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Washington, DC 20002

RESERVATIONS: (202) 741–6008

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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

Food and Nutrition Service

7 CFR Part 272

RIN 0584–AC75

Food Stamp Program: Civil Rights Data Collection

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This rule finalizes the proposed rule of the same name which was published November 27, 2002. It implements the revised collection and reporting of racial/ethnic data by State agencies on persons receiving benefits from the Food Stamp Program (FSP). The changes comply with new racial/ethnic data collection standards issued by the Office of Management and Budget (OMB) while also providing regulatory flexibility and reform for this area of the program regulations.

DATES: *Effective date:* This rule is effective June 19, 2006. *Implementation date:* State agencies may implement the provisions in this final rule anytime after June 19, 2006 but no later than April 1, 2007.

FOR FURTHER INFORMATION CONTACT: Barbara Hallman, Chief, State Administration Branch, Food and Nutrition Service, 3101 Park Center Drive, Alexandria, Virginia 22302, (703) 305–2383. Her Internet address is: *Barbara.Hallman@FNS.USDA.GOV.*

Executive Order 12866

This final rule has been determined to be not significant for purposes of Executive Order 12866 and therefore has not been reviewed by the Office of Management and Budget.

Executive Order 12372

The FSP is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the final rule at 7 CFR Part 3015, Subpart V and related Notice (48 FR 29115, June 24, 1983), the FSP is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612). Roberto Salazar, Administrator for the Food and Nutrition Service, has certified that this rule will not have a significant impact on a substantial number of small entities. This rule may have minimal effect on some small entities.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted.

Public Law 104–4

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, FNS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

This proposed rule contains no Federal mandates under the regulatory provisions of Title II of the UMRA for State, local and tribal governments or the private sector of $100 million or more in any one year. Therefore, this rule is not subject to the requirements of Sections 202 and 205 of the UMRA.

Executive Order 13132, Federalism

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132. FNS has considered the impact on State agencies. The effect on State agencies is moderate although it will mean a one-time change to collect and compile the new data in State agencies' automated systems. However, because these changes have been or are also being made in other Federal programs, the impact is not all that great for the Food Stamp Program. FNS is not aware of any case where the discretionary provisions of the rule would preempt State law.

(1) Prior Consultation With State Officials

Prior to drafting this rule, we consulted with State and local agencies at various times. Because the FSP is a State-administered, Federally funded program, our regional offices have formal and informal discussions with State and local officials on an ongoing basis regarding program implementation and policy issues. This arrangement allows State and local agencies to provide comments that form the basis for many discretionary decisions in this and other Food Stamp rules. Further, we first requested comments on the proposed data collection for the revised standards in our November 30, 1999 **Federal Register** notice. State agency comments have helped us make the rule responsive to concerns presented by State agencies.

(2) Nature of Concerns and the Need To Issue This Rule

State agencies generally were concerned that the classification by eligibility workers of an applicant's multiple race heritage via visual observation of people who chose not to self-identify may not always be accurate. They were also concerned

about the cost involved and time that will be allowed for State agencies to make system changes to collect and compile the data, to train workers, and to convert the current caseload. The standardization of the data collection addresses another major State concern i.e. the need to have the data collected in the same way across other means-tested Federal programs. Specific comments and policy questions submitted by State agencies helped us identify issues that needed to be clarified in the final rule.

(3) Extent to Which We Meet Those Concerns

FNS has considered the impact of the rule on State and local agencies. This rule makes changes that conform to the revised OMB standards for the collection and reporting of racial ethnic data. Although the rule implementing the revised data collection standards will require eligibility workers to collect both race and ethnicity on participating households, the information will standardize racial ethnic data collection by States for the Federal Government and will permit more accurate data collection on individuals who classify themselves as being of more than one race. FNS intends to allow State agencies to record one race per person when visual observation is used because the applicant chooses not to self-identify. While State agencies will have to change their application form and possibly their information system to collect, compile, and report data, and train workers, this is a one-time change. For existing cases, we are allowing State agencies to collect the data at the time of recertification through the normal re-application process. The approximately 50 percent Federal reimbursement by FNS helps defray approximately half the State agencies' costs to make the change for the FSP. The rule provides State agencies ample time to implement the revised data collection standards and convert the existing caseload to the revised data requirements. In the rule, we have addressed every concern submitted by State agencies regarding this provision. FNS is not aware of any case where the provisions of the rule would preempt State law.

Government Paperwork Elimination Act

The Government Paperwork Elimination Act (GPEA) requires Federal Government agencies to provide electronic submission for information collection as an alternative to paper submission. FNS is committed to compliance with GPEA. The racial/ethnic information is collected by State and local agencies. In April 2004, FNS implemented electronic reporting for the FNS–101 for the FSP. The data may be submitted to FNS via data entered in the Food Programs Reporting System.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35; see 5 CFR 1320) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB number. This final rule contains information collection that have been approved by OMB under OMB #0584–0025.

The rule addresses implementation of the revised OMB standards for the FSP only. Historically, the FSP, the Commodity Supplemental Food Program (CSFP), and the Food Distribution Program on Indian Reservations (FDPIR) have been approved under the same OMB approval package. FNS is publishing the revised regulation for the FSP only because the regulations governing the FSP contain provisions that must be amended to implement the revised standards, since they specifically identify the old racial/ethnic classifications. The CSFP and FDPIR do not require similar regulatory changes.

Under the proposed rule, we estimated that 53 State FSP agencies would submit a Form FNS–101 once a year at a burden of 2 hours per respondent for a total of 106 hours for the FSP. The final rule requires States to report the Form FNS–101 by project area, as they do now. We estimate that 2,616 project areas will report the FNS–101 for the FSP. Accordingly, we estimate a total burden for the FSP under 0584–0025 will decline to 5,232 hours, a decrease of 654 hours. The decline is due to a re-estimate of the time it takes to complete the revised FNS–101.

Burden Estimate

Respondents: Local agencies that administer the CSFP, FDPIR, and FSP.

Number of Respondents: 2,873 (147 for CSFP, 110 for FSDPIR, and 2,616 for FSP).

Estimated Number of Responses per Respondent:

Form FNS–191: 147 local CSFP agencies once a year.

Form FNS–101: 110 local FDPIR agencies and 2,616 FSP local agencies once a year.

Estimate of Burden:

Form FNS–191: The local CSFP agencies submit Form FNS–191 at an estimate of 1.92 hours per respondent, or 282.24 hours. There is an additional recordkeeping burden of .08 hours per respondent, or 11.76 hours. Total burden is 294 hours.

Form FNS–101: The 2,726 local FDPIR and FSP agencies submit Form FNS–101 at an estimate of 1.92 hours per respondent, or 5,233.92 hours. There is an additional burden of .08 hours per respondent for recordkeeping, or 218.08 hours. Total burden is 5,452 hours.

Estimated Total Annual Burden on Respondents: The revised annual reporting and recordkeeping burden for OMB No. 0584–0025 is estimated to be 5,746 hours, a reduction of 675.5 hours. The burden reduction is due to a re-estimate of the time it takes to complete the new FNS–101 form.

Civil Rights Impact Analysis

FNS has reviewed this final rule in accordance with the Department Regulation 4300–4, ''Civil Rights Impact Analysis,'' to identify and address any major civil rights impacts the rule might have on minorities, women, and persons with disabilities. After a careful review of the rule's intent and provisions, and the characteristics of food stamp households and individual participants, FNS has determined that there is no adverse impact on any group. While this rule does provide for the collection of racial ethnic data on FSP applicants and recipients, it does not change any eligibility criteria.

FNS specifically prohibits the State and local government agencies that administer the Program from engaging in actions that discriminate based on race, color, national origin, gender, age, religious creed, disability, or political beliefs (FSP nondiscrimination policy can be found at 7 CFR 272.6(a)). Where State agencies have options, and they choose to implement a certain provision, they must implement it in such a way that it complies with the regulations at 7 CFR 272.6.

Background

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin in programs receiving federal financial assistance. The Department of Justice (DOJ) regulations, at 28 CFR 42.406(a), require all Federal agencies to provide for the collection of racial and ethnic information from applicants for and beneficiaries of Federal assistance sufficient to permit effective enforcement of Title VI. On October 30, 1997, OMB issued revised standards for the classification of Federal data on race

and ethnicity in a notice in the **Federal Register** (62 FR 58782). All Federal agencies are required to comply with the revised OMB standards. The OMB standards revise the racial and ethnic categories and require that respondents be offered the option of selecting one or more racial designations.

On November 27, 2002, we published a rule proposing to codify a general requirement for the new racial ethnic data collection and reporting procedures in the FSP regulations to comply with OMB policy while dropping the technical details such as the racial/ethnic classifications from the regulations in order to maintain flexibility for any future changes in the data collection and reporting procedures. On the same day we published a Notice on the proposed information collection requirements for public comment. The detailed procedures, which were proposed in the preambles of these documents, would be provided to State agencies in an implementing memorandum. The period for comment ended on January 27, 2003. We received comments from 7 State agencies, 1 State agency organization, 15 advocate groups, and 1 legal aid office. For a full understanding of the background of the provisions in this rule, see the proposed rulemaking and Notice, which were published in the **Federal Register** at 67 FR 70861 and 70916, respectively.

7 CFR 272.6(g)—Data Collection by State Agencies

Under the revised standards, there are five categories for race and two categories for ethnicity. The new racial categories are American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White. The revised standards allow individuals to choose more than one race to describe themselves. The revised categories on ethnicity are ''Hispanic or Latino'', and ''Not Hispanic or Latino.'' The State agency must include these racial and ethnic categories on the State agency's application or data input screen.

Several State agencies were concerned that the collection of multiple race data would lengthen the application process for participants and caseworkers, making it more burdensome and complex. They felt more time would be spent explaining the data collection to participants. We believe State agencies will be able to efficiently collect the data for the new categories without serious difficulty. The OMB standards came out in 1997. We note that the Census Bureau collected the data for Census 2000 and other Federal programs like the Temporary Assistance for Needy Families (TANF) have been collecting the data under the new categories, so most applicants by now should be familiar with the new categories and format used in Federal programs.

We proposed that to ensure data quality, the State agency's application or data input screen must use separate questions for collecting ethnicity and race, with ethnicity requested first. One State agency felt that the sequence of the two questions was irrelevant since the data is voluntary for the participant and since the data have to be collected by the State agency for both questions. The proposed sequence is in compliance with the OMB standards which specify that ethnicity be collected first. The sequence allows individuals of Hispanic origin to identify their ethnicity, as they have done in the past, and then in the next question to identify their race, which they may now do. This sequence agrees with TANF Program data collection requirements and other Federal programs, making the data collection format standard across Federal programs. Therefore, we have retained the requirement that the application collect ethnicity first, then the race.

