—*i.e.*, the time for administrative appeal has run or the adverse administrative finding has otherwise become final. The final opinion or order that is subject to the notification provisions of this section is the notice of proposed determination, if a request for hearing is not timely filed, the decision of the ALJ, if that is not appealed, or the final decision of the Board.

D. Subpart E—Procedures for Hearings

As previously explained, the provisions of section 1128A of the Act apply to the imposition of a civil money penalty under section 1176 ''in the same manner as'' they apply to the imposition of civil money penalties under section 1128A itself. The provisions of subpart E are, as a consequence, based in large part upon, and are in many respects the same as, the OIG regulations implementing section 1128A. We adapt, re-order, or combine the language of the OIG regulations in a number of places for clarity of presentation or to reflect concepts unique to the HIPAA provisions or rules. To avoid confusion, we also employ certain language usages in order to be consistent with the usages in the other HIPAA rules (for example, for mandatory duties, ''must'' or ''will'' instead of ''shall'' is used; for discretionary duties, ''may'' instead of ''has the authority to'' is used).

Subpart E, as adopted by the April 17, 2003 interim final rule, adopted provisions relating to investigational inquiries and subpoenas and certain definitions that have now been moved to subpart C. It also adopted a number of provisions that relate to all civil money penalties that have now been moved to subpart D. Subpart E, as revised below, addresses only the administrative hearing phase of the enforcement process.

General comment: Several comments argued that the proposed Enforcement Rule, as a whole, would give the government an unfair advantage and seriously compromise the ability of covered entities to defend themselves before an ALJ and on an appeal to the Board. It was argued that the following provisions, in combination, would ''stack the deck'' in the government's favor:

> (1) The severely restricted ability of covered entities to rebut the statistical sampling report; (2) the ''extraordinary circumstances'' standard for failure to timely exchange exhibits and witness statements; (3) the inability to depose prior to the hearing or question at the hearing the government's statistical sampling expert; (4) the ability of the * * * ALJ * * * to admit prior evidence of witnesses which were not subject to cross examination by the covered entity; (5) the requirements regarding hearing requests; (6) the limited nature of discovery and the lack of obligation to share exculpatory evidence; (7) the ALJ's discretion about applying the Federal Rules of Evidence; (8) the very broad harmless error rule which significantly restricts a covered entity's appeal rights; and (9) the limited authority of the ALJ and correspondingly broad discretion provided to the Secretary.

Response: While we also discuss the above provisions individually, we provide the following general response. We do not agree that the proposed rule would have given HHS an unfair advantage or compromised the ability of covered entities to defend themselves. Most of the provisions cited should operate even-handedly, providing no greater advantage to the government than to the respondent. For example, the limitation on depositions will also mean that the governmental party cannot depose any statistical expert of the respondent; similarly, the other limitations on discovery should operate similarly for both parties, as should the ALJ's discretion with respect to the application of the Federal Rules of Evidence and the application of the harmless error rule.

In any event, we have changed several of the provisions cited. We have required the government's statistical study to be provided with the notice of proposed determination, we have clarified the conditions for the admission of written statements, and we have eliminated the restriction on the ALJ's authority to review the method by which the number of violations is determined. We believe that the final rule strikes an appropriate balance and should ensure that neither party has a procedural advantage.

1. Section 160.504—Hearing Before an ALJ

Proposed rule: The proposed rule proposed few changes to this section, which was § 160.526 of the April 17, 2003 interim final rule. Section 160.526(a)(2) of the April 17, 2003 interim final rule stated that the Departmental party in a hearing is ''the Secretary.'' The term ''Secretary'' is defined at § 160.103 of the HIPAA rules as ''the Secretary of Health and Human Services or any other officer or employee of HHS to whom the authority involved has been delegated.'' However, in light of the multiple roles of the Secretary in the context of a hearing (OCR and/or CMS would be a party, while the ALJ or the Board would be the adjudicator), we proposed to clarify in § 160.504(a)(2) which part of HHS acts as the ''party'' in the hearing. Because which component of HHS will be the ''party'' in a particular case will depend on which rule is alleged to have been violated, and because a particular case could involve more than one HIPAA rule, we proposed to define the Secretarial party generically, by reference to the component with the delegated enforcement authority. Under the proposed provision, the Secretarial party could consist of more than one officer or employee, so that it is possible for both CMS and OCR to be the Secretarial party in a particular case.

Proposed § 160.504(b) provided that the request for a hearing must be mailed within 60 days, via certified mail, return receipt requested, to the address specified in the notice of proposed determination. The last sentence of proposed § 160.504(b) provided that the date of receipt of the notice of proposed determination is presumed to be five days after the date of the notice unless the respondent makes a reasonable

showing to the contrary. This showing may be made even where the notice is sent by mail and is not precluded by the computation of time rule of proposed § 160.526(c), establishing a five-day allowance for mailing.

Proposed § 160.504(c) would require that the request for hearing clearly and directly admit, deny, or explain each of the findings of fact contained in the notice of proposed determination with respect to which the respondent has knowledge and must also state the circumstances or arguments that the respondent alleges constitute the grounds for any defense and the factual and legal basis for opposing the penalty. Proposed § 160.504(d)(1) would require the ALJ to dismiss a hearing request where ''[t]he respondent's hearing request is not filed as required by paragraphs (b) and (c) of this section.'' Proposed §§ 160.504(d)(2)–(4) would require dismissal where the hearing request was, respectively, withdrawn, abandoned, or raised no issue that could properly be addressed in a hearing.

Final rule: Section 160.504 below revises the proposed rule in several respects. The proposed 60-day time limit for filing a request for hearing is extended to 90 days. See § 160.504(b). Section 160.504(c) provides that an affirmative defense under § 160.410(b)(1) may be raised at any time. Section 160.504(d)(1) provides that a dismissal on the grounds stated in that paragraph may only be made on motion of the Secretary, and the ground for dismissal under paragraph (b) is limited to the respondent's failure to comply with the timely filing requirement of paragraph (b).

Comment: A number of comments objected to the 60-day time limit of proposed § 160.504(b) as unreasonably short and unfair, given the detailed showing the covered entity is required to provide in its request for hearing and the severe consequences, under proposed § 160.504(d)(1), of failing to meet this requirement. A couple of comments also objected that this provision is not necessary and does not follow the OIG regulation in this respect. Comments suggested several changes: (1) That the required specificity of the request for hearing be eliminated, (2) that the time for response be lengthened, and/or (3) that there be a provision to excuse an untimely request for hearing based on good cause.

Response: We accommodate the concerns raised in the public comment by extending the period for filing a request for hearing from 60 to 90 days. We note that, as so revised, the rule does not parallel the analogous provision of the OIG regulations (42 CFR 1005.2(c)) in two respects: (1) It requires more specificity in the hearing request; and (2) it provides the respondent more time in which to file the hearing request. We are of the view, however, that the compromise in § 160.504(b), as revised, will promote the conduct of the hearing in an efficient manner by clarifying at an early stage of the process the issues in dispute and the basis for those disputes. We retain the requirement of proposed § 160.504(c) that the request for hearing clearly and directly admit, deny, or explain each of the findings of fact and state the circumstances or arguments that the respondent alleges constitute the grounds for any defense and the factual and legal basis for opposing the penalty. (However, the respondent need not provide its statistical study, assuming it has one, until 30 days before the scheduled hearing. See § 160.518.) This requirement will facilitate narrowing and refining the issues in dispute, thereby expediting the conduct of the hearing.

Comment: One comment suggested that, if the 60-day time period for response were retained, HHS be required to send a reminder to the covered entity on the 45th day.

Response: We do not adopt this suggestion. The need for the suggested change is obviated by our decision to extend the 60-day period.

Comment: Several comments suggested that the rule does not properly take into account the possibility of notices being delivered to the wrong official in a covered entity or getting lost in a covered entity's internal mail system. They recommended that the rule specify the official(s) in the covered entity to whom the notice of proposed determination must be sent, so that the covered entity does not lose time needed to prepare its defense. A few comments suggested that the notice of proposed determination be sent to the Privacy Officer. It was suggested that the covered entity be able to show good cause for failing to respond in a timely manner in such cases, or that the 60-day time period be tolled.

Response: We do not think it is necessary or feasible to identify the person(s) to whom the notice of proposed determination should be addressed. Fed. R. Civ. P. 4 (28 U.S.C. Appendix), which applies under section 1128A(c), establishes who may be served and applies without need for further regulatory action. Because the size and other organizational circumstances of covered entities vary greatly, a rule that further limited or defined who must be served would most likely be inappropriate for some covered entities. Further, it is likely that a notice of proposed determination would be issued after significant prior contact with the covered entity, so we anticipate that our investigators would be able to ascertain which officer would be the appropriate recipient of the notice.

In any event, a respondent can raise the issues of concern raised by the comments—*e.g.*, failure to reach the appropriate official or the official to whom the notice of proposed determination was addressed due to problems in the entity's mail system—under § 160.504(b). Under that section, if the respondent makes ''a reasonable showing'' to the ALJ that the mailed notice of proposed determination was not properly received by the covered entity or by a proper official within the covered entity, the ALJ can extend the 90-day period to the extent he or she considers appropriate.

Comment: One comment asked whether findings of fact that are not contested or about which the claim is made of insufficient knowledge to respond in the hearing request are deemed admitted.

Response: Section 160.504(c) provides respondents with two choices with respect to denying findings of fact: (1) The respondent may deny them; or (2) the respondent may claim a lack of knowledge, in which case the finding in question is ''deemed denied.'' Since the regulation deems a finding of fact denied only where lack of knowledge is claimed, if the respondent has neither denied nor asserted lack of knowledge with respect to the finding, the finding must be deemed admitted.

Comment: One comment stated that dismissal of a hearing request on the grounds described in proposed § 160.504(d)(1)–(3) should be made permissive, not mandatory, and § 160.504(d)(4) (dismissal where the respondent fails to state an issue that may properly be addressed in a hearing) should be eliminated, to ensure that covered entities are provided a fair opportunity to request a hearing and develop an appropriate defense.

Response: We revise proposed § 160.504(d)(1) to require dismissal on the ground of failure to comply with paragraph (b) to be limited to failure to comply with the requirement of the paragraph for timely filing of the request for hearing. We revise proposed § 160.504(d)(1) to provide that dismissal on this ground may occur only if the Secretary moves for dismissal on this ground. If the Secretarial party—OCR, CMS, or both—does not believe that the hearing should be dismissed due to the insufficiency of the respondent's request

for hearing, and so does not challenge the timeliness or sufficiency of the request for hearing under paragraph (b) or (c), respectively, the hearing should go forward. The revision to paragraph (d)(1) would permit this to occur.

Like its counterparts in other rules issued pursuant to section 1128A, § 160.504(d)(1)–(3) mandates dismissal so that the limited resources of the government and of respondents are not expended on hearing requests that fail to comply with the straightforward requirements of this section or that have been withdrawn or abandoned by the respondent. We believe that considerations of economy and efficiency require the dismissal of cases that fall within the descriptions of these subsections. However, in response to the comments, we have added a requirement to § 160.504(d)(1) that the Secretary must file a motion for dismissal of a hearing request rather than permit an automatic dismissal by the ALJ. The filing of such a motion will require the Secretary to enunciate the reasons a hearing request is deficient under paragraphs (b) and (c) of this section and allow the respondent the opportunity to answer those charges. We do not add such a requirement to § 160.504(d)(2)–(3), because we think that the ALJ should have authority to dismiss such cases for reasons of withdrawal or abandonment by the respondent without being requested to do so by the Secretary.

Section 160.504(d)(4) provides the administrative review channel leading to judicial review of claims that may not be reviewed administratively, such as constitutional claims. This subsection is necessary so that there is no confusion about how respondents can efficiently exhaust the administrative process for such claims. We, thus, decline to eliminate this subsection.

2. Section 160.508—Authority of the ALJ

Proposed rule: The text of proposed § 160.508 was adopted by the April 17, 2003 interim final rule as § 160.530. No changes to paragraphs (a) and (b) were proposed. We proposed to revise paragraph (c) by adding paragraphs (c)(1) and (c)(5) to the list of limitations on the authority of the ALJ. Proposed paragraph (c)(1) would require the ALJ to follow Federal statutes, regulations, and Secretarial delegations of authority, and to give deference to published guidance to the extent not inconsistent with statute or regulation; the preamble to the proposed rule indicated that by ''published guidance'' we meant guidance that has been publicly disseminated, including posting on the CMS or OCR Web site. Proposed paragraph (c)(5) would clarify that ALJs may not review the Secretary's exercise of discretion whether to grant an extension or to provide technical assistance under section 1176(b)(3)(B) of the Act or the Secretary's exercise of discretion in the choice of variable(s) under proposed § 160.406.

Final rule: The final rule adopts the provisions of the proposed rule, except for proposed § 160.508(c)(5)(ii), which is eliminated. A conforming change is made to § 160.508(c)(5).

a. Section 160.508(b)

Comment: One comment stated that this provision should be amended to add a provision requiring that a requested hearing be conducted within a time certain, not to exceed 90 days from receipt of the request for a hearing. Another comment suggested that the ALJ should notify a respondent of the date and time for the hearing no later than 90 days after the request for hearing is filed.

Response: It would not be reasonable or appropriate to impose a fixed deadline by which hearings must be scheduled, and we decline to do so. In a complicated case, the time for discovery and pre-hearing motions may take more than 90 days, and, thus, imposing such a deadline may circumscribe the parties' ability to prepare their cases. Moreover, the ALJs have other cases on their dockets, and we cannot assume that they will in all cases be able to begin a hearing on a civil money penalty within 90 days. The scheduling of the hearing is best left to the ALJs, in consultation with the parties.

b. Section 160.508(c)

Comment: A number of comments opposed proposed § 160.508(c), on the ground that it would significantly limit the ALJ's authority to rule on pertinent issues. They stated that it was questionable under this section whether the ALJ would have the authority to review the determination of the number of violations, or imposition of joint and several liability, since they may be addressed in published guidance to which the ALJ must give deference. It was suggested that this limitation would be a problem under proposed § 160.424(d), since those are issues that a respondent would be unable to raise at the administrative level.

Response: We do not agree. We believe that it is of importance to covered entities that ALJ and Board decisions, as components of HHS, be consistent with one another and with the published compliance guidance HHS provides to covered entities. Accordingly, we require ALJs and the Board to follow guidance which has been publicly disseminated, unless the ALJ or Board finds the guidance to be inconsistent with statute or regulation. In the examples cited, any published guidance related to the determination of the number of violations, or when joint and several liability is appropriate must be consistent with applicable statute and regulation, matters upon which the ALJ may rule. See section 1176 and §§ 160.402(b)(2), 160.406, and 160.508. While deference to such published guidance is required of the ALJs and DAB, as components of HHS, similar deference is not necessarily afforded such guidance in any judicial review of an adverse final agency determination sought by a respondent. Section 160.424(d) should not present a problem, since challenges related to published guidance may be raised during administrative and judicial reviews of the proposed penalty.

Comment: One comment stated that ALJs should be allowed to consider affirmative defenses during a hearing, even if they relate to issues committed to the Secretary's discretion. The comment argued that an inability to raise affirmative defenses before the ALJ might impact a covered entity's ability to subsequently pursue legal remedies under § 160.424(d).

Response: We agree that the ALJ is allowed to consider affirmative defenses during a hearing. See the discussion of § 160.410 above.

Comment: A couple of comments agreed that ALJs should have the authority to evaluate whether there was a violation in the first place and asked that this provision be retained in the final rule.

Response: We agree and have done so.

c. Section 160.508(c)(1)

Comment: One comment asked, if a guidance in effect at the time a violation occurred were changed before the date of the hearing, which version of the guidance the ALJ would have to follow.

Response: The guidance in effect at the time the violation occurred would govern.

Comment: One comment expressed concern with § 160.508(c)(1), insofar as it would include in ''published guidance'' FAQs published on the CMS and OCR Web sites. According to the comment, FAQs have never been designated in the HIPAA regulations as having the force of regulations themselves. According to the comment, many covered entities are not aware of these postings and the industry is unaware that they will have the same

force and effect as regulations. The comment further stated that if FAQs are to have the force of regulation, then the questions and responses should be organized for such use, and the HIPAA regulation should specifically designate that covered entities will be held accountable for compliance with these responses or ''published guidance.'' Another comment suggested that proposed § 160.508(c)(1) should be revised to require the ALJ to give consideration to published guidance and consider whether the covered entity reasonably relied on such guidance, as is done in the regulations relating to hearings by the Provider Reimbursement Review Board (PRRB), citing to 42 CFR 405.1867.

Response: The ''published guidances'', including FAQs, inform covered entities of the approach HHS is taking in the enforcement of the HIPAA rules. The guidances do not have the force and effect of a regulation, as the comment suggests, and are not controlling upon the courts, as would be the case with a regulation. As previously explained, HHS seeks to provide consistent compliance guidance to covered entities and, to the extent possible, to render decisions in the adjudicative process that are both consistent with other adjudicated cases and with the policy decisions of the Secretary expressed in HHS rules and guidances. The consistency sought within HHS is achieved by requiring the ALJ and the Board, which are components of HHS, to defer to such published guidances, if they are consistent with statute and regulation. This is consistent with, and recognizes the effect of, the existing delegations of authority by the Secretary, which delegate to the programs the Secretary's authority to establish policy. Requiring that only consideration be given to such published guidances, as in PRRB hearings, rather than deference, would not achieve the desired result.

Comment: One comment argued that proposed § 160.508(c)(1) should be changed to add ''and does not establish requirements in addition to those specified in the applicable statute or regulation,'' on the ground that covered entities should not be penalized for not complying with requirements that exceed the plain language of the statute.

Response: It is not clear what the comment is suggesting, but if the comment is suggesting that guidance merely parrot what is in the statute and regulations, guidance would be both unnecessary and unhelpful. If, however, the comment is suggesting that guidance not exceed any explicit limits imposed by the statute or regulations, the language is likewise unnecessary, as the current language would permit the ALJ or the Board to disregard guidance that was not consistent with statute or regulations.

d. Section 160.508(c)(5)

Comment: Proposed § 160.508(c)(5)(ii) would have made the Secretary's selection of the variable under § 160.406 unreviewable by the ALJ. It was criticized by several commenters as unfair and inconsistent with the statute on the grounds that the whole purpose of the hearing before an ALJ is to review the Secretary's assessment of a penalty. It was argued that, if a covered entity has a reasonable argument as to why the use of variables or a particular variable was not appropriate, it should be allowed to present the argument during the ALJ hearing to which it is entitled by statute. It was also argued that, since proposed § 160.406 would include a factual determination of the number of times a covered entity may have failed to engage in required conduct, or may have engaged in a prohibited act, each of the parties should be authorized to address, and the ALJ to consider at a hearing, that factual determination. One comment asked whether, even if the ALJ lacks authority to directly question the variable(s) selected, a challenge to the variable could be made through a claim that ''justice required'' selection of a different variable.

Response: Section 1128A(c)(2) establishes the right to a hearing on the record for any person who has been given an adverse determination by the Secretary. In a proceeding under section 1176, the adverse determination by the Secretary is the civil money penalty proposed in the notice of proposed determination under § 160.420. Upon review of the comments regarding proposed § 160.508(c)(5)(ii), we agree that the count of violations is an integral part of a civil money penalty and should be reviewable by the ALJ. Thus, we have deleted proposed subparagraph (ii) from § 160.508(c)(5) in the final rule. As a conforming change, we have integrated subparagraph (i) into the text of § 160.508(c)(5).

3. Section 160.512—Prehearing Conferences

Proposed rule: Proposed § 160.512 would adopt § 160.534, as added by the April 17, 2003 interim final rule, with two changes. Proposed § 160.512 would revise paragraph (a) to establish a minimum amount of notice (not less than 14 business days) that must be provided to the parties in the scheduling of prehearing conferences. Proposed § 160.512 would also revise paragraph (b)(11) to include the issue of the protection of individually identifiable health information as a matter that may be discussed at the prehearing conference, if appropriate.

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: One comment recommended that a provision be added to § 160.512 to require the ALJ to schedule a prehearing conference within 30 days of a request for a hearing, unless both parties agree to a later date.

Response: The scheduling of a prehearing conference will depend, in part, on the scheduling of the hearing. For the reasons discussed under § 160.508(b) above, we do not agree that it is advisable to so circumscribe the ALJ's flexibility to set the hearing calendar.

Comment: A couple of comments objected that the time frame for notice of a pre-hearing conference provided for by proposed § 160.512 is inadequate to permit all necessary parties involved to prepare a response. One comment stated that the rule should extend the time frame to 25 business days, while the other suggested that the rule should require at least a 30-day notice of a pre-hearing conference.

Response: Section 160.512 does not prescribe 14 days as the amount of notice of a pre-hearing conference that must be given; rather, it simply establishes 14 days as the minimum amount of notice that is ''reasonable.'' In our experience, 14 days should in most cases be sufficient for the parties to prepare for the conference adequately; however, nothing in the rule prohibits a party from requesting a longer period of time to prepare for a pre-hearing conference or the ALJ from granting such a request.

4. Section 160.516—Discovery

Proposed rule: Proposed § 160.516 would adopt § 160.538 of the April 17, 2003 interim final rule. As relevant here, proposed § 160.516 would permit requests for production of documents, but would not permit other forms of discovery, such as interrogatories, requests for admission, and depositions. Proposed paragraph (d) states that this section ''may not be construed to require the disclosure of interview reports or statements obtained by any party, or on behalf of any party, of persons who will not be called as witnesses by that party, or analyses and summaries prepared in conjunction with the investigation or litigation of the case, or any otherwise privileged documents.''

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: Several comments recommended that proposed § 160.516 should be revised to allow requests for admissions, depositions, and written interrogatories in the discovery process. It was argued that permitting these forms of discovery would ensure that covered entities are able to mount a proper defense. It also was asserted that expert testimony will be necessary to establish both the alleged violation(s) and any affirmative defenses. Allowing such discovery would, it was asserted, help to produce a record, make appeals less likely, and potentially decrease the length of administrative hearings.

Response: We believe that the level of detail provided to a covered entity in the notice of proposed determination (including, where applicable, a copy of HHS's statistical expert's study), coupled with a right to request the production of documents for copying and inspection, provides the covered entity with the information reasonably required to mount its challenge to the proposed civil money penalty or to determine whether an affirmative defense applies. The additional discovery mentioned in the comments would result in delays and costs. Experience with the OIG regulation at 42 CFR 1005.7, which likewise does not authorize other types of discovery, has demonstrated that the discovery provided for is appropriate and sufficient.

Comment: Several comments argued that, at a minimum, depositions should be permitted at least with regard to expert witnesses, including the government's statistical expert. They asserted that, because depositions would not be permitted, covered entities would lose another potential opportunity to question the government's statistician in an effort to understand and defend against the conclusion and assumptions made in establishing the proposed civil money penalty, which would be prejudicial to the covered entity.

Response: We do not agree that depositions are necessary. Under § 160.420(a)(2), as adopted in this final rule, the study of HHS's statistical expert must be provided to the respondent with the notice of proposed determination.

Comment: A couple of comments criticized the proposed rule for not requiring that OCR and/or CMS hand over potentially exculpatory information to the entity being investigated. The obligation to provide exculpatory evidence should include handing over exculpatory interview reports or statements obtained by the government of persons who will not be called as witnesses by that party. It was recommended that this obligation be added to the final rule.

Response: The obligation to provide exculpatory evidence to an accused, which applies in criminal proceedings, is inapplicable in a HIPAA administrative simplification enforcement case.

Comment: One comment contended that § 160.516 should be revised to treat personal health information as privileged information not subject to discovery, since hearings are open to the public under proposed § 160.534.

Response: A covered entity concerned with potential public access to protected health information may raise the issue before the ALJ and seek a protective order under § 160.512(b)(11). Depending on the circumstances, an ALJ may require the information to be de-identified or direct identifiers to be stripped to protect the privacy of individuals or order other protections routinely afforded to similarly confidential information within the litigation forum, such as protective orders on the use of the information in public portions of the proceedings. In addition, the ALJ may, for good cause shown, order appropriate redactions made to the record after hearing. *See* § 160.542(d).

5. Section 160.518—Exchange of Witness Lists, Witness Statements, and Exhibits

Proposed rule: Proposed § 160.518 would carry forward § 160.540, as adopted by the April 17, 2003 interim final rule, with one substantive change. It would revise paragraph (a) to provide time limits within which the exchange of witness lists, statements, and exhibits must occur prior to a hearing. Under proposed § 160.518(a), these items must be exchanged not more than 60, but not less than 15, days prior to the scheduled hearing.

Final rule: The final rule revises this provision to require that, where a respondent retains a statistical expert for the purpose of challenging the Secretary's statistical sampling, a report by the respondent's expert be provided to the Secretarial party not less than 30 days prior to the hearing.

Comment: Several comments criticized the time frames of proposed § 160.518 as problematic in light of the anticipated use of statistical sampling. They argued that, if HHS uses statistical sampling to determine the number of violations and to establish its prima facie case against a covered entity, the covered entity must have a fair opportunity to rebut this evidence. That fair opportunity should permit the addition of rebuttal witnesses, statements and exhibits after the 15-day period and/or requiring the government to provide more detailed information to the covered entity regarding its statistical sampling calculations, methodology and assumptions at a time that is sufficiently prior to the 15-day deadline. The comments requested that the time frames listed in the regulation be increased to allow a covered entity adequate time to prepare for a hearing. Specifically, the comments urged that witness lists, statements, and exhibits for a hearing be exchanged by the parties not more than 60 days and not less than 30 days before a scheduled hearing date.