One State agency asked whether two separate fields are required for ''Hispanic or Latino'' and ''Not Hispanic or Latino'' on their application and information system or whether a yes or no response to the Hispanic or Latino field is sufficient. We note that the TANF program uses a yes or no field for ''Hispanic or Latino.'' The intent of the two ethnic categories is to allow separate counts of Hispanic and non-Hispanic data. Since yes and no responses to the Hispanic or Latino question would allow a State the basis to compile separate data on Hispanic individuals and non-Hispanic individuals, a yes/no field for Hispanic or Latino would be sufficient.

One State agency recommended that a sixth category for multiple races be added to the other five racial categories on the application, designating that the individual says multiple racial categories apply. This is not permitted under the OMB standards. The comment is not adopted.

We proposed to continue current policy that the State agency must develop alternative means of collecting racial and ethnic data on households, such as by observation during the interview, when the information is not provided voluntarily by the household on the application form. Several State agencies felt that the collection of racial data by the caseworker via observation of an applicant's race when the applicant declines to self-identify results in the collection of unreliable data. One State agency commented that caseworkers have varying capabilities and comfort levels in eliciting racial and ethnic information from participants who decline to answer or in assessing the racial and ethnic category via visual observation in a manner that is culturally sensitive and acceptable to applicants. Another State agency suggested the application have a ''declined'' category for those who decline to report their race. Another suggested that in place of observation we expand the alternatives to observation and allow State agencies to extrapolate the data from those who voluntarily report and adjust the State totals accordingly.

It is current Federal policy that observation be used to collect the data when the applicant chooses not to self-identify so workers already do this. However, we do understand the States' concerns. We believe it is better to collect the data, to the best of the caseworker's ability, through observation than to not attempt to collect the data at all simply because the applicant declines to voluntarily provide it. The notice proposed that when visual observation is used, the caseworker need collect only one race for any applicant along with the ethnicity. This is similar to what caseworkers currently do under the old policy which directed caseworkers to assign any household to only one racial category. Caseworkers should use their best judgment via observation in determining which category best applies for people who appear to be multi-racial. By not allowing States to extrapolate the data in place of observation, FNS, by comparing household participation data to racial counts, can determine the number and percentage of individuals who are of an unknown race because the applicant did not report and the caseworker was unable to observe. While we are keeping the policy as proposed, we will consider other alternatives to observation that a State agency may suggest in detail on a case-by-case basis.

One State agency asked how to categorize applicants if the face-to-face interview is replaced with a telephone interview and the applicant chooses not to report his or her race. If the State agency is unable to observe the applicant's race and ethnicity and the applicant does not provide the information, the caseworker should leave the race and ethnic field blank. The unknowns need not be compiled in the State's system and will not be

reported anywhere on the Form FNS–101. However, FNS reserves the right to calculate the number of household contacts that are of ''Unknown Race'' based on a comparison of household participation and participation by race counts.

State agencies currently collect the data by ''household'' with each household unit being counted under only one race. In actuality, most State agencies collect racial/ethnic data for one person in the household, normally the person who completes the application or is interviewed. This is done because the reporting of racial information by an applicant is voluntary and not all household members are required to be present for the eligibility interview. State agencies may continue to collect the data for one person per household (called the household contact) but must use the revised racial and ethnic categories and provide for multiple race reporting.

7 CFR 272.6(h)—Compiling and Reporting the Data

The proposed rule noted that while there will be 5 single races and the ethnicity question on the application form, the choosing of a single race or a combination of races along with ethnicity response can produce a total of 62 possible racial and ethnic categories for compilation purposes. Allowing for all the ''detailed'' race distributions, there could be 5 single race groups, 10 two-race combinations, 10 three-race combinations, 5 four-race combinations, and 1 five-race combination for a total of 31 categories. The Hispanic count by race would then produce a second set of 31 categories by race. The proposed rule and notice proposed that State agencies compile the data for all 62 possible racial categories including the combinations, maintain it by county, and report statewide for 26 categories. Several State agencies were concerned that the programming for all the categories for compiling and maintaining the data would be costly at a time of record breaking State budget deficits. It would divert limited financial resources to data-gathering functions when more significant priorities exist. One State agency felt that maintaining data for 62 categories would be burdensome since a number of categories will have little or no data. One State agency recommended that States only report the five single races and a catchall multiple race category. The State agency organization suggested that FNS collect the data through the Quality Control sample rather than have States compile the data in their information systems and report compiled data to FNS.

After careful consideration, FNS has decided it will collect from State agencies data on 20 racial and ethnic categories, plus total counts. This will consist of the number of people who selected only one racial category, separately for each of the five racial categories, and a count for the following combinations:

(1) American Indian or Alaska Native and White.

(2) Asian and White.

(3) Black or African American and White.

(4) American Indian or Alaska Native and Black or African American.

(5) The balance of respondents reporting more than one race.

In addition, we will collect data from State agencies on the number of persons in each racial category (above) who are Hispanic or Latino. In total, this is slightly less than the 26 categories originally proposed in the notice and proposed rule. The combination categories for reporting purposes are the four most common combinations according to Census data and are in accordance with the 1997 OMB guidelines for all Federal agencies.

Currently, FNS collects data on 6 racial ethnic categories (including the total count) from 2,616 project areas (typically counties) for the FSP. However, with the increase in data elements, we proposed that State agencies just report State level data to FNS but maintain project area data for FNS reviewers. Fifteen advocate groups and a legal aid office asked FNS to reconsider this proposed decision and suggested FNS should require States to continue to report project area data to FNS. They contended that the lack of project area data would make it harder for advocacy groups and legal aid offices to monitor a State agency's practices to see if they have the effect of discriminating against racial minorities. They would face undue burdens of time and expense in requesting and obtaining project area data from all States rather than getting it from FNS and may not get the data from some States. They feel FNS is too thinly-staffed to do a comprehensive review of this data in State agency offices. Finally, they argue that reporting project area data would not unduly burden States because States would still have to collect the project area data, and program their computers to provide this information to FNS for on-site visits. They note that once collected by project area at the State, having States report project area totals directly to FNS would not be that much more of a burden than maintaining it on-site.

After careful consideration of all the comments, we have decided to continue the current policy to collect project area data from State agencies. Project area data will allow us to continue to monitor local office activity and to ensure compliance with civil rights enforcement. Collecting the data through the Quality Control system as one commenter proposed is not adequate for project level data. While the quality control sample would provide a reliable estimate for the State, it would not provide a reliable estimate for a project area due to the small sample size in a project area. State agencies will need to compile and maintain the data for all categories by project area for FNS review. The data must be kept in an easily retrievable form and be made available to FNS upon request. While we recognize that there is a burden on State agencies to program their systems to compile the new data, once the data is compiled, the actual reporting to FNS thereafter will be a minimal burden for State agencies.

State agencies must collect racial and ethnic data on the household contact on the application. The State agency will have to modify their information system to store and compile data on all categories under this requirement and report to FNS by project area on the 20 racial and ethnic categories mentioned above on the Form FNS–101.

The State agency must maintain all applications received by the project area office for onsite review by FNS staff during civil rights reviews.

In February 2004, FNS modified its information system to allow States and project areas to report the current FNS–101 electronically by project area to FNS' information system. FNS' system will be further modified to accept the new FNS–101 electronically in the upcoming months.

Implementation

This will apply to all new applications received on or after the implementation date of April 1, 2007 as explained below. Several State agencies had indicated that it will take at least 12 months after the effective date to get a new application on all existing cases. One commenter asked about waivers if State agencies need more time. We understand State agencies' concerns about converting the existing caseload. By applying the new requirements solely to new applications and recertifications, we are not requiring caseload conversion outside the normal application process. The maximum certification period is 12 months for

most households, but the certification period may be lengthened to 24 months for households in which all adult members are elderly or disabled. Under the normal application process, we expect most cases to be under the new data collection requirement in 12 months. However, we understand that a small percentage of cases, the households with extended certification periods, may take up to 2 years to fall under the new data collection.

This rule is effective June 19, 2006. State agencies may implement the provisions of this rule anytime after June 19, 2006 but must implement the data collection no later than April 1, 2007 for all new applications. This will allow reporting of the new data for the report month of July 2007 for part of the caseload. The Form FNS–101 currently in use would remain in effect for the fiscal year 2006 reporting period for all State agencies.

List of Subjects in 7 CFR Part 272

Alaska, Civil rights, Food stamps, Grant programs-social programs, Reporting and recordkeeping requirements.

■ Accordingly, 7 CFR part 272 is amended as follows:

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

■ 1. The authority citation for part 272 continues to read as follows:

Authority: 7 U.S.C. 2011–2036.

■ 2. In § 272.6, paragraphs (g) and (h) are revised to read as follows:

§ 272.6 Nondiscrimination compliance.

* * * * *

(g) *Data collection.* The State agency must obtain racial and ethnic data on participating households in the manner specified by FNS. The application form must clearly indicate that the information is voluntary, that it will not affect the eligibility or the level of benefits, and that the reason for the information is to assure that program benefits are distributed without regard to race, color, or national origin. The State agency must develop alternative means of collecting the ethnic and racial data on households, such as by observation during the interview, when the information is not provided voluntarily by the household on the application form.

(h) *Reports.* As required by FNS, the State agency must report the racial and ethnic data on participating household contacts on forms or formats provided by FNS.

Dated: May 10, 2006.

Roberto Salazar,

Administrator.

[FR Doc. 06–4662 Filed 5–17–06; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 94

[Docket No. APHIS–2006–0010]

Add Kazakhstan, Romania, Russia, Turkey, and Ukraine To List of Regions In Which Highly Pathogenic Avian Influenza Subtype H5N1 is Considered To Exist

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 regulations concerning the importation of animals and animal products by adding Kazakhstan, Romania, Russia, Turkey, and Ukraine to the list of regions in which highly pathogenic avian influenza (HPAI) subtype H5N1 is considered to exist. We took that action because there have been outbreaks of HPAI subtype H5N1 in those countries. The interim rule was necessary to prevent the introduction of HPAI subtype H5N1 into the United States.

DATES: Effective on May 18, 2006, we are adopting as a final rule the interim rule that became effective on February 7, 2006.

FOR FURTHER INFORMATION CONTACT: Dr. Julie Garnier, Staff Veterinarian, Technical Trade Issues Team, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 39, Riverdale, MD 20737–1231; (301) 734–5677.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 9 CFR parts 93, 94, and 95 (referred to below as the regulations) govern the importation of certain animals, birds, poultry, meat, other animal products and byproducts, hay, and straw into the United States in order to prevent the introduction of various animal diseases, including highly pathogenic avian influenza (HPAI) subtype H5N1.