Response: We have accommodated the concern that the details of HHS's statistical study will not be made available early enough in the proceeding to allow a fair opportunity for rebuttal by requiring in § 160.420(a)(2) that a copy of the study be given to the respondent with the notice of proposed determination. Accordingly, under such circumstances, there should not be a problem identifying who respondent should call as a rebuttal witness within the time frames set out in this section.

We revise § 160.518(a) to require the respondent to provide to HHS a copy of the report of its statistical expert not less than 30 days before the scheduled hearing. This will give the Secretarial party adequate time to prepare the statistical part of its case and is reasonable in light of the fact that the respondent is given HHS's statistical study at the commencement of the proceeding.

Comment: With respect to proposed § 160.518(b)(2), one comment asked what would constitute extraordinary circumstances. The comment stated that this standard seems unnecessarily high and that ''good cause'' would be a more reasonable and fairer standard, given the need for covered entities to rebut the evidence of a statistical expert whose information they will not receive until the exchange of witnesses and exhibits.

Response: The decision concerning what is sufficient to convince the ALJ that extraordinary circumstances exist will be case-specific. The justification for lowering the standard no longer applies, given our change to § 160.420. Accordingly, we retain the ''extraordinary circumstances'' standard to emphasize the importance of observing the time frame for the exchange of such information.

6. Section 160.520—Subpoenas for Attendance at Hearing

Proposed rule: Proposed § 160.520 would carry forward § 160.542, as adopted by the April 17, 2003 interim final rule, mainly unchanged. Proposed § 160.520 would clarify that when a subpoena is served on HHS, the Secretary may comply with the subpoena by designating any knowledgeable representative to testify. Proposed § 160.520(d) would require a party seeking a subpoena to file a written motion not less than 30 days before the scheduled hearing, unless otherwise allowed by the ALJ for good cause shown; the paragraph specified what such a motion must contain.

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: One comment asked that the language in proposed § 160.520(c) be modified to provide that, if a respondent subpoenas a particular employee or official with specific knowledge of the case at hand, the identified employee or official would be required to testify. While acknowledging that it was reasonable for HHS to be able to substitute a witness if a respondent subpoenas an employee or official with no knowledge of the case (such as the Secretary), the comment argued that HHS should not have such discretion if the employee or official who is subpoenaed has specific knowledge of the case.

Response: We retain the provision as proposed, because it is necessary to permit the smooth conduct of government business. We do not agree that the provision will damage a respondent's ability to litigate his case, as the provision requires that, although the Secretary may designate an HHS representative, the person so designated must be ''knowledgeable.'' That person may be the employee or official upon whom the subpoena was first served, if the Secretary determines that such person is the appropriate witness, possessed of the requisite knowledge to testify upon the issues which are the subject of the subpoena.

Comment: One comment stated concerns with the interplay of proposed § 160.538 with proposed § 160.520(d). Under proposed § 160.538(b), if a party seeks to admit the testimony of a witness in the form of a written statement, that statement must be provided to the other party ''in a manner that allows sufficient time for the other party to subpoena the witness for cross-examination at the hearing.'' Under proposed § 160.520(d), ''a party seeking a subpoena must file a written motion not less than 30 days before the date fixed for the hearing, unless otherwise allowed by the ALJ for good cause shown.'' The comment argued that a party that wanted to subpoena a person whose written statement was being offered by the opposing party should not have the burden of showing good cause for moving for a subpoena less than 30 days before the hearing date. Instead, the party seeking to admit the written statement should be required to provide that statement to the other party more than 30 days before the hearing, so that the other party will have an opportunity to subpoena that witness under the procedures established by these regulations.

Response: We believe that the rules adequately provide for such a contingency, and so do not revise § 160.520 as requested. The party that seeks to introduce testimony, other than expert testimony, in the form of a written statement must provide the other party with a copy of the statement and the address of the witness in sufficient time to allow that other party to subpoena that witness for cross examination. Since § 160.520(d) requires that motions seeking a subpoena be filed not less than 30 days before the hearing, the witness statement and address should be provided in sufficient time to allow a timely motion to be made. In the event that such statement and/or address is not provided in sufficient time to allow for a timely motion, good cause for permitting the motion for subpoena to be made on fewer than 30 days notice would exist.

7. Section 160.522—Fees

Proposed rule: The proposed rule proposed in § 160.522 to carry forward unchanged § 160.544 of the April 17, 2003 interim final rule. The provision requires the party subpoenaing a witness to pay the cost of fees and mileage. Where the respondent is the party subpoenaing the witness, the check for such fees and mileage must accompany the subpoena when served, but the check is not required to accompany the subpoena where the party subpoenaing the witness is the Secretary.

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: One comment requested clarification of this provision. Observing that proposed § 160.522 would require a check for specific fees to accompany the subpoena except when HHS issues such a subpoena, the comment questioned whether this meant that HHS would be required to reimburse someone they subpoenaed or whether the HHS reimbursement would come at a later date. Further, if it was the case that HHS was not required to reimburse such fees, the comment asked why this is the case, since any other party would be required to reimburse those fees.

Response: HHS is required to, and will, pay to a subpoenaed witness the fees provided for in this section. The payment, however, need not accompany the subpoena. This policy is consistent with the usual procedure when the federal government is a party. *See, e.g.*, Fed. R. Civ. P. 45(b)(1). (28 U.S.C. Appendix).

8. Section 160.534—The Hearing

Proposed rule: The text of proposed § 160.534 was adopted by the April 17, 2003 interim final rule as § 160.554. No changes to paragraphs (a) and (c) were proposed. However, it was proposed to add a new paragraph (b) allocating the burden of proof at the hearing. Under proposed § 160.534(b), the respondent would bear the burden of proof with respect to: (1) Any affirmative defense, including those set out in section 1176(b) of the Act, as implemented by proposed § 160.410; (2) any challenge to the amount or scope of a proposed penalty under section 1128A(d), as implemented by proposed §§ 160.404–160.408, including mitigating factors; and (3) any contention that a proposed penalty should be reduced or waived under section 1176(b)(4), as implemented by § 160.412. The Secretary would have the burden of proof with respect to all other issues, including issues of liability and the factors considered as aggravating factors under proposed § 160.408 in determining the amount of penalties to be imposed. The burden of persuasion would be judged by a preponderance of the evidence (*i.e.*, it is more likely than not that the position advocated is true).

We also proposed a new § 160.534(d), which would provide that any party may present items or information, during its case in chief, that were discovered after the date of the notice of proposed determination or request for a hearing, as applicable. The admissibility of such proffered evidence would be governed generally by the provisions of proposed § 160.540, and be subject to the 15-day rule for the exchange of trial exhibits, witness lists and statements set out at proposed § 160.518(a). If any such evidence is offered by the Secretary, it would not be admissible, unless relevant and material to the findings of fact set forth in the notice of proposed determination, including circumstances that may increase such penalty. If any such evidence is offered by the respondent, it would not be admissible unless relevant and material to a

specific admission, denial, or explanation of a finding of fact, or to a specific circumstance or argument expressly stated in the respondent's request for hearing that are alleged to constitute grounds for any defense or the factual and legal basis for opposing or reducing the penalty.

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: One comment recommended that proposed § 160.534(b)(1)(ii) (placing the burden of proof on the respondent with respect to any challenge to the amount of a proposed penalty pursuant to § 160.404–160.408, including mitigating factors) be deleted. It was argued that due process requires that HHS sustain the burden of going forward with evidence proving the amount of a proposed penalty and the burden of persuasion. It was also noted that this section would place on the respondent the burden of proof with respect to an issue that is unreviewable under proposed § 160.508(c)(5)—the selection of variables under § 160.406.

Response: We disagree that § 160.534(b)(1)(ii) violates the due process clause. Rather, it is consistent with the normal allocation of the burden of proof, in which the proponent of a fact or argument has the burden of proving it. Our change to § 160.508(c)(5) renders the remainder of the comment moot.

Comment: One comment suggested that § 160.534(c) be revised to require the ALJ, upon the request of either party, to close a public hearing that could result in disclosure of privacy or security information that should not be made public and seal the records.

Response: We agree that protecting protected health information is important and is an issue about which all parties and the ALJ should be concerned. However, administrative hearings are, in general, required to be open to the public. *See, e.g., Detroit Free Press* v. *Ashcroft,* 303 F.3d 681, 700 (6th Cir. 2002) (stating that INS deportation hearings and similar administrative proceedings are traditionally open to the public). An ALJ has means by which he can protect the privacy of protected health information to be introduced into evidence, if he determines that this should be done, including requiring redaction of identifying information and closing part of the hearing. In our view, the ALJ will be in the best position to balance the competing interests of the public's right to information and the privacy interests associated with any protected health information. Accordingly, we do not mandate closure of the hearing on request.

9. Section 160.536—Statistical Sampling

Proposed rule: Proposed § 160.536 would permit the Secretary to introduce the results of a statistical sampling study as evidence of the number of violations under proposed § 160.406(b), or, where appropriate, any factor considered in determining the amount of the civil money penalty under proposed § 160.408. If the estimation is based upon an appropriate sampling and employs valid statistical methods, it would constitute prima facie evidence of the number of violations or amount of the penalty sought that is a part of the Secretary's burden of proof. Such a showing would cause the burden of going forward to shift to the respondent, although the burden of persuasion would remain with the Secretary.

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: Several comments argued that the proposed rule would significantly limit a covered entity's ability to challenge HHS's statistical evidence. Although proposed § 160.420(a)(2) would require HHS, in the notice of proposed determination, to describe the sampling technique used by the Secretary, it is unclear what constitutes a ''brief'' description, and a brief description will most likely be insufficient to provide the covered entity with enough information to mount an adequate challenge. Because the covered entity may not receive a copy of the actual statistical study until 15 days before the hearing, it would have a very short period of time in which to review, investigate, critique, and/or rebut the statistical study. Because proposed § 160.516 would prohibit the taking of depositions, there would be no way to subject the HHS's statistical expert to adverse examination until the hearing, if then. The comments requested that proposed § 160.536 be deleted or, alternatively, the rule be revised to permit depositions of HHS's statistical expert and require HHS to give covered entities more detail of the technique utilized in sufficient time to allow entities to provide a meaningful defense and rebuttal.

Response: We recognize the concern that to make an effective challenge to the Secretary's introduction of the results of a statistical study, a covered entity should be provided with the details of that study early in the proceeding. Accordingly, we have revised proposed § 160.420(a)(2) to require HHS to provide a copy of the study relied upon to the respondent with the notice of proposed determination. Further, we have revised proposed § 160.504(b) to enlarge the time within which a respondent seeking a hearing before an ALJ must mail its request for hearing from 60 to 90 days. We do not agree that depositions, which are expensive and time consuming, are required; the statistical study relied upon will be given to respondent with the notice of proposed determination, allowing an adequate amount of time to prepare any opposition thereto.

Comment: Several comments contended that permitting proof of violations by statistical sampling violates basic notions of due process and fundamental fairness, in that either a violation is provable or it is not. The comments raised the following specific objections on this ground. Statistical sampling merely estimates the number of violations that could have occurred and should not be used as a ''short cut'' for appropriate investigation and review. The determination of any variable used to calculate the number of violations should be based on an objective standard. The proposed approach would not treat all covered entities the same. The following example was provided to illustrate this latter concern. Suppose that a dentist had 3,000 patients of record, and that seven percent of those patients, or 210, did not receive a Notice of Privacy Practices. Suppose that a sample of 100 of the 3,000 patients was examined by HHS, and it was determined that 15 did not receive a notice. A statistical inference from this sample would estimate that 600, or 15 percent of all patients of record, did not receive a notice, even though in fact only 210 had not received a notice. Under § 160.536, the provider could be charged for 600 violations. While, on average, the sampling approach would yield the correct estimate of all providers, it would not necessarily be correct for any specific provider, which would be unfair to the individual providers involved.

Response: The use of sampling and statistical methods is recognized under Fed. R. Evid. 702 and under 42 CFR 1003.133 of the OIG rules, upon which the language of this section is based. The respondent may challenge whether the estimation offered by the Secretary is based upon a valid sample and employs valid statistical methods or may otherwise rebut the statistical evidence submitted. In the example cited by the comment, the respondent also could rebut the results with evidence that the actual number of violations is less than the estimate derived from the statistical sample.

With respect to the concerns regarding the fairness and appropriateness of using statistical

sampling to determine the number of violations, HHS will use sampling methods which follow recognized scientific guidelines for statistical validity and precision. These methods would be applicable to all types of covered entities and will objectively measure the number of violations by a covered entity or the number of occurrences of a particular aggravating circumstance. Because of the wide range of possible violations, however, we cannot at this time present specific sampling designs or levels of acceptable precision. However, the methodology employed will be documented and made available in the statistical sampling study provided with the notice of proposed determination.

Comment: Several comments argued that the use of statistical sampling is inappropriate to determine violations of the HIPAA rules. A couple of comments argued that, because of the many variables and discretionary considerations that can go into determining that a violation has occurred, and because many complaints or investigations will relate to individual circumstances, using statistical sampling to determine the number of violations is not appropriate. Another comment gave as an example of this problem Privacy Rule violations involving disclosure of protected health information beyond the ''minimum necessary;'' it asserted that the number of such violations cannot be adequately assessed through a statistical sample. Use of statistical sampling in such a case could preclude a covered entity from asserting its fact-based affirmative defenses. It was argued that statistical sampling is appropriate for use in estimating averages, but is not appropriate for determining the number of violations by a specific covered entity.

Response: As noted above, statistical sampling is recognized under the Federal Rules of Evidence and other HHS regulations. See, *e.g.*, 42 CFR 1003.133. The results, if based upon an appropriate sampling and computed by valid statistical methods, are only prima facie evidence of the number of violations or the existence of factors material to the proposed civil money penalty. The respondent may challenge the adequacy or size of the sample or the statistical methods employed, and may offer other evidence to rebut the results derived through the statistical methodology.

We do not agree that statistical methods are, per se, inappropriate for determining the number of violations that have occurred. For example, suppose that a health plan with a large volume of electronic claims is found to have required providers to include on such claims a data element which is not part of the standard. A sample of the claims would be selected, and the percentage of claims found to be in violation of the standard would be computed from the sample and projected to the universe of claims for the year to establish the total number of violations of the standard in the calendar year. Of course, HHS's statistical methods would have to pass muster, and a respondent could challenge the statistical results, on normal statistical grounds, *e.g.*, that the sample size was insufficient, that the sample was not representative, and so on.

Comment: Several comments contended that, by allowing statistical sampling to be introduced at a hearing, proposed § 160.536 directly contradicts the language of § 160.508, which does not allow an ALJ to review issues under the Secretary's discretion, which includes calculating the number of violations. Other comments stated that, in the event that statistical sampling is used by HHS to determine the number of violations, it should be subject to ALJ review and that insulating it from review would increase the potential for abuse exponentially.

Response: Proposed § 160.508(c) has been revised to permit the ALJ to review the Secretary's calculation of the number of violations of an identical administrative simplification provision under § 160.406. If statistical sampling is employed to determine the number of violations, the results are subject to challenge before the ALJ.

Comment: The provision of proposed § 160.536 limiting statistical studies to those ''based upon an appropriate sampling and computed by valid statistical methods'' was criticized. It was noted that no criteria for validity are given, even though the comments by the agency specifically acknowledge the danger of extrapolating from small sample sizes. It also was argued that the appropriateness and validity of such sampling techniques are left to the discretion of the Secretary, who will employ criteria known only to the Secretary. It was recommended that statistical sampling not be permitted without clearer guidelines or more flexibility to challenge the study at an early stage, before significant investment of resources.

Response: By requiring that appropriate sampling and valid statistical methods be employed, HHS is mirroring the standard by which the reliability of such expert testimony is assessed under Fed. R. Evid. 702. If statistical sampling is employed to determine the number of violations of an administrative simplification provision in a calendar year, such determination is subject to review by the ALJ. With respect to a respondent's ability to challenge the study at an earlier stage, under § 160.420(a)(2), a copy of the study relied upon will be provided to the respondent with the notice of proposed determination.

10. Section 160.538—Witnesses

Proposed rule: Proposed § 160.538 would carry forward unchanged § 160.556, as adopted by the April 17, 2003 interim final rule. As relevant here, paragraph (b) provides that, at the discretion of the ALJ and subject to certain conditions, testimony of witnesses other than the testimony of expert witnesses may be admitted in the form of a written statement and the ALJ may, at his discretion, admit prior sworn testimony of experts that has been subject to adverse examination.

Final rule: The final rule adopts the provisions of the proposed rule, except that the fourth sentence of proposed § 160.538(b) is placed before the second sentence of proposed § 160.538(b).

Comment: One comment stated that it was unclear whether the government's statistician could even be required to testify; rather, it appeared that the government could rely solely on the expert's prior testimony in other cases and/or the expert's report. Because depositions are not allowed, this provision must mean that testimony from experts in other cases may be used. It was argued that this would be prejudicial, because the covered entity will not have had an opportunity to subject the testimony to adverse examination and the facts of different cases would likely not be identical. Therefore, the expert testimony in one case may not be appropriate for use in a different case. It was recommended that this section be revised to require, at the covered entity's request, the testimony at the hearing of the government's statistical expert and prohibit the use of prior sworn testimony of experts unless from the specific case at issue.

Response: HHS expects that its statistical expert will testify at the hearing. Moreover, the respondent may move the ALJ to subpoena HHS's statistical expert to appear and testify at the hearing. See § 160.520.

Comment: One comment stated that, when §§ 160.538 and 160.516(b) are read together, they would permit an expert's testimony, taken under oath in a different case, to be admitted into

evidence, leaving the respondent with no chance to question the expert.

Response: We recognize the concern raised, which we believe arises out of an inadvertent transposition of a sentence in the text of proposed § 160.538(b). We intended that the subsection's text mirror that of the OIG regulation at 45 CFR 1005.16(b) by ending with the following: ''Any such written statement must be provided to the other party, along with the last known address of the witness, in a manner that allows sufficient time for the other party to subpoena the witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing must be exchanged as provided in § 160.518.'' We have corrected this error. As the rule now reads, the prior sworn testimony of an expert will be treated like any other witness's statement that a party proposes to offer in lieu of testimony at the hearing: a copy must be provided to the other party along with the witness's address in sufficient time to permit such other party to subpoena and question that witness at the hearing.

11. Section 160.540—Evidence

Proposed rule: Proposed § 160.540 would carry forward unchanged § 160.558, which was adopted by the April 17, 2003 interim final rule. Paragraph (b) of this section provides that the ALJ is not bound by the Federal Rules of Evidence, except as provided in the subpart.

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: One comment argued that proposed § 160.540(b) should be revised. The comment stated that the optional use of the Federal Rules of Evidence is insufficient and would not allow entities to know what evidence will be admissible at the hearing or what rules of evidence will apply. At a minimum, it was argued, the use of hearsay should be prohibited except pursuant to the hearsay exceptions of the Federal Rules of Evidence.

Response: The Administrative Procedure Act does not require HHS to apply the Federal Rules of Evidence to limit the discretion of ALJs to admit evidence at hearings. See 5 U.S.C. 556(d). To be admissible, evidence need only be relevant, material, reliable, and probative. However, the ALJ may apply the Federal Rules of Evidence, where appropriate. Examples of situations where use of the Federal Rules of Evidence might be appropriate would include to exclude unreliable evidence, to weigh the probative value of evidence against the risks attending its admission, to determine whether a Federal privilege exists, or to determine whether the evidence relates to an offered compromise and settlement, which would be inadmissible under Fed. R. Evid. 408.

Comment: One comment argued that proposed § 160.540(g) should be deleted. It was argued that this provision is inconsistent with the six-year time limit in § 160.414, in that it permits admission at the hearing of ''crimes, wrongs or acts'' without limit as to when they may have occurred. The comment stated that acts or other behaviors that are not the subject of civil money penalties are not relevant factors in determining the penalties that should be imposed, nor are they proof that the prohibited activity occurred. The Secretary is not required in a civil administrative proceeding to prove intent or mens rea.

Response: We believe that evidence of prior bad acts, admitted for the purposes listed (which are consistent with Fed. R. Evid. 404(b)) may be relevant and material in particular cases and, thus, should not be categorically excluded, as suggested. For instance, such evidence may be relevant and material to proving a covered entity's knowledge of the violation or aggravating circumstances affecting the amount of the civil money penalty imposed. In the latter case, for example, the evidence would be admitted to prove the aggravating circumstances and not the actual violations at issue; thus, the statute of limitations would not apply with respect to the bad acts. (We note, however, that prior bad acts unrelated to the covered entity's compliance with the HIPAA provisions or rules would not be admissible to prove aggravating circumstances under § 160.408(d).)

Comment: Another comment argued that proposed § 160.540(g) should be deleted, but if retained, such evidence should be reviewable under the other criteria for admissibility of proposed § 160.540, and HHS should be required to provide advance notice of its intent to present such evidence.

Response: Evidence of prior bad acts would be subject to the same criteria for admissibility as other evidence offered at the hearing—for instance, whether the probative value of such evidence is substantially outweighed by its potential for prejudice. Such evidence is also subject to the rules regarding notice that apply to other evidence; see, *e.g.*, §§ 160.420(a)(5), 160.516, and 160.518.

12. Section 160.542—The Record

Proposed rule: This section would carry forward unchanged § 160.560, adopted by the April 17, 2003 interim final rule. Since the section provides that the record of the proceedings be transcribed, we proposed to add to paragraph (a) of this section a requirement that the cost of transcription of the record be borne equally by the parties, in the interest of fairness.

Final rule: The final rule adopts the provisions of the proposed rule, except that paragraph (a) is revised to clarify that if a party requests a copy of the transcript of the hearing proceedings it must pay the cost of such transcript, unless such payment is waived by the ALJ or the Board for good cause shown.

Comment: One comment recommended that this fee be assessed at the end of the investigation and assumed by the responsible party based on the outcome of the investigation. Another comment requested that HHS bear the cost of the court reporter's appearance (as opposed to the cost of copies).

Response: We acknowledge that the language of proposed paragraph (a) suggested that there is a fee or cost for a court reporter's appearance, in addition to the cost of obtaining a copy of the transcript of the hearing proceedings. As there is no such additional cost, we have revised paragraph (a) to state that a party that requests a copy of the transcript of hearing is required to pay the cost of preparing such transcript. We have also added a provision that will permit the ALJ or the Board, for good cause shown, to waive the cost of obtaining the transcript.

13. Section 160.546—ALJ Decision

Proposed rule: The proposed rule proposed that the ALJ decision would be the initial decision of the Secretary, rather than the final decision of the Secretary as set forth in § 160.564(d) of the April 17, 2003 interim final rule. Thus, we proposed to revise paragraph (d) to provide that the decision of the ALJ will be final and binding on the parties 60 days from the date of service of the ALJ decision, unless it is timely appealed by either party.

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: One comment requested that the section be revised to provide that the ALJ could not increase a penalty beyond the statutory cap of section 1176(a)(1).

Response: The ALJ is bound by both the statute and the regulations, which both explicitly address this issue. Section 1176(a)(1) states that ''the total amount imposed on the person for all violations of an identical requirement or prohibition during a calendar year may not exceed $25,000.'' Section

160.404(b)(1)(ii) states that the Secretary may not impose a civil money penalty in excess of $25,000 for identical violations during a calendar year.

In light of these explicit provisions, we do not agree that the suggested change is necessary.

14. Section 160.548—Appeal of the ALJ Decision

Proposed rule: Proposed § 160.548 would provide that any party may appeal the initial decision of the ALJ to the Board within 30 days of the date of service of the ALJ initial decision, unless extended for good cause. The appealing party must file a written brief specifying its exceptions to the initial decision. The opposing party may file an opposition brief, which is limited to the exceptions raised in the brief accompanying notice of appeal and any relevant issues not addressed in said exceptions and must be filed within 30 days of receiving the appealing party's notice of appeal and brief. The appealing party may, if permitted by the Board, file a reply brief. These briefs may be the only means that the parties will have to present their case to the Board, since there is no right to appear personally before the Board. The proposed rule provided that if a party demonstrates that additional evidence is material and relevant and there are reasonable grounds why such evidence was not introduced at the ALJ hearing, the Board may remand the case to the ALJ for consideration of the additional evidence. In an appeal to the Board, the standard of review on a disputed issue of fact would be whether the ALJ's initial decision is supported by substantial evidence on the record as a whole; on a disputed issue of law, the standard of review is whether the ALJ's initial decision is erroneous. The Board could decline review, affirm, increase, reduce, or reverse any penalty, or remand a penalty determination to the ALJ.

Under proposed § 160.548(i), the Board must serve its decision on the parties within 60 days after final briefs are filed. The decision of the Board becomes the final decision of the Secretary 60 days after service of the decision, except where the decision is to remand to the ALJ or a party requests reconsideration before the decision becomes final. Proposed § 160.548(j) provides that a party may request reconsideration of the Board's decision, provides a reconsideration process, and provides that the Board's reconsideration decision becomes final on service. The decision of the Board constitutes the final decision of the Secretary from which a petition for judicial review may be filed by a respondent aggrieved by the Board's decision. Proposed § 160.548(k) provides for a petition for judicial review of a final decision of the Secretary.

Final rule: The final rule adopts the provisions of the proposed rule, except that paragraph (e) is revised to make it consistent with the revision to § 160.504(c). The revision would permit the Board to consider an affirmative defense under § 160.410(b)(1) that is raised for the first time before the Board. Thus, under paragraph (f) of this section, the Board could, but would not be required to, remand the case to the ALJ for consideration of any evidence adduced with respect to such defense.

Comment: One comment was received on this section. It requested that the section be revised to provide that the Board could not increase a penalty beyond the statutory cap of section 1176(a)(1).