In an interim rule effective on February 7, 2006, and published in the **Federal Register** on February 13, 2006 (71 FR 7401–7402, Docket No. APHIS–2006–0010), we amended the regulations in part 94 by adding Kazakhstan, Romania, Russia, Turkey, and Ukraine to the list in § 94.6(d) of regions where HPAI subtype H5N1 exists.

Comments on the interim rule were required to be received on or before April 14, 2006. We received one comment by that date, from a private citizen. The commenter supported the interim rule. 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 rule concerning Executive Order 12866 and the Regulatory Flexibility Act, Executive Order 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 9 CFR Part 94

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

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

Accordingly, we are adopting as a final rule, without change, the interim rule that amended 9 CFR part 94 and that was published at 71 FR 7401–7402 on February 13, 2006.

Done in Washington, DC, this 12th day of May 2006.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 06–4650 Filed 5–17–06; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. CE243, Special Condition 23–183–SC]

Special Conditions; Dual Innovative Solutions & Support Electronic Flight Instrument Systems (EFIS) Installation in Pilatus PC–12, PC–12/45, and PC–12/47; Protection of Systems for High Intensity Radiated Fields (HIRF)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued to Innovative Solutions & Support (IS&S), 720 Pennsylvania Drive, Exton, PA 19341–1129, for a Supplemental Type Certificate for the Pilatus PC–12, PC–12/45, and PC–12/47 airplanes. These airplanes will have novel and unusual design features when compared to the state of technology envisaged in the applicable airworthiness standards. These novel and unusual design features include the installation of two 12″ x 9″ Integrated Flat Panel Display (IFPD) Electronic Flight Instrument Systems (EFIS), manufactured by IS&S, and components associated with this display system. The applicable regulations do not contain adequate or appropriate airworthiness standards for the protection of these systems from the effects of high intensity radiated fields (HIRF). These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to the airworthiness standards applicable to these airplanes.

DATES: The effective date of these special conditions is May 10, 2006. Comments must be received on or before June 19, 2006.

ADDRESSES: Comments may be mailed in duplicate to: Federal Aviation Administration, Regional Counsel, ACE–7, Attention: Rules Docket Clerk, Docket No. CE243, Room 506, 901 Locust, Kansas City, Missouri 64106. All comments must be marked: Docket No. CE243. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Wes Ryan, Aerospace Engineer, Standards Office (ACE–110), Small Airplane Directorate, Aircraft Certification Service, Federal Aviation Administration, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone (816) 329–4123.

SUPPLEMENTARY INFORMATION: The FAA has determined that notice and opportunity for prior public comment hereon are impracticable because the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA, therefore, finds that good cause exists for making these special conditions effective upon issuance.

Comments Invited

Interested persons are invited to submit such written data, views, or arguments, as they may desire. Communications should identify the regulatory docket or notice number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Administrator. The special conditions may be changed in light of the comments received. All comments received will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. CE243.'' The postcard will be date stamped and returned to the commenter.

Background

In early February 2006, IS&S made an application to the FAA for a new Supplemental Type Certificate (STC) for the Pilatus PC–12, PC–12/45, and PC–12/47 airplanes, which are currently approved under TC No. A78EU. The proposed modification incorporates novel or unusual design features that are vulnerable to HIRF external to the airplane.

Type Certification Basis

Under the provisions of 14 CFR part 21, § 21.101, IS&S must show that the Pilatus PC–12, PC–12/45, and PC–12/47 aircraft meet the provisions of the original certification basis for each model, as listed on the Type Data Sheet A78EU, and the additional provisions & applicable regulations in effect on the date of application for this Supplemental Type Change. The additional systems related provisions that cover the EFIS installation include: § 23.1301, § 23.1309, § 23.1311, § 23.1321, § 23.1322, § 23.1323, § 23.1331, § 23.1353, and § 23.1357 at the amendment level appropriate for the application date; exemptions, if any; and the special conditions adopted by this rulemaking action. Additional information regarding the certification basis for this STC is available from the applicant.

Discussion

If the Administrator finds that the applicable airworthiness standards do not contain adequate or appropriate safety standards because of novel or unusual design features of an airplane, special conditions are prescribed under the provisions of § 21.16.

Special conditions, as appropriate, as defined in § 11.19, are issued in accordance with § 11.38 after public notice and become part of the type certification basis in accordance with § 21.101(b)(2).

Special conditions are initially applicable to the model for which they are issued. Should the applicant apply for a supplemental type certificate to modify any other model already included on the same type certificate to incorporate the same novel or unusual design feature, the special conditions would also apply to the other model under the provisions of § 21.101.

Novel or Unusual Design Features

IS&S plans to incorporate certain novel and unusual design features into an airplane for which the airworthiness standards do not contain adequate or appropriate safety standards for protection from the effects of HIRF. These features include dual EFIS systems and associated components, potentially susceptible to the HIRF environment that were not envisaged by the existing regulations for this type of airplane.

Protection of Systems From High Intensity Radiated Fields (HIRF)

Recent advances in technology have given rise to the application in aircraft designs of advanced electrical and electronic systems that perform functions required for continued safe flight and landing. Due to the use of sensitive solid-state advanced components in analog and digital electronics circuits, these advanced systems are readily responsive to the transient effects of induced electrical current and voltage caused by the HIRF. The HIRF can degrade electronic systems performance by damaging components or upsetting system functions.

Furthermore, the HIRF environment has undergone a transformation that was not foreseen when the current requirements were developed. Higher energy levels are radiated from transmitters that are used for radar, radio, and television. Also, the number of transmitters has increased significantly. There is also uncertainty concerning the effectiveness of airframe shielding for HIRF. Furthermore, coupling to cockpit-installed equipment through the cockpit window apertures is undefined.

The combined effect of the technological advances in airplane design and the changing environment has resulted in an increased level of vulnerability of electrical and electronic systems required for the continued safe flight and landing of the airplane. Effective measures against the effects of exposure to HIRF must be provided by the design and installation of these systems. The accepted maximum energy levels in which civilian airplane system installations must be capable of operating safely are based on surveys and analysis of existing radio frequency emitters. These special conditions require that the airplane be evaluated under these energy levels for the protection of the electronic system and its associated wiring harness. These external threat levels, which are lower than previous required values, are believed to represent the worst case to which an airplane would be exposed in the operating environment.

These special conditions require qualification of systems that perform critical functions, as installed in aircraft, to the defined HIRF environment in paragraph 1 or, as an option to a fixed value using laboratory tests, in paragraph 2, as follows:

(1) The applicant may demonstrate that the operation and operational capability of the installed electrical and electronic systems that perform critical functions are not adversely affected when the aircraft is exposed to the HIRF environment defined below:

Frequency	Field strength (volts per meter)	
	Peak	Average
10 kHz–100 kHz	50	50
100 kHz–500 kHz	50	50
500 kHz–2 MHz	50	50
2 MHz–30 MHz	100	100
30 MHz–70 MHz	50	50
70 MHz–100 MHz	50	50
100 MHz– 200 MHz	100	100
200 MHz–400 MHz	100	100
400 MHz–700 MHz	700	50
700 MHz–1 GHz	700	100
1 GHz–2 GHz	2000	200
2 GHz–4 GHz	3000	200
4 GHz–6 GHz	3000	200
6 GHz–8 GHz	1000	200
8 GHz–12 GHz	3000	300
12 GHz–18 GHz	2000	200
18 GHz–40 GHz	600	200

The field strengths are expressed in terms of peak root-mean-square (rms) values.

or,

(2) The applicant may demonstrate by a system test and analysis that the electrical and electronic systems that perform critical functions can withstand a minimum threat of 100 volts per meter, electrical field strength, from 10 kHz to 18 GHz. When using this test to show compliance with the HIRF requirements, no credit is given for signal attenuation due to installation.

A preliminary hazard analysis must be performed by the applicant, for approval by the FAA, to identify either electrical or electronic systems that perform critical functions. The term ''critical'' refers to functions, whose failure would contribute to, or cause, a failure condition that would prevent the continued safe flight and landing of the airplane. The systems identified by the hazard analysis that perform critical functions are candidates for the application of HIRF requirements. A system may perform both critical and non-critical functions. Primary electronic flight display systems, and their associated components, perform critical functions such as attitude, altitude, and airspeed indication. The HIRF requirements apply only to critical functions.

Compliance with HIRF requirements may be demonstrated by tests, analysis, models, similarity with existing systems, or any combination of these. Service experience alone is not acceptable since normal flight operations may not include an exposure to the HIRF environment. Reliance on a system with similar design features for redundancy as a means of protection against the effects of external HIRF is generally insufficient since all elements of a redundant system are likely to be exposed to the fields concurrently.

Applicability

As discussed above, these special conditions are applicable to the Pilatus PC–12, PC–12/45, and PC–12/47 airplanes. Should IS&S apply at a later date for a supplemental type certificate to modify any other model on the same type certificate to incorporate the same novel or unusual design feature, the special conditions would apply to that model as well under the provisions of § 21.101.

Conclusion

This action affects only certain novel or unusual design features on one model of airplane. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. For this reason, and because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has

determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 23

Aircraft, Aviation safety, Signs and symbols.

Citation

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113 and 44701; 14 CFR 21.16 and 21.101; and 14 CFR 11.38 and 11.19.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Pilatus PC–12, PC–12/45, and PC–12/47 airplanes modified by IS&S to add dual EFIS installations.

1. *Protection of Electrical and Electronic Systems From High Intensity Radiated Fields (HIRF).* Each system that performs critical functions must be designed and installed to ensure that the operations, and operational capabilities of these systems to perform critical functions, are not adversely affected when the airplane is exposed to high intensity radiated electromagnetic fields external to the airplane.

2. For the purpose of these special conditions, the following definition applies:

Critical Functions: Functions whose failure would contribute to, or cause, a failure condition that would prevent the continued safe flight and landing of the airplane.

Issued in Kansas City, Missouri on May 10, 2006.

David R. Showers,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 06–4624 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–21028; Directorate Identifier 2004–NM–238–AD; Amendment 39–14601; AD 2006–10–17]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–600, –700, –700C, –800, and –900 Series Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Boeing Model 737–600, –700, –700C, –800, and –900 series airplanes. This AD requires replacing brackets that hold the P5 panel to the airplane structure, the standby compass bracket assembly, the generator drive and standby power module, and the air conditioning module. This AD also requires, among other actions, inspecting for wire length and for damage of the connectors and the wire bundles, and doing applicable corrective actions if necessary. This AD results from an electrical burning smell in the flight compartment. We are issuing this AD to prevent wire bundles from contacting the overhead dripshield panel and modules in the P5 overhead panel, which could result in electrical arcing and shorting of the electrical connector and consequent loss of several critical systems essential for safe flight.