Response: We do not agree that such a provision is necessary, for the reasons discussed in the preceding section.

15. Section 160.552—Harmless Error

Proposed rule: Proposed § 160.552 proposed to adopt the ''harmless error'' rule that applies to civil litigation in Federal courts. The provision would provide, in general, that the ALJ and the Board at every stage of the proceeding will disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

Final rule: The final rule adopts the provisions of the proposed rule.

Comment: One comment asked for further guidance on, and clarification of, this provision. Another comment stated that the provision was far too broad, particularly given the limited discovery available to covered entities. Concern was expressed that the rule would severely limit a covered entity's ability to appeal an adverse ruling.

Response: The proposed rule was modeled after Fed. R. Civ. P. 61 and 42 CFR 1005.23 of the OIG regulations. It is a common provision in procedural rules that govern civil and administrative adjudications and is intended to promote efficiency in the resolution of disputes. If a respondent seeks an appeal because of an error that affects the party's substantive rights or the case's outcome, this section would not be applicable. Thus, we do not agree that it would severely limit a covered entity's ability to appeal an adverse ruling, and we adopt the section as proposed.

IV. Impact Statement and Other Required Analyses

Comment: Only one comment was received on the impact and other required analyses of the proposed rule (see 70 FR 20247–49). The comment asserted that HHS was declaring itself exempt from complying with the Paperwork Reduction Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act of 1995, the Small Business Regulatory Enforcement and Fairness Act, and Executive Order 13132, and that an effort to compute vigorously the range of potential effects is needed to assure agency accountability.

Response: The comment misstates the position HHS took in the proposed rules concerning these laws. HHS does not consider itself, or the Enforcement Rule, exempt from these laws. However, each of these laws covers only certain types of rules and agency actions. For the reasons stated in the proposed rule and summarized below, those laws do not apply to the particular actions taken with respect to this rule. The comment provides no substantive grounds for altering our prior conclusions with respect to these laws.

A. Paperwork Reduction Act

We reviewed this final rule to determine whether it raises issues that would subject it to the Paperwork Reduction Act (PRA). Since the final rule comes within the exemption of 5 CFR 1320.4(a), as it deals entirely with administrative investigations and actions against specific individuals or entities, it need not be reviewed by the Office of Management and Budget under the authority of the PRA.

B. Executive Order 12866; Regulatory Flexibility Act; Unfunded Mandates Reform Act of 1995; Small Business Regulatory Enforcement Fairness Act of 1996; Executive Order 13132

We have examined the impacts of this final rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 16, 1980, Pub. L. 96–354), the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), the Small Business Regulatory Enforcement and Fairness Act, 5 U.S.C. 801, *et seq.*, and Executive Order 13132.

1. Executive Order 12866

Executive Order 12866 (as amended by Executive Order 13258, which merely reassigns responsibility of duties) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is

necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 12866 defines, at section 3(f), several categories of ''significant regulatory actions.'' One category is ''economically significant'' rules, which are defined in section 3(f)(1) of the Order as rules that may ''have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.'' Another category, under section 3(f)(4) of the Order, consists of rules that are ''significant regulatory actions'' because they ''raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.'' Executive Order 12866 requires a full economic impact analysis only for ''economically significant'' rules under section 3(f)(1). For the reasons stated at 70 FR 20248–49, we have concluded that this rule should be treated as a ''significant regulatory action'' within the meaning of section 3(f)(4) of Executive Order 12866, but that the impact of this rule is not such that it reaches the economically significant threshold under section 3(f)(1) of the Order.

We note, with regard to our prior analysis, that our ongoing experiences with HIPAA complaints bears out our experience to July 2004, which was discussed at 70 FR 20248. As of October 31, 2005, OCR had received and initiated review of over 16,000 complaints and had closed 68 percent of the complaints; at the same time, CMS had received and initiated review of 413 complaints and closed 67 percent of the complaints. Thus, we continue to be of the view that the costs attributable to the provisions of this rule will, in most cases that are opened, be low. We likewise continue to believe, for the reasons stated at 70 FR 20249, that the value of the benefits brought by the HIPAA provisions are sufficient to warrant appropriate enforcement efforts and that the benefits of these protections far outweigh the costs of this enforcement regulation.

Thus, in most cases, if covered entities comply with the various HIPAA rules, they should not incur any significant additional costs as a result of the Enforcement Rule. This is based on the fact the costs intrinsic to most of the HIPAA rules and operating directions against which compliance is evaluated have been scored independently of this rule, and those requirements are not changed by this rule. We recognize that the specific requirements against which compliance is evaluated are not yet well known and may evolve with experience under HIPAA, but we expect that covered entities have both the ability and expectation to maintain compliance, especially given our commitment to encouraging and facilitating voluntary compliance. While not straightforward to project, it seems likely that the number of times in which the full civil money penalty enforcement process will be invoked will be extremely small, based on the evidence to date.

2. Other Analyses

We also examined the impact of this rule as required by the Regulatory Flexibility Act (RFA). The RFA requires agencies to determine whether a rule will have a significant economic impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government jurisdictions; for health care entities, the size standard for a ''small'' entity ranges from $6 million to $29 million in revenues in any one year. For the reasons discussed at 70 FR 20249, the Secretary certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531 *et seq.*, also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditure in any one year by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million, adjusted for inflation. The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 801, *et seq.*, requires that rules that will have an impact on the economy of $100 million or more per annum be submitted for Congressional review. For the reasons discussed above and at 70 FR 20248–49, this rule will not impose a burden large enough to require a section 202 statement under the Unfunded Mandates Reform Act of 1995 or Congressional review under SBREFA.

Executive Order 13132 establishes certain requirements that an agency must meet when it adopts a final rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This final rule does not have ''Federalism implications, '' as it will not have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government,'' nor, for the reasons previously explained, will it have substantial economic effects would not be substantial, while any preemption of State law that could occur would be a function of the underlying HIPAA rules, not this rule. Therefore, the Enforcement Rule is not subject to Executive Order 13132 (Federalism).

Dated: December 20, 2005.

Michael O. Leavitt,

Secretary.

List of Subjects

45 CFR Part 160

Administrative practice and procedure, Computer technology, Electronic transactions, Employer benefit plan, Health, Health care, Health facilities, Health insurance, Health records, Hospitals, Investigations, Medicaid, Medical research, Medicare, Penalties, Privacy, Reporting and record keeping requirements, Security.

45 CFR Part 164

Administrative practice and procedure, Electronic information system, Electronic transactions, Employer benefit plan, Health, Health care, Health facilities, Health Insurance, Health records, Hospitals, Medicaid, Medical research, Medicare, Privacy, Reporting and record keeping requirements, Security.

■ For the reasons set forth in the preamble, the Department of Health and Human Services amends 45 CFR subtitle A, subchapter C, parts 160 and 164, as set forth below.

PART 160—GENERAL ADMINISTRATIVE REQUIREMENTS

■ 1. The authority citation for part 160 is revised to read as follows:

Authority: 42 U.S.C. 1302(a), 42 U.S.C. 1320d—1320d–8, sec. 264 of Pub. L.104–191, 110 Stat. 2033–2034 (42 U.S.C. 1320d–2 (note)), and 5 U.S.C. 552.

■ 2. Add to § 160.103 in alphabetical order the definition of ''Person'' to read as follows:

§ 160.103 Definitions.

* * * * *

''Person'' means a natural person, trust or estate, partnership, corporation, professional association or corporation, or other entity, public or private.

* * * * *

■ 3. Revise subpart C to read as follows:

Subpart C—Compliance and Investigations

Sec.
160.300 Applicability.
160.302 Definitions.
160.304 Principles for achieving compliance.
160.306 Complaints to the Secretary.
160.308 Compliance reviews.
160.310 Responsibilities of covered entities.
160.312 Secretarial action regarding complaints and compliance reviews.
160.314 Investigational subpoenas and inquiries.
160.316 Refraining from intimidation or retaliation.

§ 160.300 Applicability.

This subpart applies to actions by the Secretary, covered entities, and others with respect to ascertaining the compliance by covered entities with, and the enforcement of, the applicable provisions of this part 160 and parts 162 and 164 of this subchapter.

§ 160.302 Definitions.

As used in this subpart and subparts D and E of this part, the following terms have the following meanings:

Administrative simplification provision means any requirement or prohibition established by:

(1) 42 U.S.C. 1320d—1320d–4, 1320d–7, and 1320d–8;

(2) Section 264 of Pub. L. 104–191; or

(3) This subchapter.

ALJ means Administrative Law Judge.

Civil money penalty or *penalty* means the amount determined under § 160.404 of this part and includes the plural of these terms.

Respondent means a covered entity upon which the Secretary has imposed, or proposes to impose, a civil money penalty.

Violation or *violate* means, as the context may require, failure to comply with an administrative simplification provision.

§ 160.304 Principles for achieving compliance.

(a) *Cooperation.* The Secretary will, to the extent practicable, seek the cooperation of covered entities in obtaining compliance with the applicable administrative simplification provisions.

(b) *Assistance.* The Secretary may provide technical assistance to covered entities to help them comply voluntarily with the applicable administrative simplification provisions.

§ 160.306 Complaints to the Secretary.

(a) *Right to file a complaint.* A person who believes a covered entity is not complying with the administrative simplification provisions may file a complaint with the Secretary.

(b) *Requirements for filing complaints.* Complaints under this section must meet the following requirements:

(1) A complaint must be filed in writing, either on paper or electronically.

(2) A complaint must name the person that is the subject of the complaint and describe the acts or omissions believed to be in violation of the applicable administrative simplification provision(s).

(3) A complaint must be filed within 180 days of when the complainant knew or should have known that the act or omission complained of occurred, unless this time limit is waived by the Secretary for good cause shown.

(4) The Secretary may prescribe additional procedures for the filing of complaints, as well as the place and manner of filing, by notice in the **Federal Register**.

(c) *Investigation.* The Secretary may investigate complaints filed under this section. Such investigation may include a review of the pertinent policies, procedures, or practices of the covered entity and of the circumstances regarding any alleged violation. At the time of initial written communication with the covered entity about the complaint, the Secretary will describe the act(s) and/or omission(s) that are the basis of the complaint.

§ 160.308 Compliance reviews.

The Secretary may conduct compliance reviews to determine whether covered entities are complying with the applicable administrative simplification provisions.

§ 160.310 Responsibilities of covered entities.

(a) *Provide records and compliance reports.* A covered entity must keep such records and submit such compliance reports, in such time and manner and containing such information, as the Secretary may determine to be necessary to enable the Secretary to ascertain whether the covered entity has complied or is complying with the applicable administrative simplification provisions.

(b) *Cooperate with complaint investigations and compliance reviews.* A covered entity must cooperate with the Secretary, if the Secretary undertakes an investigation or compliance review of the policies, procedures, or practices of the covered entity to determine whether it is complying with the applicable administrative simplification provisions.

(c) *Permit access to information.* (1) A covered entity must permit access by the Secretary during normal business hours to its facilities, books, records, accounts, and other sources of information, including protected health information, that are pertinent to ascertaining compliance with the applicable administrative simplification provisions. If the Secretary determines that exigent circumstances exist, such as when documents may be hidden or destroyed, a covered entity must permit access by the Secretary at any time and without notice.

(2) If any information required of a covered entity under this section is in the exclusive possession of any other agency, institution, or person and the other agency, institution, or person fails or refuses to furnish the information, the covered entity must so certify and set forth what efforts it has made to obtain the information.

(3) Protected health information obtained by the Secretary in connection with an investigation or compliance review under this subpart will not be disclosed by the Secretary, except if necessary for ascertaining or enforcing compliance with the applicable administrative simplification provisions, or if otherwise required by law.

§ 160.312 Secretarial action regarding complaints and compliance reviews.

(a) *Resolution when noncompliance is indicated.* (1) If an investigation of a complaint pursuant to § 160.306 or a compliance review pursuant to § 160.308 indicates noncompliance, the Secretary will attempt to reach a resolution of the matter satisfactory to the Secretary by informal means. Informal means may include demonstrated compliance or a completed corrective action plan or other agreement.

(2) If the matter is resolved by informal means, the Secretary will so inform the covered entity and, if the matter arose from a complaint, the complainant, in writing.

(3) If the matter is not resolved by informal means, the Secretary will—

(i) So inform the covered entity and provide the covered entity an opportunity to submit written evidence of any mitigating factors or affirmative defenses for consideration under §§ 160.408 and 160.410 of this part. The covered entity must submit any such evidence to the Secretary within 30 days (computed in the same manner as prescribed under § 160.526 of this part) of receipt of such notification; and

(ii) If, following action pursuant to paragraph (a)(3)(i) of this section, the

Secretary finds that a civil money penalty should be imposed, inform the covered entity of such finding in a notice of proposed determination in accordance with § 160.420 of this part.

(b) *Resolution when no violation is found.* If, after an investigation pursuant to § 160.306 or a compliance review pursuant to § 160.308, the Secretary determines that further action is not warranted, the Secretary will so inform the covered entity and, if the matter arose from a complaint, the complainant, in writing.