DATES: This AD becomes effective June 22, 2006.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of June 22, 2006.

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

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

FOR FURTHER INFORMATION CONTACT: Binh Tran, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6485; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Examining the Docket

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

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to certain Boeing Model 737–600, –700, –700C, –800, and –900 series airplanes. That NPRM was published in the **Federal Register** on April 27, 2005 (70 FR 21689). That NPRM proposed to require replacing brackets that hold the P5 panel to the airplane structure, the standby compass bracket assembly, the generator drive and standby power module, and the air conditioning module. That NPRM also proposed to require, among other actions, inspecting for wire length and for damage of the connectors and the wire bundles, and doing applicable corrective actions if necessary.

New Relevant Service Information

Since the issuance of the NPRM, we have reviewed Revision 2 of Boeing Service Bulletin 737–24A1141, dated December 1, 2005 (Revision 1 of the service bulletin was referenced in the NPRM as the appropriate source of service information for doing certain proposed actions). Revision 2 updates multiple figures to correct typographical errors in the graphics or in the task or flag note tables. Revision 2 also moves a certain group of airplanes from one figure to another. The procedures in Revision 2 are essentially identical to those in Revision 1. No more work is necessary on airplanes changed as shown in Revision 1 of the service bulletin. Therefore, we have revised paragraph (f) of this AD to refer to Revision 2 as the appropriate source of service information for doing the required inspection, replacements, wiring changes, and corrective actions if necessary. We also have revised the applicability to refer to Revision 2 as the appropriate source of service information for determining the affected airplanes. In addition, we have added a new paragraph (g) to the AD (and redesignated subsequent paragraphs) to give operators credit for doing the actions required by paragraph (f) before

the effective date of this AD in accordance with Revision 1.

Comments

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

Support for NPRM

AirTran Airways and The Boeing Company support the NRPM.

Requests To Extend Compliance Time

The Air Transport Association (ATA) of America, Inc., on behalf of one of its members (American Airlines), and Continental Airlines request that the compliance time specified in paragraph (f) of the NPRM be extended. Continental Airlines states that a compliance time of 36 months is necessary, because of the large number of work hours specified in Boeing Alert Service Bulletin 737–24A1141, Revision 1, for doing the examination, change, and retermination if necessary. American Airlines states that a compliance time of 48 months is necessary to align with heavy maintenance schedules and to avoid an unnecessary financial burden.

We agree that the compliance time in paragraph (f) of this AD can be extended somewhat. We intended to require the inspection, replacements, wiring change, and retermination if necessary at intervals that would coincide with regularly scheduled maintenance visits for the majority of the affected fleet, when the airplanes would be located at a base where special equipment and trained personnel would be readily available, if necessary. Based on the information supplied by the operators, we have determined that 36 months corresponds more closely to the interval representative of most of the affected operators' heavy maintenance schedules. We have revised paragraph (f) of the AD accordingly. We do not consider that this extension will adversely affect safety.

Request for an Alternative Method of Compliance (AMOC)

The ATA of America, Inc., on behalf of one of its members (Delta Air Lines), states that there are a number of errors in Boeing Alert Service Bulletin 737–24A1141, Revision 1, and requests that we approve corrections made to the service bulletin as an AMOC for the corresponding proposed actions in the NPRM. Delta Air Lines states that other errors have been identified in Boeing Information Notice 69–37319–21–02 IN 02.

We partially agree. We agree with the ATA of America, Inc., and Delta Air Lines that there are several errors in Boeing Alert Service Bulletin 737–24A1141, Revision 1, but do not agree to revise the AD as suggested by them. As discussed previously in ''New Relevant Service Information,'' we have reviewed Boeing Service Bulletin 737–24A1141, Revision 2, and have revised this AD to refer to that revision as an appropriate source of service information for the actions required by paragraph (f) of this AD.

Request To Refer to Original Issue of Service Bulletin

The ATA of America, Inc., on behalf of one of its members (Delta Air Lines), requests that we refer to the original release of Boeing Component Service Bulletin 69–37319–21–02, dated March 15, 2001, in paragraph (g)(2) of the NPRM (redesignated as paragraph (h)(2) in this AD) as an acceptable means of compliance with the proposed modification, if the modification specified in the original release was done before the effective date of the AD. Delta Air Lines notes that Revision 1 of the component service bulletin, which is cited in paragraph (g)(2) as the appropriate source of service information, states, ''No more work is necessary on components changed as shown on the initial release of this service bulletin.''

We do not agree. We have confirmed with The Boeing Company that the statement above in Revision 1 of the component service bulletin is incorrect. More work is necessary on components changed as shown in the original issue of the component service bulletin. The Boeing Company has issued Information Notice 69–37319–21–02 IN 03 to inform operators of this error. Therefore, we have made no change to the AD in this regard.

Request To Verify Parts Availability

Alaska Airlines finds the proposed actions and the 24-month compliance time acceptable provided that the kits for parts for the modification are readily available during that period of time.

From this comment, we infer that Alaska Airlines is requesting that we verify whether parts will be available for doing the modifications within the proposed compliance time. The Boeing Company has informed us that there are sufficient parts available for doing the required modification within the compliance time.

Request To Revise Work Hour Estimate

Continental Airlines requests that the work hour estimates for the replacements, inspections, and modifications in ''Costs of Compliance'' of the NPRM be aligned with the total task hours specified in Boeing Alert Service Bulletin 737–24A1141, Revision 1. Continental Airlines also points out that the cure time (eight hours) and the time for retermination of connectors are not included in the total task hours in the service bulletin.

We do not agree. The ''Costs of Compliance'' describes only the direct costs of the actions required by this AD. Based on the best data available, The Boeing Company provided 16 or 18 work hours (depending on airplane configuration) for doing the required inspection, replacements, and wiring changes; provided 2 work hours for doing the required modification of the generator drive and standby power module assembly; and provided 1 work hour for doing the required modification of the air conditioning module assembly. These numbers represent the time necessary to perform only the actions actually required by this AD. We recognize that, in doing the actions required by an AD, operators may incur incidental costs in addition to the direct costs. The cost analysis in AD rulemaking actions, however, typically does not include incidental costs such as the time required to gain access and close up, time necessary for planning, or time necessitated by other administrative actions. Those incidental costs, which may vary significantly among operators, are almost impossible to calculate.

In addition, the economic analysis of an AD is limited to the cost of actions that are actually required. The economic analysis does not consider the costs of conditional actions, such as repairing damaged wire bundles detected during a required inspection. Such conditional repairs would be required—regardless of AD direction—to correct an unsafe condition identified in an airplane and to ensure that the airplane is operated in an airworthy condition, as required by the Federal Aviation Regulations. Therefore, we have made no change to this AD in this regard.

Clarification of Alternative Method of Compliance (AMOC) Paragraph

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

Conclusion

We have carefully reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting

the AD with the changes described previously. We have determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Costs of Compliance

There are about 740 airplanes of the affected design in the worldwide fleet and 333 affected airplanes on the U.S. register.

For all airplanes, the required inspection, replacements, and wiring change will take about 16 or 18 work hours per airplane (depending on airplane configuration), at an average labor rate of $65 per work hour. Required parts will cost about $10,231 or $11,139 per airplane (depending on the kit). Based on these figures, the estimated cost of the replacements and inspections required by this AD for U.S. operators is between $3,753,243 and $4,098,897, or between $11,271 and $12,309 per airplane.

For certain airplanes, the modification of the generator drive and standby power module assembly will take about 2 work hours per airplane, at an average labor rate of $65 per work hour. The airplane manufacturer states that it will supply required parts to operators at no cost. Based on these figures, the estimated cost of this modification required by this AD is $130 per airplane.

For certain other airplanes, the modification of the air conditioning module assembly will take about 1 work hour per airplane, at an average labor rate of $65 per work hour. The airplane manufacturer states that it will supply required parts to operators at no cost. Based on these figures, the estimated cost of this modification required by this AD is $65 per airplane.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2006–10–17 Boeing: Amendment 39–14601. Docket No. FAA–2005–21028; Directorate Identifier 2004–NM–238–AD.

Effective Date

(a) This AD becomes effective June 22, 2006.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Boeing Model 737–600, –700, –700C, –800, and –900 series airplanes, certificated in any category; as identified in Boeing Service Bulletin 737–24A1141, Revision 2, dated December 1, 2005.

Unsafe Condition

(d) This AD results from an electrical burning smell in the flight compartment. We are issuing this AD to prevent wire bundles from contacting the overhead dripshield panel and modules in the P5 overhead panel, which could result in electrical arcing and shorting of the electrical connector and consequent loss of several critical systems essential for safe flight.

Compliance

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

Inspection/Replacements/Wiring Changes/Corrective Actions

(f) Within 36 months after the effective date of this AD, do the actions in paragraphs (f)(1) through (f)(5) of this AD by accomplishing all the applicable actions specified in the Accomplishment Instructions of Boeing Service Bulletin 737–24A1141, Revision 2, dated December 1, 2005. Any applicable corrective actions must be done before further flight.

(1) Replace the five brackets that hold the P5 panel to the airplane structure with new brackets;

(2) Do a general visual inspection for wire length and damage of the connectors and the wire bundles, and applicable corrective actions;

(3) Make wiring changes;

(4) Replace the standby compass bracket assembly with a new assembly; and

(5) Replace the stud assemblies with new assemblies.

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

(g) Actions done before the effective date of this AD in accordance with Boeing Alert Service Bulletin 737–24A1141, Revision 1, dated December 23, 2004, are acceptable for compliance with the requirements of paragraph (f) of this AD.

Concurrent Requirements

(h) Before or concurrently with the requirements of paragraph (f) of this AD, do the applicable action specified in Table 1 of this AD.

TABLE 1.—CONCURRENT REQUIREMENTS

For airplanes identified in Boeing Component Service Bulletin—	Action
(1) 233A3205–24–01, dated July 26, 2001	Modify the generator drive and standby power module assembly in accordance with the Accomplishment Instructions of the service bulletin.
(2) 69–37319–21–02, Revision 1, August 30, 2001.	Modify the air conditioning module assembly in accordance with the Accomplishment Instructions of the service bulletin.

Alternative Methods of Compliance (AMOCs)

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

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

Material Incorporated by Reference

(j) You must use the applicable service information identified in Table 2 of this AD to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of these documents in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov*; or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

TABLE 2.—MATERIAL INCORPORATED BY REFERENCE

Service bulletin	Revision level	Date
(1) Boeing Component Service Bulletin 233A3205–24–01	Original Issue	July 26, 2001.
(2) Boeing Component Service Bulletin 69–37319–21–02	1	August 30, 2001.
(3) Boeing Service Bulletin 737–24A1141	2	December 1, 2005.

Issued in Renton, Washington, on May 8, 2006.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 06–4595 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–21331; Directorate Identifier 2005–NE–07–AD; Amendment 39–14605; AD 2006–10–21]

RIN 2120–AA64

Airworthiness Directives; Engine Components Incorporated (ECi) Reciprocating Engine Connecting Rods

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

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Lycoming Engines (formerly Textron Lycoming) 360 and 540 series reciprocating engines with ECi connecting rods, part number (P/N) AEL11750, installed. The Airmotive Engineering Corp, Division of Engine Components Incorporated (ECi), holds the Parts Manufacturer Approval (PMA) for the affected parts, and markets the parts as ECi parts. This AD requires replacing certain lot and serial numbered connecting rods, P/N AEL11750, having forging part number AEL11488. This AD would also prohibit installing certain ECi connecting rods, P/N AEL11750, into any Lycoming 360 or 540 series reciprocating engines. This AD results from reports of connecting rods with excessive variation in circularity of the journal bores. We are issuing this AD to prevent fatigue failure of the connecting rod and a possible uncommanded shutdown of the engine.

DATES: This AD becomes effective June 22, 2006.

ADDRESSES: You may examine the AD docket on the Internet at *http://dms.dot.gov* or in Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Peter Hakala, Aerospace Engineer, Special Certification Office, FAA, Rotorcraft Directorate, 2601 Meacham Blvd., Fort Worth, TX 76193; telephone (817) 222–5145; fax (817) 222–5785.

SUPPLEMENTARY INFORMATION: The FAA proposed to amend 14 CFR part 39 with a proposed airworthiness directive (AD). The proposed AD applies to Lycoming Engines (formerly Textron Lycoming) 360 and 540 series reciprocating engines with ECi connecting rods, part number (P/N) AEL11750, installed. We published the proposed AD in the **Federal Register** on October 5, 2005 (70 FR 58103). That action proposed to require replacing certain lot and serial numbered connecting rods, P/N AEL11750, having forging part number AEL11488. That action would also prohibit installing certain ECi connecting rods, P/N AEL11750, into any Lycoming 360 or 540 series reciprocating engines.

Examining the AD Docket

You may examine the docket that contains the AD, any comments received, and any final disposition in person at the Docket Management Facility Docket Offices between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone (800) 647–5227) is located on the plaza level of the Department of Transportation Nassif Building at the street address stated in **ADDRESSES.** Comments will be available

in the AD docket shortly after the DMS receives them.

Comments

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

Date Range for Defective Connecting Rods

Six commenters request the date range during which the defective ECi connecting rods were manufactured or produced. Knowledge of the manufacturing dates for the defective connecting rods could make them easier to identify. We agree. ECi produced the connecting rods, P/N AEL11750, with lot numbers 1 thru 54, between January 2002 and January 2004. We changed the AD applicability to indicate the dates ECi produced the connecting rods.

Labor Time To Replace the Connecting Rods

Four commenters express concern that the labor time allotted to remove and replace the ECi connecting rods is insufficient. We disagree. The engine labor time estimates come from the Lycoming ''Removal and Installation Labor Allowance Guidebook'', SSP–875, Revision dated May 2000. The labor allowance indicates that four hours are required to replace each connecting rod. Therefore, a four-cylinder engine with four connecting rods would require 16 workhours to remove and replace the connecting rods. We did not change the AD.

Discussion Regarding Failure of the Connecting Rod Insert Bearings

Two commenters discuss the relationship between the failure of the connecting rod insert bearing and the manufacturing defects in circularity with the ECi connecting rods. We partially agree. The contact signature between the big bore end of the connecting rod and the backs of the insert bearings is critical. Improper machining of the big bore end of the connecting rod can cause irregular support and distress to the insert bearings. A manufacturer of engine insert bearings states that wavy patterns on the connecting rod surface are also indicated by horizontal stripes on the inner surface of the connecting rod bearing. The horizontal stripes or contact signature marks appear after the engine is run from 100 to 200 hours. Less severe contact signature marks on the big bore end of the connecting rod will not propagate a failure, as observed on several Lycoming connecting rods. However, more severe dimensional defects than existed on ECi connecting rods examined by the FAA may cause distress and fatigue failure of the insert bearings. We determined that the fatigue failure of the insert bearing accelerated the fracture of the ECi connecting rod with the resulting engine failure that prompted this AD. We are not aware of any reports of engine failures caused by Lycoming connecting rods with similar contact signature marks. We did not change the AD.

More Frequent Oil and Filter Changes

Two commenters recommend that the oil and filter be changed every 25 hours and that the oil filters be cut open and inspected for any non-magnetic insert bearing materials. We disagree. Lycoming Engines has issued several mandatory service bulletins for connecting rod insert bearing replacement that also require more frequent oil and filter changes. For example, Lycoming Service Bulletin No. 547 and Service Bulletin No. 561 state: ''Until the subject engine has been upgraded with new bearings, Lycoming requires that the oil and filter change interval be reduced to 10 hours and a mandatory filter and suction screen inspection be accomplished at each interval.'' Lycoming also suggests that more frequent oil changes with examination of the contents of the oil filter can show early signs of connecting rod insert bearing problems. We do not require more frequent oil changes, and we did not change the AD.

Society of Automotive Engineers (SAE) Standards for Automobile Engines

Two commenters ask if the FAA uses SAE standards for engine clearances for water-cooled automobile engines. They also suggest that the FAA is creating new airworthiness standards for air-cooled piston engines. We disagree. We did not use SAE standards for water-cooled automobile engines for the development of the connecting rod AD. We did not change this AD.

Extend the NPRM Comment Period

One commenter requested that we extend the NPRM comment period an additional 90 days. We disagree. Several months have passed since the December 5, 2005 comment deadline without any additional comments. Therefore, we see no reason to extend the comment period. We did not change the AD.

Comments That the Proposed AD is Not Necessary

Several commenters question the need for the connecting rod AD. We disagree. We confirmed that a manufacturing defect existed in the ECi connecting rods. The FAA has determined that this defect was the most probable cause of an engine shutdown and forced landing incident. ECi identified the manufacturing process deficiencies that were responsible for the defective condition and took specific actions to correct these deficiencies. We also determined that the subject ECi connecting rods in service could possess these manufacturing defects and could, therefore, fail during operation. The AD has now been changed to require that the subject connecting rods be removed at 2,000 hours time-in-service (TIS) rather than the 1,500 TIS required in the NPRM. We project that the required replacement time can be extended to 2,000 hours (TIS) while maintaining an acceptable level of safety. With the AD applying to the first 400 production connecting rods, we estimate that only about 100 aircraft engines will be affected. This AD is necessary to insure that these parts are removed from service to prevent this unsafe condition from causing an engine failure and uncommanded shutdown.

Discussion of Connecting Rod Service Difficulties

On October 16, 2003, ECi informed us that a Lycoming Engines O–360-A4M engine experienced an in flight engine failure and uncommanded shutdown. The failure occurred after 50 hours TIS following an engine overhaul. ECi P/N AEL11750 connecting rods were installed in this engine. The No. 4 connecting rod used in the Lycoming Engines O–360–A4M failed due to destruction of the big bore end bearing and its support. Examination of the No. 1, No. 2, and No. 3 connecting rods indicated an unusual contact signature between the big bore ends and the backs of the respective insert bearings. The signature was essentially the same for each of the three rods and consisted of evenly spaced marks parallel to the big bore end axes. There was also significant damage present on the inner diameter of these three insert bearings. Our metallurgical report also indicated that the big bore end of the connecting rod had been poorly machined. This is consistent with a finding in 2003, that a grinding machine used to produce the parts had introduced irregular shaped holes at the big bore end of the connecting rod due to problems with the bearings, grinding stones and cutting fluid in the grinding machine. Also, FAA approved repair stations reported that the early ECi P/N AEL11750 connecting rods had insufficient clearance for a socket to fit correctly over the connecting rod nut. Dragging of

the socket on the side of the connecting rod would result in an incorrect torque value when the connecting rod nut was torqued during engine assembly. ECi changed the design of the connecting rod to provide more socket clearance. An undertorqued rod bolt could loosen during operation.

Inspection and Regrinding of the Connecting Rods at Engine Overhaul

Four commenters recommend that the ECi AEL11750 connecting rods be inspected after removal at engine overhaul and be reground to clean up any defects. We disagree. A Lycoming service bulletin describes the inspection and regrinding of connecting rods at engine overhaul, but the connecting rods in this AD are not made by Lycoming. ECi might be developing a new service bulletin for the identification and inspection of the subject connecting rods. We did not change the AD requirement for the connecting rod removal.

Definition of Connecting Rod Accessibility

Connecting rod accessibility is defined in paragraph (g)(4)(iii) as any maintenance action in which a cylinder assembly is removed for maintenance. These Lycoming engines are normally overhauled at 2,000 hours (TIS), therefore, we estimate that 70% of the subject connecting rods will be replaced at engine overhaul. The subject connecting rods can be replaced when a cylinder assembly is removed for maintenance. If the connecting rods are replaced during cylinder assembly removal, the engine case halves do not have to be separated.

Conclusion

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

Costs of Compliance

We estimate that this AD would affect about 100 Lycoming Engines 360 and 540 series reciprocating engines installed on aircraft of U.S. registry. We also estimate that it would take about 4 workhours per connecting rod (a four cylinder engine with four connecting rods would require 16 workhours to remove and replace the connecting rods), and that the average labor rate is $65 per workhour. Required parts would cost about $450 per connecting rod. Based on these figures, we estimate the total cost of the AD to U.S. operators to be $288,000.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary at the address listed under **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2006–10–21 Engine Components Incorporated (ECi): Amendment 39–14605. Docket No. FAA–2005–21331; Directorate Identifier 2005–NE–07–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective June 22, 2006.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Lycoming Engines (formerly Textron Lycoming) 360 and 540 series reciprocating engines specified in Table 1 of this AD with Engine Components Incorporated (ECi) connecting rods, part number (P/N) AEL11750 installed, limited to Serial Numbers 54/6 and below and produced between January 2002 and January 2004. They are also identified with forging P/N AEL11488 in raised letters on the web of the beam between the big and small ends of the connecting rod.