§ 160.314 Investigational subpoenas and inquiries.

(a) The Secretary may issue subpoenas in accordance with 42 U.S.C. 405(d) and (e), 1320a–7a(j), and 1320d–5 to require the attendance and testimony of witnesses and the production of any other evidence during an investigation or compliance review pursuant to this part. For purposes of this paragraph, a person other than a natural person is termed an ''entity.''

(1) A subpoena issued under this paragraph must—

(i) State the name of the person (including the entity, if applicable) to whom the subpoena is addressed;

(ii) State the statutory authority for the subpoena;

(iii) Indicate the date, time, and place that the testimony will take place;

(iv) Include a reasonably specific description of any documents or items required to be produced; and

(v) If the subpoena is addressed to an entity, describe with reasonable particularity the subject matter on which testimony is required. In that event, the entity must designate one or more natural persons who will testify on its behalf, and must state as to each such person that person's name and address and the matters on which he or she will testify. The designated person must testify as to matters known or reasonably available to the entity.

(2) A subpoena under this section must be served by—

(i) Delivering a copy to the natural person named in the subpoena or to the entity named in the subpoena at its last principal place of business; or

(ii) Registered or certified mail addressed to the natural person at his or her last known dwelling place or to the entity at its last known principal place of business.

(3) A verified return by the natural person serving the subpoena setting forth the manner of service or, in the case of service by registered or certified mail, the signed return post office receipt, constitutes proof of service.

(4) Witnesses are entitled to the same fees and mileage as witnesses in the district courts of the United States (28 U.S.C. 1821 and 1825). Fees need not be paid at the time the subpoena is served.

(5) A subpoena under this section is enforceable through the district court of the United States for the district where the subpoenaed natural person resides or is found or where the entity transacts business.

(b) Investigational inquiries are non-public investigational proceedings conducted by the Secretary.

(1) Testimony at investigational inquiries will be taken under oath or affirmation.

(2) Attendance of non-witnesses is discretionary with the Secretary, except that a witness is entitled to be accompanied, represented, and advised by an attorney.

(3) Representatives of the Secretary are entitled to attend and ask questions.

(4) A witness will have the opportunity to clarify his or her answers on the record following questioning by the Secretary.

(5) Any claim of privilege must be asserted by the witness on the record.

(6) Objections must be asserted on the record. Errors of any kind that might be corrected if promptly presented will be deemed to be waived unless reasonable objection is made at the investigational inquiry. Except where the objection is on the grounds of privilege, the question will be answered on the record, subject to objection.

(7) If a witness refuses to answer any question not privileged or to produce requested documents or items, or engages in conduct likely to delay or obstruct the investigational inquiry, the Secretary may seek enforcement of the subpoena under paragraph (a)(5) of this section.

(8) The proceedings will be recorded and transcribed. The witness is entitled to a copy of the transcript, upon payment of prescribed costs, except that, for good cause, the witness may be limited to inspection of the official transcript of his or her testimony.

(9)(i) The transcript will be submitted to the witness for signature.

(A) Where the witness will be provided a copy of the transcript, the transcript will be submitted to the witness for signature. The witness may submit to the Secretary written proposed corrections to the transcript, with such corrections attached to the transcript. If the witness does not return a signed copy of the transcript or proposed corrections within 30 days (computed in the same manner as prescribed under § 160.526 of this part) of its being submitted to him or her for signature, the witness will be deemed to have agreed that the transcript is true and accurate.

(B) Where, as provided in paragraph (b)(8) of this section, the witness is limited to inspecting the transcript, the witness will have the opportunity at the time of inspection to propose corrections to the transcript, with corrections attached to the transcript. The witness will also have the opportunity to sign the transcript. If the witness does not sign the transcript or offer corrections within 30 days (computed in the same manner as prescribed under § 160.526 of this part) of receipt of notice of the opportunity to inspect the transcript, the witness will be deemed to have agreed that the transcript is true and accurate.

(ii) The Secretary's proposed corrections to the record of transcript will be attached to the transcript.

(c) Consistent with § 160.310(c)(3), testimony and other evidence obtained in an investigational inquiry may be used by HHS in any of its activities and may be used or offered into evidence in any administrative or judicial proceeding.

§ 160.316 Refraining from intimidation or retaliation.

A covered entity may not threaten, intimidate, coerce, harass, discriminate against, or take any other retaliatory action against any individual or other person for—

(a) Filing of a complaint under § 160.306;

(b) Testifying, assisting, or participating in an investigation, compliance review, proceeding, or hearing under this part; or

(c) Opposing any act or practice made unlawful by this subchapter, provided the individual or person has a good faith belief that the practice opposed is unlawful, and the manner of opposition is reasonable and does not involve a disclosure of protected health information in violation of subpart E of part 164 of this subchapter.

■ 4. Add a new subpart D to read as follows:

Subpart D—Imposition of Civil Money Penalties

160.400 Applicability.
160.402 Basis for a civil money penalty.
160.404 Amount of a civil money penalty.
160.406 Violations of an identical requirement or prohibition.
160.408 Factors considered in determining the amount of a civil money penalty.
160.410 Affirmative defenses.
160.412 Waiver.
160.414 Limitations.
160.416 Authority to settle.
160.418 Penalty not exclusive.

160.420 Notice of proposed determination.
160.422 Failure to request a hearing.
160.424 Collection of penalty.
160.426 Notification of the public and other agencies.

§ 160.400 Applicability.

This subpart applies to the imposition of a civil money penalty by the Secretary under 42 U.S.C. 1320d–5.

§ 160.402 Basis for a civil money penalty.

(a) *General rule.* Subject to § 160.410, the Secretary will impose a civil money penalty upon a covered entity if the Secretary determines that the covered entity has violated an administrative simplification provision.

(b) *Violation by more than one covered entity.* (1) Except as provided in paragraph (b)(2) of this section, if the Secretary determines that more than one covered entity was responsible for a violation, the Secretary will impose a civil money penalty against each such covered entity.

(2) A covered entity that is a member of an affiliated covered entity, in accordance with § 164.105(b) of this subchapter, is jointly and severally liable for a civil money penalty for a violation of part 164 of this subchapter based on an act or omission of the affiliated covered entity, unless it is established that another member of the affiliated covered entity was responsible for the violation.

(c) *Violation attributed to a covered entity.* A covered entity is liable, in accordance with the federal common law of agency, for a civil money penalty for a violation based on the act or omission of any agent of the covered entity, including a workforce member, acting within the scope of the agency, unless—

(1) The agent is a business associate of the covered entity;

(2) The covered entity has complied, with respect to such business associate, with the applicable requirements of §§ 164.308(b) and 164.502(e) of this subchapter; and

(3) The covered entity did not—

(i) Know of a pattern of activity or practice of the business associate, and

(ii) Fail to act as required by §§ 164.314(a)(1)(ii) and 164.504(e)(1)(ii) of this subchapter, as applicable.

§ 160.404 Amount of a civil money penalty.

(a) The amount of a civil money penalty will be determined in accordance with paragraph (b) of this section and §§ 160.406, 160.408, and 160.412.

(b) The amount of a civil money penalty that may be imposed is subject to the following limitations:

(1) The Secretary may not impose a civil money penalty—

(i) In the amount of more than $100 for each violation; or

(ii) In excess of $25,000 for identical violations during a calendar year (January 1 through the following December 31).

(2) If a requirement or prohibition in one administrative simplification provision is repeated in a more general form in another administrative simplification provision in the same subpart, a civil money penalty may be imposed for a violation of only one of these administrative simplification provisions.

§ 160.406 Violations of an identical requirement or prohibition.

The Secretary will determine the number of violations of an administrative simplification provision based on the nature of the covered entity's obligation to act or not act under the provision that is violated, such as its obligation to act in a certain manner, or within a certain time, or to act or not act with respect to certain persons. In the case of continuing violation of a provision, a separate violation occurs each day the covered entity is in violation of the provision.

§ 160.408 Factors considered in determining the amount of a civil money penalty.

In determining the amount of any civil money penalty, the Secretary may consider as aggravating or mitigating factors, as appropriate, any of the following:

(a) The nature of the violation, in light of the purpose of the rule violated.

(b) The circumstances, including the consequences, of the violation, including but not limited to:

(1) The time period during which the violation(s) occurred;

(2) Whether the violation caused physical harm;

(3) Whether the violation hindered or facilitated an individual's ability to obtain health care; and

(4) Whether the violation resulted in financial harm.

(c) The degree of culpability of the covered entity, including but not limited to:

(1) Whether the violation was intentional; and

(2) Whether the violation was beyond the direct control of the covered entity.

(d) Any history of prior compliance with the administrative simplification provisions, including violations, by the covered entity, including but not limited to:

(1) Whether the current violation is the same or similar to prior violation(s);

(2) Whether and to what extent the covered entity has attempted to correct previous violations;

(3) How the covered entity has responded to technical assistance from the Secretary provided in the context of a compliance effort; and

(4) How the covered entity has responded to prior complaints.

(e) The financial condition of the covered entity, including but not limited to:

(1) Whether the covered entity had financial difficulties that affected its ability to comply;

(2) Whether the imposition of a civil money penalty would jeopardize the ability of the covered entity to continue to provide, or to pay for, health care; and

(3) The size of the covered entity.

(f) Such other matters as justice may require.

§ 160.410 Affirmative defenses.

(a) As used in this section, the following terms have the following meanings:

Reasonable cause means circumstances that would make it unreasonable for the covered entity, despite the exercise of ordinary business care and prudence, to comply with the administrative simplification provision violated.

Reasonable diligence means the business care and prudence expected from a person seeking to satisfy a legal requirement under similar circumstances.

Willful neglect means conscious, intentional failure or reckless indifference to the obligation to comply with the administrative simplification provision violated.

(b) The Secretary may not impose a civil money penalty on a covered entity for a violation if the covered entity establishes that an affirmative defense exists with respect to the violation, including the following:

(1) The violation is an act punishable under 42 U.S.C. 1320d–6;

(2) The covered entity establishes, to the satisfaction of the Secretary, that it did not have knowledge of the violation, determined in accordance with the federal common law of agency, and, by exercising reasonable diligence, would not have known that the violation occurred; or

(3) The violation is—

(i) Due to reasonable cause and not willful neglect; and

(ii) Corrected during either:

(A) The 30-day period beginning on the date the covered entity liable for the penalty knew, or by exercising reasonable diligence would have known, that the violation occurred; or

(B) Such additional period as the Secretary determines to be appropriate based on the nature and extent of the failure to comply.

§ 160.412 Waiver.

For violations described in § 160.410(b)(3)(i) that are not corrected within the period described in § 160.410(b)(3)(ii), the Secretary may waive the civil money penalty, in whole or in part, to the extent that payment of the penalty would be excessive relative to the violation.

§ 160.414 Limitations.

No action under this subpart may be entertained unless commenced by the Secretary, in accordance with § 160.420, within 6 years from the date of the occurrence of the violation.

§ 160.416 Authority to settle.

Nothing in this subpart limits the authority of the Secretary to settle any issue or case or to compromise any penalty.

§ 160.418 Penalty not exclusive.

Except as otherwise provided by 42 U.S.C. 1320d-5(b)(1), a penalty imposed under this part is in addition to any other penalty prescribed by law.

§ 160.420 Notice of proposed determination.

(a) If a penalty is proposed in accordance with this part, the Secretary must deliver, or send by certified mail with return receipt requested, to the respondent, written notice of the Secretary's intent to impose a penalty. This notice of proposed determination must include—

(1) Reference to the statutory basis for the penalty;

(2) A description of the findings of fact regarding the violations with respect to which the penalty is proposed (except that, in any case where the Secretary is relying upon a statistical sampling study in accordance with § 160.536 of this part, the notice must provide a copy of the study relied upon by the Secretary);

(3) The reason(s) why the violation(s) subject(s) the respondent to a penalty;

(4) The amount of the proposed penalty;

(5) Any circumstances described in § 160.408 that were considered in determining the amount of the proposed penalty; and

(6) Instructions for responding to the notice, including a statement of the respondent's right to a hearing, a statement that failure to request a hearing within 90 days permits the imposition of the proposed penalty without the right to a hearing under § 160.504 or a right of appeal under § 160.548 of this part, and the address to which the hearing request must be sent.

(b) The respondent may request a hearing before an ALJ on the proposed penalty by filing a request in accordance with § 160.504 of this part.

§ 160.422 Failure to request a hearing.

If the respondent does not request a hearing within the time prescribed by § 160.504 of this part and the matter is not settled pursuant to § 160.416, the Secretary will impose the proposed penalty or any lesser penalty permitted by 42 U.S.C. 1320d–5. The Secretary will notify the respondent by certified mail, return receipt requested, of any penalty that has been imposed and of the means by which the respondent may satisfy the penalty, and the penalty is final on receipt of the notice. The respondent has no right to appeal a penalty under § 160.548 of this part with respect to which the respondent has not timely requested a hearing.

§ 160.424 Collection of penalty.

(a) Once a determination of the Secretary to impose a penalty has become final, the penalty will be collected by the Secretary, subject to the first sentence of 42 U.S.C. 1320a–7a(f).

(b) The penalty may be recovered in a civil action brought in the United States district court for the district where the respondent resides, is found, or is located.

(c) The amount of a penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sum then or later owing by the United States, or by a State agency, to the respondent.

(d) Matters that were raised or that could have been raised in a hearing before an ALJ, or in an appeal under 42 U.S.C. 1320a–7a(e), may not be raised as a defense in a civil action by the United States to collect a penalty under this part.

§ 160.426 Notification of the public and other agencies.

Whenever a proposed penalty becomes final, the Secretary will notify, in such manner as the Secretary deems appropriate, the public and the following organizations and entities thereof and the reason it was imposed: the appropriate State or local medical or professional organization, the appropriate State agency or agencies administering or supervising the administration of State health care programs (as defined in 42 U.S.C. 1320a–7(h)), the appropriate utilization and quality control peer review organization, and the appropriate State or local licensing agency or organization (including the agency specified in 42 U.S.C. 1395aa(a), 1396a(a)(33)).

■ 5. Revise subpart E of this part to read as follows:

Subpart E—Procedures for Hearings

Sec.

160.500 Applicability.
160.502 Definitions.
160.504 Hearing before an ALJ.
160.506 Rights of the parties.
160.508 Authority of the ALJ.
160.510 Ex parte contacts.
160.512 Prehearing conferences.
160.514 Authority to settle.
160.516 Discovery.
160.518 Exchange of witness lists, witness statements, and exhibits.
160.520 Subpoenas for attendance at hearing.
160.522 Fees.
160.524 Form, filing, and service of papers.
160.526 Computation of time.
160.528 Motions.
160.530 Sanctions.
160.532 Collateral estoppel.
160.534 The hearing.
160.536 Statistical sampling.
160.538 Witnesses.
160.540 Evidence.
160.542 The record.
160.544 Post hearing briefs.
160.546 ALJ's decision.
160.548 Appeal of the ALJ's decision.
160.550 Stay of the Secretary's decision.
160.552 Harmless error.

§ 160.500 Applicability.

This subpart applies to hearings conducted relating to the imposition of a civil money penalty by the Secretary under 42 U.S.C. 1320d–5.

§ 160.502 Definitions.

As used in this subpart, the following term has the following meaning:

Board means the members of the HHS Departmental Appeals Board, in the Office of the Secretary, who issue decisions in panels of three.

§ 160.504 Hearing before an ALJ.

(a) A respondent may request a hearing before an ALJ. The parties to the hearing proceeding consist of—

(1) The respondent; and

(2) The officer(s) or employee(s) of HHS to whom the enforcement authority involved has been delegated.

(b) The request for a hearing must be made in writing signed by the respondent or by the respondent's attorney and sent by certified mail, return receipt requested, to the address specified in the notice of proposed determination. The request for a hearing must be mailed within 90 days after notice of the proposed determination is received by the respondent. For purposes of this section, the

respondent's date of receipt of the notice of proposed determination is presumed to be 5 days after the date of the notice unless the respondent makes a reasonable showing to the contrary to the ALJ.

(c) The request for a hearing must clearly and directly admit, deny, or explain each of the findings of fact contained in the notice of proposed determination with regard to which the respondent has any knowledge. If the respondent has no knowledge of a particular finding of fact and so states, the finding shall be deemed denied. The request for a hearing must also state the circumstances or arguments that the respondent alleges constitute the grounds for any defense and the factual and legal basis for opposing the penalty, except that a respondent may raise an affirmative defense under § 160.410(b)(1) at any time.

(d) The ALJ must dismiss a hearing request where—

(1) On motion of the Secretary, the ALJ determines that the respondent's hearing request is not timely filed as required by paragraphs (b) or does not meet the requirements of paragraph (c) of this section;

(2) The respondent withdraws the request for a hearing;

(3) The respondent abandons the request for a hearing; or

(4) The respondent's hearing request fails to raise any issue that may properly be addressed in a hearing.

§ 160.506 Rights of the parties.

(a) Except as otherwise limited by this subpart, each party may—

(1) Be accompanied, represented, and advised by an attorney;

(2) Participate in any conference held by the ALJ;

(3) Conduct discovery of documents as permitted by this subpart;

(4) Agree to stipulations of fact or law that will be made part of the record;

(5) Present evidence relevant to the issues at the hearing;

(6) Present and cross-examine witnesses;

(7) Present oral arguments at the hearing as permitted by the ALJ; and

(8) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

(b) A party may appear in person or by a representative. Natural persons who appear as an attorney or other representative must conform to the standards of conduct and ethics required of practitioners before the courts of the United States.

(c) Fees for any services performed on behalf of a party by an attorney are not subject to the provisions of 42 U.S.C. 406, which authorizes the Secretary to specify or limit their fees.

§ 160.508 Authority of the ALJ.

(a) The ALJ must conduct a fair and impartial hearing, avoid delay, maintain order, and ensure that a record of the proceeding is made.

(b) The ALJ may—

(1) Set and change the date, time and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses at hearings and the production of documents at or in relation to hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of documentary discovery as permitted by this subpart;

(8) Regulate the course of the hearing and the conduct of representatives, parties, and witnesses;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Upon motion of a party, take official notice of facts;

(12) Conduct any conference, argument or hearing in person or, upon agreement of the parties, by telephone; and

(13) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact. A summary judgment decision constitutes a hearing on the record for the purposes of this subpart.

(c) The ALJ—

(1) May not find invalid or refuse to follow Federal statutes, regulations, or Secretarial delegations of authority and must give deference to published guidance to the extent not inconsistent with statute or regulation;

(2) May not enter an order in the nature of a directed verdict;

(3) May not compel settlement negotiations;

(4) May not enjoin any act of the Secretary; or

(5) May not review the exercise of discretion by the Secretary with respect to whether to grant an extension under § 160.410(b)(3)(ii)(B) of this part or to provide technical assistance under 42 U.S.C. 1320d–5(b)(3)(B).

§ 160.510 Ex parte contacts.

No party or person (except employees of the ALJ's office) may communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for both parties to participate. This provision does not prohibit a party or person from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 160.512 Prehearing conferences.

(a) The ALJ must schedule at least one prehearing conference, and may schedule additional prehearing conferences as appropriate, upon reasonable notice, which may not be less than 14 business days, to the parties.

(b) The ALJ may use prehearing conferences to discuss the following—

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(3) Stipulations and admissions of fact or as to the contents and authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of the other party) and written argument;

(6) Limitation of the number of witnesses;

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery of documents as permitted by this subpart;

(9) The time and place for the hearing;

(10) The potential for the settlement of the case by the parties; and

(11) Other matters as may tend to encourage the fair, just and expeditious disposition of the proceedings, including the protection of privacy of individually identifiable health information that may be submitted into evidence or otherwise used in the proceeding, if appropriate.

(c) The ALJ must issue an order containing the matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

§ 160.514 Authority to settle.

The Secretary has exclusive authority to settle any issue or case without the consent of the ALJ.

§ 160.516 Discovery.

(a) A party may make a request to another party for production of documents for inspection and copying

that are relevant and material to the issues before the ALJ.

(b) For the purpose of this section, the term ''documents'' includes information, reports, answers, records, accounts, papers and other data and documentary evidence. Nothing contained in this section may be interpreted to require the creation of a document, except that requested data stored in an electronic data storage system must be produced in a form accessible to the requesting party.

(c) Requests for documents, requests for admissions, written interrogatories, depositions and any forms of discovery, other than those permitted under paragraph (a) of this section, are not authorized.

(d) This section may not be construed to require the disclosure of interview reports or statements obtained by any party, or on behalf of any party, of persons who will not be called as witnesses by that party, or analyses and summaries prepared in conjunction with the investigation or litigation of the case, or any otherwise privileged documents.

(e)(1) When a request for production of documents has been received, within 30 days the party receiving that request must either fully respond to the request, or state that the request is being objected to and the reasons for that objection. If objection is made to part of an item or category, the part must be specified. Upon receiving any objections, the party seeking production may then, within 30 days or any other time frame set by the ALJ, file a motion for an order compelling discovery. The party receiving a request for production may also file a motion for protective order any time before the date the production is due.

(2) The ALJ may grant a motion for protective order or deny a motion for an order compelling discovery if the ALJ finds that the discovery sought—

(i) Is irrelevant;

(ii) Is unduly costly or burdensome;

(iii) Will unduly delay the proceeding; or

(iv) Seeks privileged information.

(3) The ALJ may extend any of the time frames set forth in paragraph (e)(1) of this section.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

§ 160.518 Exchange of witness lists, witness statements, and exhibits.

(a) The parties must exchange witness lists, copies of prior written statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 160.538, not more than 60, and not less than 15, days before the scheduled hearing, except that if a respondent intends to introduce the evidence of a statistical expert, the respondent must provide the Secretarial party with a copy of the statistical expert's report not less than 30 days before the scheduled hearing.

(b)(1) If, at any time, a party objects to the proposed admission of evidence not exchanged in accordance with paragraph (a) of this section, the ALJ must determine whether the failure to comply with paragraph (a) of this section should result in the exclusion of that evidence.

(2) Unless the ALJ finds that extraordinary circumstances justified the failure timely to exchange the information listed under paragraph (a) of this section, the ALJ must exclude from the party's case-in-chief—

(i) The testimony of any witness whose name does not appear on the witness list; and

(ii) Any exhibit not provided to the opposing party as specified in paragraph (a) of this section.

(3) If the ALJ finds that extraordinary circumstances existed, the ALJ must then determine whether the admission of that evidence would cause substantial prejudice to the objecting party.

(i) If the ALJ finds that there is no substantial prejudice, the evidence may be admitted.

(ii) If the ALJ finds that there is substantial prejudice, the ALJ may exclude the evidence, or, if he or she does not exclude the evidence, must postpone the hearing for such time as is necessary for the objecting party to prepare and respond to the evidence, unless the objecting party waives postponement.

(c) Unless the other party objects within a reasonable period of time before the hearing, documents exchanged in accordance with paragraph (a) of this section will be deemed to be authentic for the purpose of admissibility at the hearing.

§ 160.520 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any person at the hearing may make a motion requesting the ALJ to issue a subpoena if the appearance and testimony are reasonably necessary for the presentation of a party's case.

(b) A subpoena requiring the attendance of a person in accordance with paragraph (a) of this section may also require the person (whether or not the person is a party) to produce relevant and material evidence at or before the hearing.

(c) When a subpoena is served by a respondent on a particular employee or official or particular office of HHS, the Secretary may comply by designating any knowledgeable HHS representative to appear and testify.

(d) A party seeking a subpoena must file a written motion not less than 30 days before the date fixed for the hearing, unless otherwise allowed by the ALJ for good cause shown. That motion must—

(1) Specify any evidence to be produced;

(2) Designate the witnesses; and

(3) Describe the address and location with sufficient particularity to permit those witnesses to be found.

(e) The subpoena must specify the time and place at which the witness is to appear and any evidence the witness is to produce.

(f) Within 15 days after the written motion requesting issuance of a subpoena is served, any party may file an opposition or other response.

(g) If the motion requesting issuance of a subpoena is granted, the party seeking the subpoena must serve it by delivery to the person named, or by certified mail addressed to that person at the person's last dwelling place or principal place of business.

(h) The person to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within 10 days after service.

(i) The exclusive remedy for contumacy by, or refusal to obey a subpoena duly served upon, any person is specified in 42 U.S.C. 405(e).

§ 160.522 Fees.

The party requesting a subpoena must pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage must accompany the subpoena when served, except that, when a subpoena is issued on behalf of the Secretary, a check for witness fees and mileage need not accompany the subpoena.

§ 160.524 Form, filing, and service of papers.

(a) *Forms.* (1) Unless the ALJ directs the parties to do otherwise, documents filed with the ALJ must include an original and two copies.

(2) Every pleading and paper filed in the proceeding must contain a caption setting forth the title of the action, the case number, and a designation of the paper, such as motion to quash subpoena.

(3) Every pleading and paper must be signed by and must contain the address and telephone number of the party or the person on whose behalf the paper was filed, or his or her representative.

(4) Papers are considered filed when they are mailed.

(b) *Service.* A party filing a document with the ALJ or the Board must, at the time of filing, serve a copy of the document on the other party. Service upon any party of any document must be made by delivering a copy, or placing a copy of the document in the United States mail, postage prepaid and addressed, or with a private delivery service, to the party's last known address. When a party is represented by an attorney, service must be made upon the attorney in lieu of the party.

(c) *Proof of service.* A certificate of the natural person serving the document by personal delivery or by mail, setting forth the manner of service, constitutes proof of service.

§ 160.526 Computation of time.