TABLE 1.—ENGINE MODELS

Engine models
O–360–A1A, A1AD, A1C, A1D, A1F, A1F6, A1F6D, A1G, A1G6, A1G6D, A1H, A1H6, A1LD, A1P, A2A, A2D, A2E, A2F, A2G, A2H, A3A, A3AD, A3D, A4A, A4AD, A4D, A4G, A4J, A4K, A4M, A4N, A4P, A5AD, B1A, B1B, B2A, B2B, C1A, C1C, C1E, C1F, C1G, C2A, C2B, C2C, C2D, C2E, C4F, C4P, D1A, D2A, D2B, F1A6, G1A6, J2A;
HO–360–A1A, B1A, B1B, C1A;
IO–360–B1A, B1B, B1C, B1D, B1E, B1F, B1F6, B1G6, B2E, B2F, B2F6, B4A, E1A, F1A, L2A;
LO–360–A1G6D, A1H6;
HIO–360–A1A, A1B, B1A, B1B;
AEIO–360–B1B, B1D, B1F, B1F6, B1G6, B2F, B2F6, B4A, H1A, H1B;
O–540–A1A, A1A5, A1B5, A1C5, A1D, A1D5, A2B, A3D5, A4A5, A4B5, A4C5, A4D5, B1A5, B1B5, B1D5, B2A5, B2B5, B2C5, B4A5, B4B5, D1A5, E4A5, E4B5, E4C5, F1A5, F1B5, G1A5, G2A5, H1A5, H1A5D, H1B5D, H2A5, H2A5D, H2B5D;
AEIO–540–D4A5, D4B5, D4C5, D4D5;
IO–540–A1A5, B1A5, B1B5, B1C5, C1B5, C1C5, C2C, C4B5, C4C5, C4D5, C4D5D, D4A5, D4B5, D4C5, E1A5, E1B5, E1C5, G1A5, G1B5, G1C5, G1D5, G1E5, G1F5, J4A5, N1A5, P1A5, R1A5, T4A5D, T4B5, T4B5D, T4C5D, V4A5, V4A5D;
LTIO–540–K1AD;

TABLE 1.—ENGINE MODELS—Continued

Engine models
TIO–540–C1A, E1A, G1A, H1A, K1AD, AA1AD, AB1AD, AB1BD, AF1A, AF1B, AG1A.

These engines are installed on, but not limited to, the aircraft listed in Table 2 of this AD.

TABLE 2.—AIRCRAFT MODELS

Aircraft manufacturer	Aircraft model
Aero Boero	AB–180, AB–260.
Aero Commander	Lark (100), Aero Commander (500, 500–B, 500–E, 500–U).
Aero Engine Service Ltd	Victa (R–2).
Aerofab Inc	Renegade 250, Turbo Renegade (270).
Aviamilano	Flamingo (F–250).
Aviat	Husky.
Avions Pierre Robin	(HR100/250).
Beagle	Airedale (A–109), Husky (D5–180 01–U).
Bellanca Aircraft	Scout (8GCBC–CS, 8GCBC FP), Super Decathlon (8KCAB–180), Aries T–250.
Bolkow	207, Klemm (K1–107C).
Britten-Norman	BN–2.
Brooklanda	Scoutmaster.
C.A.A.R.P.	S A.N. (M–23III), C.A.P. (10).
C. Itoh and Co	Fuji FA–200.
Center Est Aeronautique	Regente (DR–253).
Cerva	(CE–43 Guepard).
Cessna Aircraft	Cardinal C–177A and C–177B, Teal III, TSC (1A3), Skyhawk RG, and C–172RG, Cutlass C–172Q.
Christen	Husky (A–1), Christen. Pitts (S–2S), (S–2B).
DeHavilland	Drover (DHA–3MK3), Heron Conversion.
Dinfia	Ranquel (IA–51), Querandi (1A–45).
Dornier	(DO–28, DO–28–B1, DO–8–B1).
Doyn Aircraft	Doyn-Cessna (170B, 172, 172A, 172B).
Doyn Aircraft	Doyn-Beech (Beech 95).
Doyn Aircraft	Doyn-Piper (PA–23 ''160'', PA–23 ''200'', PA–24 ''250'', PA–23 ''250'').
Earl Horton	Pawnee (Piper PA–25).
Embraer	Corioca (EMB–710), Impanema ''AG.''
F.F.A.	Bravo (200).
Found Bros	(FBA–2C), Centennial (100).
Fuji	(FA–200).
General Aviation	Model 114.
Gippsland	GA–200.
Great Lakes	Trainer.
Grob	G115/Sport-Acro.
H.A.L.	HPT–32.
Hughes Tool Co	(269A, 269–A–1, YHO–2HU, 300).
Intermountain Mfg Co	Call Air (A–6, A–9, IAR821, IAR–822, IAR–826, IAR–823).
Kingsford-Smith	Bushmaster (O–6).
Lake Aircraft	Colonial (C–2, LA–4, 4A or 4P), Seawolf.
Malmo	Vipan (MF–10B, MF1–10).
Maule	Star Rocket MX–7–180, MX–7–180A, Star Rocket (MX–7–235), Super Rocket (M–6–235), Super Std. Rocket (M–7–235).
Mid-States Mfg. Co	Twin Courier (H–500), (U–5).
Mooney Aircraft	Master ''21'' (M–20D, M–20E), Mark ''20B'', ''20D'', (M20B, M20C), Statesman (M–20G), Mark ''21'' (M–20E), ''TLS'' M20M.
Moravan	Zlin-50L.
Mundry	CAP–10.
Nash Aircraft Ltd	Petrel.
Neiva	1PD–590V.
Norman Aeroplace Co	NAC–1 Freelance.
Omega Aircraft	BS–12D1.
Partenavia	Oscar (P–66).
Penn Yan	Super Cub Conversion.
Pilatus Britten-Norman	Islander (BN–2A–26), Islander (BN–2A–27, Islander II (BN–2B–26), Islander (BN–2A–21), Trislander (BN–2A–Mark III–2).
Piper Aircraft	Comanche (PA–24), Seminole (PA–44), Cherokee ''C'' (PA–28 ''180''), Cherokee ''D'' (PA–28 180''), Archer II (PA–28 ''180''), Arrow (PA–28 ''180R''), Seminole (PA–44), Comanche (PA–24 ''150''), Aztec (PA–23 ''250''), Cherokee (PA–24 ''250''), Pawnee (PA–24 ''235''), Cherokee (PA–28 ''235''), Aztec (PA–23 ''235''), Cherokee (PA–28 ''235''), Comanche (PA–24 ''260''), Cherokee Six (PA–32 ''260''), Pawnee (PA–25 ''260''), Aztec B (PA–23 ''250''), Comanche (PA–24 ''250''), Aztec C (PA–23 ''250''), Aztec F, Comanche (PA–24), Turbo Aztec (PA–23–250).

TABLE 2.—AIRCRAFT MODELS—Continued

Aircraft manufacturer	Aircraft model
Pitts	S–1S.
Poeschel	P–300.
Procaer	Picchio (F–15–A).
Rawdon Brow	Radon (T–1).
Raytheon Aircraft Co (Beech)	Travel-Air (95, B–95, B–95A, B–95B), Duchess 76, Sport, Musketeer Custom III, Sundowner 180.
Regente	N–591.
Rhein-Flugzeughau	RF–V.
Riley Aircraft	Rocket-Cessna (310), Turbo-Rocket, Turbo-Aztec.
Robin	Regent (DR400/180), Remorqueur (DR400/180R), R–3170, Aiglon (R–1180T).
Robinson	R–44.
Rockwell	Commander (114, 114B, 114TC).
S A.A.B.	Safir (91–D).
Schweizer Aircraft Corporation	269A.
S.O.C.A.T.A.	Tobago (TB–10), Rallye Commodore (MS–893), Rallye 180GI, Sportana Sportsman (RS–180), Rallye 235CA, Rallye 235GT, Rallye 235C, TB–20, Trinidad TB–20, Trinidad TC TB–21.
Shrike	(500–S).
Societe Aeronautique Normande. Mousquetaire	D–140, Jodel (D–140C).
Siai-Marchetti	(S–205, SF–260, SF–208).
Silvercraft	
Std. Helicopter	
Sud	Gardan (GY–180).
Tiger Aircraft LLC (American General)	Tiger.
T. R. Smith Aircraft	Aerostar, (600).
United Consultants	See-Bee.
Utva	75.
Valmet	PIK–23.
Varga	Kachina.
Wassmer	Super 4 (WA–50A), Sancy (WA–40), Baladou (WA–40), Pariou (WA–40), (WA–50), Europa WA–52, WA–421, WA4–2V.
Yoeman Aviation	YA–1.

Unsafe Condition

(d) This AD results from reports of connecting rods with excessive variation in circularity of the journal bores. We are issuing this AD to prevent fatigue failure of the connecting rod and possible uncommanded shutdown of the engine.

Compliance

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

Engines Not Repaired or Overhauled Since New

(f) If your engine has not been overhauled or had any repair since new, no further action is required.

Engines Overhauled or Repaired Since New

(g) If your engine was overhauled or repaired since new, do the following:

(1) Before further flight inspect the maintenance records and engine logbook to determine if the overhaul or repair facility used ECi connecting rods, P/N AEL11750.

(2) If the connecting rods are not ECi, P/N AEL11750, no further action is required.

(3) If the connecting rods are ECi, P/N AEL11750, and if the serial number is 54/7 or higher, no further action is required. (Note: 54 is the lot number and 7 is the serial number of the ECi connecting rod.)

(4) If the connecting rods are ECi, P/N AEL11750, having forging P/N AEL11488 in raised letters on the web of the beam, and if the serial number is 54/6 or lower, do the following:

(i) If the connecting rod has 2,000 or more hours time-in-service (TIS), replace the connecting rod with a connecting rod that has a lot number 55 or higher, or that has a P/N not specified in this AD, within 50 hours TIS after the effective date of this AD.

(ii) If the connecting rod has fewer than 2,000 hours TIS, replace the connecting rod with a connecting rod that has a lot number 55 or higher, or that has a P/N not specified in this AD, at the next engine overhaul, or next accessibility of the connecting rod, but no later than 2,000 hours TIS on the connecting rod.

(iii) For the purpose of this AD, connecting rod accessibility is defined as any maintenance action in which a cylinder assembly is removed for maintenance.

(h) After the effective date of this AD, do not install any ECi connecting rod, P/N AEL11750, that has SN 54/6 or lower into any engine.

Alternative Methods of Compliance

(i) The Manager, Special Certification Office, has the authority to approve alternative methods of compliance for this AD, if requested, using the procedures found in 14 CFR 39.19.

Related Information

(j) None.

Material Incorporated by Reference

(k) None.

Issued in Burlington, Massachusetts, on May 12, 2006.

Thomas A. Boudreau,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 06–4646 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 183

[Docket No. FAA–2003–16685]

RIN 2120–AH79

Establishment of Organization Designation Authorization Program

ACTION: Final rule; correction.

SUMMARY: This action makes a correction to 14 CFR part 183 by adding two section references that were inadvertently omitted from the final rule published in the **Federal Register** on October 13, 2005 (70 FR 59932).

DATES: This correction is effective November 14, 2005.