(a) In computing any period of time under this subpart or in an order issued thereunder, the time begins with the day following the act, event or default, and includes the last day of the period unless it is a Saturday, Sunday, or legal holiday observed by the Federal Government, in which event it includes the next business day.

(b) When the period of time allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal Government must be excluded from the computation.

(c) Where a document has been served or issued by placing it in the mail, an additional 5 days must be added to the time permitted for any response. This paragraph does not apply to requests for hearing under § 160.504.

§ 160.528 Motions.

(a) An application to the ALJ for an order or ruling must be by motion. Motions must state the relief sought, the authority relied upon and the facts alleged, and must be filed with the ALJ and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions must be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 10 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to the motion.

(d) The ALJ may not grant a written motion before the time for filing responses has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny the motion without awaiting a response.

(e) The ALJ must make a reasonable effort to dispose of all outstanding motions before the beginning of the hearing.

§ 160.530 Sanctions.

The ALJ may sanction a person, including any party or attorney, for failing to comply with an order or procedure, for failing to defend an action or for other misconduct that interferes with the speedy, orderly or fair conduct of the hearing. The sanctions must reasonably relate to the severity and nature of the failure or misconduct. The sanctions may include—

(a) In the case of refusal to provide or permit discovery under the terms of this part, drawing negative factual inferences or treating the refusal as an admission by deeming the matter, or certain facts, to be established;

(b) Prohibiting a party from introducing certain evidence or otherwise supporting a particular claim or defense;

(c) Striking pleadings, in whole or in part;

(d) Staying the proceedings;

(e) Dismissal of the action;

(f) Entering a decision by default;

(g) Ordering the party or attorney to pay the attorney's fees and other costs caused by the failure or misconduct; and

(h) Refusing to consider any motion or other action that is not filed in a timely manner.

§ 160.532 Collateral estoppel.

When a final determination that the respondent violated an administrative simplification provision has been rendered in any proceeding in which the respondent was a party and had an opportunity to be heard, the respondent is bound by that determination in any proceeding under this part.

§ 160.534 The hearing.

(a) The ALJ must conduct a hearing on the record in order to determine whether the respondent should be found liable under this part.

(b) (1) The respondent has the burden of going forward and the burden of persuasion with respect to any:

(i) Affirmative defense pursuant to § 160.410 of this part;

(ii) Challenge to the amount of a proposed penalty pursuant to §§ 160.404–160.408 of this part, including any factors raised as mitigating factors; or

(iii) Claim that a proposed penalty should be reduced or waived pursuant to § 160.412 of this part.

(2) The Secretary has the burden of going forward and the burden of persuasion with respect to all other issues, including issues of liability and the existence of any factors considered as aggravating factors in determining the amount of the proposed penalty.

(3) The burden of persuasion will be judged by a preponderance of the evidence.

(c) The hearing must be open to the public unless otherwise ordered by the ALJ for good cause shown.

(d)(1) Subject to the 15-day rule under § 160.518(a) and the admissibility of evidence under § 160.540, either party may introduce, during its case in chief, items or information that arose or became known after the date of the issuance of the notice of proposed determination or the request for hearing, as applicable. Such items and information may not be admitted into evidence, if introduced—

(i) By the Secretary, unless they are material and relevant to the acts or omissions with respect to which the penalty is proposed in the notice of proposed determination pursuant to § 160.420 of this part, including circumstances that may increase penalties; or

(ii) By the respondent, unless they are material and relevant to an admission, denial or explanation of a finding of fact in the notice of proposed determination under § 160.420 of this part, or to a specific circumstance or argument expressly stated in the request for hearing under § 160.504, including circumstances that may reduce penalties.

(2) After both parties have presented their cases, evidence may be admitted in rebuttal even if not previously exchanged in accordance with § 160.518.

§ 160.536 Statistical sampling.

(a) In meeting the burden of proof set forth in § 160.534, the Secretary may introduce the results of a statistical sampling study as evidence of the number of violations under § 160.406 of this part, or the factors considered in determining the amount of the civil money penalty under § 160.408 of this part. Such statistical sampling study, if based upon an appropriate sampling and computed by valid statistical methods, constitutes prima facie evidence of the number of violations and the existence of factors material to the proposed civil money penalty as described in §§ 160.406 and 160.408.

(b) Once the Secretary has made a prima facie case, as described in paragraph (a) of this section, the burden of going forward shifts to the respondent

to produce evidence reasonably calculated to rebut the findings of the statistical sampling study. The Secretary will then be given the opportunity to rebut this evidence.

§ 160.538 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing must be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony of witnesses other than the testimony of expert witnesses may be admitted in the form of a written statement. The ALJ may, at his or her discretion, admit prior sworn testimony of experts that has been subject to adverse examination, such as a deposition or trial testimony. Any such written statement must be provided to the other party, along with the last known address of the witness, in a manner that allows sufficient time for the other party to subpoena the witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing must be exchanged as provided in § 160.518.

(c) The ALJ must exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth;

(2) Avoid repetition or needless consumption of time; and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ must permit the parties to conduct cross-examination of witnesses as may be required for a full and true disclosure of the facts.

(e) The ALJ may order witnesses excluded so that they cannot hear the testimony of other witnesses, except that the ALJ may not order to be excluded—

(1) A party who is a natural person;

(2) In the case of a party that is not a natural person, the officer or employee of the party appearing for the entity pro se or designated as the party's representative; or

(3) A natural person whose presence is shown by a party to be essential to the presentation of its case, including a person engaged in assisting the attorney for the Secretary.

§ 160.540 Evidence.

(a) The ALJ must determine the admissibility of evidence.

(b) Except as provided in this subpart, the ALJ is not bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate, for example, to exclude unreliable evidence.

(c) The ALJ must exclude irrelevant or immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence must be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement are inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) Evidence of crimes, wrongs, or acts other than those at issue in the instant case is admissible in order to show motive, opportunity, intent, knowledge, preparation, identity, lack of mistake, or existence of a scheme. This evidence is admissible regardless of whether the crimes, wrongs, or acts occurred during the statute of limitations period applicable to the acts or omissions that constitute the basis for liability in the case and regardless of whether they were referenced in the Secretary's notice of proposed determination under § 160.420 of this part.

(h) The ALJ must permit the parties to introduce rebuttal witnesses and evidence.

(i) All documents and other evidence offered or taken for the record must be open to examination by both parties, unless otherwise ordered by the ALJ for good cause shown.

§ 160.542 The record.

(a) The hearing must be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ. A party that requests a transcript of hearing proceedings must pay the cost of preparing the transcript unless, for good cause shown by the party, the payment is waived by the ALJ or the Board, as appropriate.

(b) The transcript of the testimony, exhibits, and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for decision by the ALJ and the Secretary.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by any person, unless otherwise ordered by the ALJ for good cause shown.

(d) For good cause, the ALJ may order appropriate redactions made to the record.

§ 160.544 Post hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ must fix the time for filing the briefs. The time for filing may not exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. The briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 160.546 ALJ's decision.

(a) The ALJ must issue a decision, based only on the record, which must contain findings of fact and conclusions of law.

(b) The ALJ may affirm, increase, or reduce the penalties imposed by the Secretary.

(c) The ALJ must issue the decision to both parties within 60 days after the time for submission of post-hearing briefs and reply briefs, if permitted, has expired. If the ALJ fails to meet the deadline contained in this paragraph, he or she must notify the parties of the reason for the delay and set a new deadline.

(d) Unless the decision of the ALJ is timely appealed as provided for in § 160.548, the decision of the ALJ will be final and binding on the parties 60 days from the date of service of the ALJ's decision.

§ 160.548 Appeal of the ALJ's decision.

(a) Any party may appeal the decision of the ALJ to the Board by filing a notice of appeal with the Board within 30 days of the date of service of the ALJ decision. The Board may extend the initial 30 day period for a period of time not to exceed 30 days if a party files with the Board a request for an extension within the initial 30 day period and shows good cause.

(b) If a party files a timely notice of appeal with the Board, the ALJ must forward the record of the proceeding to the Board.

(c) A notice of appeal must be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions. Any party may file a brief in opposition to the exceptions, which may raise any relevant issue not addressed in the exceptions, within 30 days of receiving the notice of appeal and the accompanying brief. The Board may permit the parties to file reply briefs.

(d) There is no right to appear personally before the Board or to appeal to the Board any interlocutory ruling by the ALJ.

(e) Except for an affirmative defense under § 160.410(b)(1) of this part, the Board may not consider any issue not raised in the parties' briefs, nor any issue in the briefs that could have been raised before the ALJ but was not.

(f) If any party demonstrates to the satisfaction of the Board that additional evidence not presented at such hearing is relevant and material and that there were reasonable grounds for the failure to adduce such evidence at the hearing, the Board may remand the matter to the ALJ for consideration of such additional evidence.

(g) The Board may decline to review the case, or may affirm, increase, reduce, reverse or remand any penalty determined by the ALJ.

(h) The standard of review on a disputed issue of fact is whether the initial decision of the ALJ is supported by substantial evidence on the whole record. The standard of review on a disputed issue of law is whether the decision is erroneous.

(i) Within 60 days after the time for submission of briefs and reply briefs, if permitted, has expired, the Board must serve on each party to the appeal a copy of the Board's decision and a statement describing the right of any respondent who is penalized to seek judicial review.

(j)(1) The Board's decision under paragraph (i) of this section, including a decision to decline review of the initial decision, becomes the final decision of the Secretary 60 days after the date of service of the Board's decision, except with respect to a decision to remand to the ALJ or if reconsideration is requested under this paragraph.

(2) The Board will reconsider its decision only if it determines that the decision contains a clear error of fact or error of law. New evidence will not be a basis for reconsideration unless the party demonstrates that the evidence is newly discovered and was not previously available.

(3) A party may file a motion for reconsideration with the Board before the date the decision becomes final under paragraph (j)(1) of this section. A motion for reconsideration must be accompanied by a written brief specifying any alleged error of fact or law and, if the party is relying on additional evidence, explaining why the evidence was not previously available. Any party may file a brief in opposition within 15 days of receiving the motion for reconsideration and the accompanying brief unless this time limit is extended by the Board for good cause shown. Reply briefs are not permitted.

(4) The Board must rule on the motion for reconsideration not later than 30 days from the date the opposition brief is due. If the Board denies the motion, the decision issued under paragraph (i) of this section becomes the final decision of the Secretary on the date of service of the ruling. If the Board grants the motion, the Board will issue a reconsidered decision, after such procedures as the Board determines necessary to address the effect of any error. The Board's decision on reconsideration becomes the final decision of the Secretary on the date of service of the decision, except with respect to a decision to remand to the ALJ.

(5) If service of a ruling or decision issued under this section is by mail, the date of service will be deemed to be 5 days from the date of mailing.

(k)(1) A respondent's petition for judicial review must be filed within 60 days of the date on which the decision of the Board becomes the final decision of the Secretary under paragraph (j) of this section.

(2) In compliance with 28 U.S.C. 2112(a), a copy of any petition for judicial review filed in any U.S. Court of Appeals challenging the final decision of the Secretary must be sent by certified mail, return receipt requested, to the General Counsel of HHS. The petition copy must be a copy showing that it has been time-stamped by the clerk of the court when the original was filed with the court.

(3) If the General Counsel of HHS received two or more petitions within 10 days after the final decision of the Secretary, the General Counsel will notify the U.S. Judicial Panel on Multidistrict Litigation of any petitions that were received within the 10 day period.

§ 160.550 Stay of the Secretary's decision.

(a) Pending judicial review, the respondent may file a request for stay of the effective date of any penalty with the ALJ. The request must be accompanied by a copy of the notice of appeal filed with the Federal court. The filing of the request automatically stays the effective date of the penalty until such time as the ALJ rules upon the request.

(b) The ALJ may not grant a respondent's request for stay of any penalty unless the respondent posts a bond or provides other adequate security.

(c) The ALJ must rule upon a respondent's request for stay within 10 days of receipt.

§ 160.552 Harmless error.

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in any act done or omitted by the ALJ or by any of the parties is ground for vacating, modifying or otherwise disturbing an otherwise appropriate ruling or order or act, unless refusal to take such action appears to the ALJ or the Board inconsistent with substantial justice. The ALJ and the Board at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

PART 164—SECURITY AND PRIVACY

■ 1. The authority citation for part 164 is revised to read as follows:

Authority: 42 U.S.C. 1320d–1320d–8 and sec. 264, Pub. L. No. 104–191, 110 Stat. 2033–2034 (42 U.S.C. 1320d–2 (note)).

■ 2. In § 164.530, revise paragraph (g) to read as follows:

§ 164.530 Administrative requirements.

* * * * *

(g) *Standard: refraining from intimidating or retaliatory acts.* A covered entity—

(1) May not intimidate, threaten, coerce, discriminate against, or take other retaliatory action against any individual for the exercise by the individual of any right established, or for participation in any process provided for by this subpart, including the filing of a complaint under this section; and

(2) Must refrain from intimidation and retaliation as provided in § 160.316 of this subchapter.

* * * * *

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