FOR FURTHER INFORMATION CONTACT: For technical issues, Ralph Meyer, Delegation and Airworthiness Programs Branch, Aircraft Engineering Division

(AIR–140), Aircraft Certification Service, Federal Aviation Administration, 6500 S. MacArthur Blvd, ARB Room 308, Oklahoma City, OK 73169; telephone (405) 954–7072; facsimile (405) 954–2209, e-mail *ralph.meyer@faa.gov.* For legal issues, Karen Petronis, Office of the Chief Counsel, Regulations Division (AGC–200), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–3073; facsimile (202) 267–7971; e-mail *karen.petronis@faa.gov.* [address of original contact person].

SUPPLEMENTARY INFORMATION:

Background

When the FAA issued the final rule, ''Establishment of Organization Designation Authorization Program'' in October 2005, we inadvertently omitted two section references from paragraph (b) of § 183.15. This paragraph provides for the duration of certificates for Flight Standards or Aircraft Certification Service Designated Representatives. The references omitted were to the sections describing the privileges of pilot examiners (§ 183.23) and technical personnel examiners (§ 183.25). This correction adds those two references to § 183.15(b).

Need for Correction

The omission of these two references could cause confusion with regard to the duration of the two referenced delegations.

List of Subjects in 14 CFR Part 183

Aircraft, Airmen, Authority delegations (Government agencies), Health professions, Reporting and recordkeeping requirements.

■ Accordingly, 14 CFR part 183 is corrected as follows:

PART 183—REPRESENTATIVES OF THE ADMINISTRATOR

■ 1. The authority citation for part 183 continues to read as follows:

Authority: 31 U.S.C. 9701; 49 U.S.C. 106(g), 40113, 44702, 45303.

■ 2. Revise § 183.15(b) to read as follows:

§ 183.15 Duration of certificates.

* * * * *

(b) Unless sooner terminated under paragraph (c) of this section, a designation as Flight Standards or Aircraft Certification Service Designated Representative as described in §§ 183.23, 183.25, 183.27, 183.29, 183.31, or 183.33 is effective until the expiration date shown on the document granting the authorization.

* * * * *

Issued in Washington, DC on May 10, 2006.

Tony F. Fazio,

Director, Office of Rulemaking, Aviation Safety.

[FR Doc. 06–4626 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1260

RIN 2700–AD24

NASA Grant and Cooperative Agreement Handbook—Patent Rights and Rights in Data, CSC Programs

AGENCY: National Aeronautics and Space Administration.

ACTION: Final rule.

SUMMARY: This final rule amends 14 CFR 1260.20(e), ''Provisions,'' and the introductory paragraph to Exhibit E (Commercial Space Centers Program Grants/Cooperative Agreements Intellectual Property) to clarify that the ''Patent Rights'' and ''Rights in Data—CSC Program'' special conditions in Exhibit E are to be used in all grants or cooperative agreements awarded to Commercial Space Centers (CSC) under the Space Development and Commercial Research (SDCR) Program instead of (rather than in addition to) the general conditions for Patent Rights (§ 1260.28) and Rights in Data (§ 1260.30).

In addition, this final rule makes an administrative change to correct a cross-reference error in paragraph (e) of the general condition entitled, ''Patent Rights,'' § 1260.28.

DATES: *Effective Date:* May 18, 2006.

FOR FURTHER INFORMATION CONTACT: Paul Brundage, NASA Headquarters, Contract Management Division, Washington, DC, (202) 358–0481, e-mail: *paul.d.brundage@nasa.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

The Grant Handbook at § 1260.20(e) requires use of Exhibit E, Special Conditions for Cooperative Agreements between NASA and the Commercial Space Centers. However, Exhibit E also requires use of the general conditions which include § 1260.28, Patent Rights, and § 1260.30, Rights in Data. This coverage may have the unintentional consequence of requiring use of both the Exhibit E special conditions and the general conditions. In such case, the Exhibit E special conditions would take precedence since they are structured as stand-alone special conditions that supersede the general conditions. However, to avoid any potential misinterpretation or confusion, this change clarifies that the special conditions in Exhibit E replace the general conditions for patent and data rights.

B. Regulatory Flexibility Act

NASA certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because the changes are merely clarifying existing coverage in the Grant Handbook.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this rule does not impose any new recordkeeping or information collection requirements, or collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

List of Subjects in 14 CFR Part 1260

Grant programs—science and technology.

Tom Luedtke,

Assistant Administrator for Procurement.

■ Accordingly, 14 CFR part 1260 is amended as follows:

■ 1. The authority citation for 14 CFR part 1260 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1), Pub. L. 97–258, 96 Stat. 1003 (31 U.S.C. 6301 *et seq.*), and OMB Circular A–110.

PART 1260—GRANTS AND COOPERATIVE AGREEMENTS

■ 2. Amend § 1260.20 by revising paragraph (e) to read as follows:

§ 1260.20 Provisions.

* * * * *

(e) Grants or cooperative agreements awarded by NASA to the Commercial Space Centers under the Space Development and Commercial Research (SDCR) Program require special conditions in lieu of those set forth at §§ 1260.28, Patent Rights, and 1260.30, Rights in Data. SDCR Special Conditions are required to be included in full text for all SDCR Grants and Cooperative Agreements (Exhibit E to subpart A of this part 1260). Changes or additions to these Special Conditions must be approved by the Office of Space Utilization and Product Development before the award of the grant or

cooperative agreement. Requests for changes or additions are to be coordinated through the Office of Procurement, Program Operations Division.

* * * * *

■ 3. Amend § 1260.28 by revising the date and paragraph (e) to read as follows:

§ 1260.28 Patent rights.

Patent Rights

May 2006

* * * * *

(e) The NASA implementing regulation for paragraph (g)(2) of the ''Patent Rights'' clause is at 48 CFR 1827.304–4(a)(i).

* * * * *

■ 4. Amend Exhibit E to subpart A of part 1260 by revising the introductory paragraph to read as follows:

The following Space Development and Commercial Research (SDCR) Special Conditions replace General Conditions §§ 1260.28, Patent Rights, and 1260.30, Rights in Data. Insert these Special Conditions in full text in all SDCR Grants and Cooperative Agreements in addition to the General Conditions in the NASA Grant and Cooperative Agreement Handbook (except for §§ 1260.28 and 1260.30). Any changes or additions to these Special Conditions must be approved by the Office of Procurement, NASA Headquarters, Procurement Operations Division, before award of the agreement.

* * * * *

[FR Doc. 06–4493 Filed 5–17–06; 8:45 am]

BILLING CODE 7510–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[COTP Guam 06–008]

RIN 1625–AA00

Safety Zone; Tarague Basin and Adjacent Waters, GU

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone in the waters of the North Pacific Ocean bounded by a circle with a 2077-yard radius, centered at 13°35′35″ North Latitude and 144°56′29″ East Longitude (NAD 1983) in the vicinity of Pati Point, Guam. This safety zone is necessary to protect mariners who would otherwise transit or be within this area from possible safety hazards associated with U.S. Air Force detonation range operations. Entry of persons or vessels into this temporary safety zone is prohibited unless authorized by the Captain of the Port (COTP).

DATES: This safety zone is effective from 8 a.m. on May 4, 2006 to 4 p.m. on July 30, 2006. The zone will be enforced every Sunday from 8 a.m. to 4 p.m. from May 4, 2006 to July 30, 2006. All times are Kilo, Local Time.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket COTP Guam 06–008 and are available for inspection or copying at Coast Guard Sector Guam between 7:30 a.m. and 3:30 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant (Junior Grade) Jose M. Rosario, U.S. Coast Guard Sector Guam at (671) 339–2001 Extension 159.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. The precise location of this detonation operation site, and the need for this safety zone, was not determined until less than 30 days before the range operations were scheduled to begin. Publishing an NPRM and delaying the effective date would be contrary to the public interest because the Air Force operations would begin before the rulemaking process was complete, thereby jeopardizing the safety of people and property unknowingly transiting or remaining in the area.

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 COTP finds this good cause to be the immediate need for a safety zone to allay the aforementioned safety concerns surrounding the detonation operations.

Background and Purpose

The Coast Guard expects that, every Sunday from 8 a.m. to 4 p.m. from May 4, 2006 to July 30, 2006, the U.S. Air Force will conduct range operations within the Guam Captain of the Port Zone. The Coast Guard has determined that a temporary safety zone in the waters of Tarague Basin bounded by a circle with a 2077-yard radius in the vicinity of Pati Point, Guam is necessary to protect people and property from hazards associated with the operation.

Discussion of Rule

This temporary safety zone will be enforced every Sunday from 8 a.m. to 4 p.m. from May 4, 2006 to July 30, 2006. It is located within the Guam Captain of the Port Zone (See 33 CFR 3.70–15) and covers all waters bounded by a circle with a 2077-yard radius, centered at 13°35′35″ North Latitude and 144°56′29″ East Longitude (NAD 1983), from the surface of the water to the ocean floor.

The general regulations governing safety zones contained in 33 CFR 165.23 apply. Entry into, transit through, or anchoring within this zone is prohibited unless authorized by the Captain of the Port or a designated representative thereof. Any Coast Guard commissioned, warrant, or petty officer, and any other Captain of the Port representative permitted by law, may enforce the zone. The Captain of the Port may waive any of the requirements of this rule for any person, vessel, or class of vessel upon finding that application of the safety zone is unnecessary or impractical for the purpose of maritime safety.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under § 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under § 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

The Coast Guard expects the economic impact of this rule to be so minimal that a full Regulatory Evaluation is unnecessary. This expectation is based on the short durations of the zone and the limited geographic area affected by it.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. We expect that there will be little or no impact to small entities due to the narrowly tailored scope of this safety zone.

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create 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 does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

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

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

Environment

We have analyzed this rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, under figure 2–1, paragraph (34)(g) of the Instruction, this rule is categorically excluded from further environmental documentation. 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, and Waterways.

■ For the reasons discussed 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. Add § 165.T14–144 to read as follows:

§ 165.T14–144 Safety Zone; Tarague Basin and Adjacent Waters, GU.

(a) *Location.* The following area, from the surface of the water to the ocean floor, is a safety zone: All waters bounded by a circle with a 2077-yard radius, centered at 13°35′35″ North Latitude and 144°56′29″ East Longitude (NAD 1983) in the vicinity of Pati Point, Guam.

(b) *Effective Dates.* This safety zone is effective from 8 a.m. on May 4, 2006 to 4 p.m. on July 30, 2006.

(c) *Regulations.* The general regulations governing safety zones contained in 33 CFR 165.23 apply. Entry into, transit through, or anchoring within this zone is prohibited unless authorized by the Captain of the Port or a designated representative thereof.

(d) *Enforcement.* This rule will be enforced every Sunday from 8 a.m. to 4 p.m. from May 4, 2006 to July 30, 2006. Any Coast Guard commissioned, warrant, or petty officer may enforce this temporary safety zone.

(e) *Waiver.* The Captain of the Port may waive any of the requirements of this rule for any person, vessel, or class of vessel upon finding that application of the safety zone is unnecessary or impractical for the purpose of maritime security.

Dated: May 4, 2006.

W.R. Marhoffer,

Captain, U.S. Coast Guard, Captain of the Port, Guam.

[FR Doc. 06–4627 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R10–OAR–2006–0050; FRL–8171–4]

Approval and Promulgation of Air Quality Implementation Plans; La Grande, OR; PM_{10} Maintenance Plan and Redesignation Request; Withdrawal of Direct Final Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Due to an adverse comment, EPA is withdrawing the March 22, 2006 direct final rule (see 71 FR 14393) to approve a PM_{10} State Implementation Plan (SIP) maintenance plan revision for the La Grande, Oregon nonattainment area and to redesignate the area from nonattattainment to attainment for PM_{10}. In the March 22, 2006 direct final rule, we stated that if we received adverse comments by April 21, 2006, the direct final rule would be withdrawn and would not take effect. EPA subsequently received adverse comment on that direct final rule. EPA will address all comments received in a subsequent final action based upon the proposed action also published on March 22, 2006 (see 71 FR 14438). EPA will not institute a second comment period on this document.

FOR FURTHER INFORMATION CONTACT: Donna Deneen, Environmental Protection Agency, Region 10, 1200 Sixth Avenue (AWT–107), Seattle, WA 98101, (206) 553–6706.

SUPPLEMENTARY INFORMATION: See the information provided in the direct final rule located in the Rules and Regulations section of the March 22, 2006 **Federal Register** (71 FR 14393).

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: May 9, 2006.

Julie M. Hagensen,

Acting Regional Administrator, Region 10.

[FR Doc. 06–4604 Filed 5–17–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R10–OAR–2006–0010; FRL–8171–3]

Approval and Promulgation of Air Quality Implementation Plans; Lakeview, OR; PM_{10} Maintenance Plan and Redesignation Request; Withdrawal of Direct Final Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Due to an adverse comment, EPA is withdrawing the March 22, 2006 direct final rule (see 71 FR 14399) to approve a PM_{10} State Implementation Plan (SIP) maintenance plan revision for the Lakeview, Oregon nonattainment area and to redesignate the area from nonattattainment to attainment for PM_{10}. In the March 22, 2006 direct final rule, we stated that if we received adverse comments by April 21, 2006, the direct final rule would be withdrawn and would not take effect. EPA subsequently received adverse comment on that direct final rule. EPA will address all comments received in a subsequent final action based upon the proposed action also published on March 22, 2006 (see 71 FR 14438). EPA will not institute a second comment period on this document.

FOR FURTHER INFORMATION CONTACT: Donna Deneen, Environmental Protection Agency, Region 10, 1200 Sixth Avenue (AWT–107), Seattle, WA 98101, (206) 553–6706.

SUPPLEMENTARY INFORMATION: See the information provided in the direct final rule located in the Rules and Regulations section of the March 22, 2006 **Federal Register** (71 FR 14399).

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: May 9, 2006.

Julie M. Hagensen,

Acting Regional Administrator, Region 10.

[FR Doc. 06–4603 Filed 5–17–06; 8:45 am]

BILLING CODE 6560–50–P

GENERAL SERVICES ADMINISTRATION

41 CFR Part 102–42

[FMR Amendment 2006–04; FMR Case 2006–102–5]

RIN 3090–AI28

Federal Management Regulation; Utilization, Donation, and Disposal of Foreign Gifts and Decorations

AGENCY: Office of Governmentwide Policy, General Services Administration (GSA).

ACTION: Final rule.

SUMMARY: The General Services Administration is amending the Federal Management Regulation (FMR) language that pertains to personal property by correcting references to outdated or superseded provisions of law or regulation; correcting text to be in conformance with revised laws, regulation, or Federal agency responsibilities; and clarifying text where the intended meaning could be updated or made clearer. The FMR and any corresponding documents may be accessed at GSA's Web site at *http://www.gsa.gov/fmr*.

DATES: *Effective Date:* June 19, 2006.

FOR FURTHER INFORMATION CONTACT: The Regulatory Secretariat, Room 4035, GSA Building, Washington, DC, 20405, (202) 208–7312, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Robert Holcombe, Office of Governmentwide Policy, Office of Travel, Transportation, and Asset Management (MT), at (202) 501–3828 or e-mail at *Robert.Holcombe@gsa.gov*. Please cite Amendment 2006–04, FMR case 2006–102–5.

SUPPLEMENTARY INFORMATION:

A. Background

In the years since 41 CFR part 102–42 was published as a final rule, the references to other regulations which migrated from the Federal Property

Management Regulations (FPMR) (41 CFR chapter 101) to the Federal Management Regulation (FMR) (41 CFR chapter 102) became outdated. Additionally, in the intervening years since this regulation was published, several agencies have moved or changed names. Finally, updating or clarifying revisions were made where the revisions are administrative or clerical in nature. This includes—

1. Clarified provisions regarding the handling of foreign gifts that are below the minimal value established by GSA, including a revised definition of ''minimal value''; and

2. A revised provision for the handling of foreign gifts and decorations received by the Vice President.

B. Executive Order 12866

The General Services Administration (GSA) has determined that this final rule is not a significant regulatory action for the purposes of Executive Order 12866.

C. Regulatory Flexibility Act

This final rule is not required to be published in the **Federal Register** for comment. Therefore, the Regulatory Flexibility Act does not apply.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FMR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

E. Small Business Regulatory Enforcement Fairness Act

This final rule is exempt from Congressional review under 5 U.S.C. 801 since it relates solely to agency management and personnel.

List of Subjects in 41 CFR Part 102–42

Government property management, Reporting and recordkeeping requirements, Decorations, medals, awards, Foreign relations, and Government property.

Dated: April 27, 2006.

David L. Bibb,

Acting Administrator of General Services.

■ For the reasons set forth in the preamble, GSA amends 41 CFR part 102–42 as set forth below:

PART 102–42—UTILIZATION, DONATION, AND DISPOSAL OF FOREIGN GIFTS AND DECORATIONS

■ 1. The authority citation for 41 CFR part 102–42 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 5 U.S.C. 7342.

■ 2. Section 102–42.5 is revised to read as follows:

§ 102–42.5 What does this part cover?

This part covers the acceptance and disposition of gifts of more than minimal value and decorations from foreign governments under 5 U.S.C. 7342. If you receive gifts other than from a foreign government, you should refer to § 102–36.405 of this subchapter B.

■ 3. Amend § 102–42.10 by revising the definition ''Minimal value'' to read as follows:

§ 102–42.10 What definitions apply to this part?

* * * * *

Minimal value means a retail value in the United States at the time of acceptance of $305 or less, except that GSA will adjust the definition of minimal value in regulations prescribed by the Administrator of General Services every three years, in consultation with the Secretary of State, to reflect changes in the consumer price index for the immediately preceding 3-year period.

§ 102–42.20 [Amended]

■ 4. Amend § 102–42.20 in paragraph (a)(5) by removing ''part 101–44 of this title'' and adding ''part 102–37 of this subchapter B'' in its place; and by removing from paragraph (a)(6) ''part 101–45 of this title'' and adding ''part 102–38 of this subchapter B'' in its place.

■ 5. Revise the heading and text of § 102–42.70 to read as follows:

§ 102–42.70 Who handles gifts and decorations received by the President or Vice President or a member of their family?

The National Archives and Records Administration normally handles gifts and decorations received by the President and Vice President or a member of the President's or Vice President's family.

§ 102–42.120 [Amended]

■ 6. Amend § 102–42.120 by removing ''part 101–44 of this title'' and adding ''part 102–37 of this subchapter B'' in its place.

§ 102–42.140 [Amended]

■ 7. Amend § 102–42.140 by removing ''part 101–45 of this title'' and adding ''part 102–38 of this subchapter B'' in its place.

§ 102–42.155 [Amended]

■ 8. Amend § 102–42.155 by removing ''part 101–45 of this title'' and adding ''part 102–38 of this subchapter B'' in its place.

[FR Doc. 06–4629 Filed 5–17–06; 8:45 am]

BILLING CODE 6820–14–S

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 3140

[WO–310–1310–PP–241A]

RIN 1004–AD76

Leasing in Special Tar Sand Areas

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule; adoption of interim final rule as final with amendments.

SUMMARY: The Bureau of Land Management (BLM or ''we'') is issuing final regulations for the leasing of hydrocarbons, except coal, gilsonite and oil shale, in special tar sand areas. In this rule, BLM implements provisions of the Energy Policy Act of 2005. This final rule also makes technical corrections to the interim final regulations BLM issued in October 2005.

DATES: The final rule is effective May 18, 2006.

ADDRESSES: You may mail suggestions or inquiries to Bureau of Land Management, Solid Minerals Group, Room 501 LS, 1849 C Street, NW., Washington, DC 20240–0001.

FOR FURTHER INFORMATION CONTACT: Ted Murphy, Solid Minerals Division Chief, at (202) 452–0351 for issues related to BLM's solid minerals programs, or Ted Hudson, Regulatory Affairs Acting Division Chief, (202) 452–5042 for regulatory process issues. Persons who use a telecommunications device for the deaf may contact these individuals through the Federal Information Relay Service (FIRS) at 1–800–877–8339, 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION:

I. Background
II. How Does the Final Rule Differ From the Interim Final Rule?
III. Responses to Comments on the October 2005 Interim Final Rule

I. Background

Section 350 of the Energy Policy Act of 2005 (Pub. L. 109–58) (the Act) further amended the Mineral Leasing Act to authorize the Secretary to issue separate oil and gas leases and tar sand leases, in addition to combined hydrocarbon leases, in special tar sand areas. Section 350 of the Act also specified several oil and gas leasing

practices that will apply to tar sand leases and set the minimum acceptable bid for tar sand leases at $2.00 per acre.

Section 369(j)(1)(D) of the Act also amended the Mineral Leasing Act to increase the maximum acreage of combined hydrocarbon leases and tar sand leases in a special tar sand area to 5,760 acres.

Section 350 of the Act required BLM to issue final regulations implementing these provisions within 45 days. Because of the prescribed time limit and the fact that the Act was specific as to the provisions BLM must adopt, we issued an interim final rule on October 7, 2005 (70 FR 58610). In the interim final rule, we explained that we would accept comments and might make changes in a later-issued final rule.

The BLM finds good cause under 5 U.S.C. 553(d) to make this rule effective immediately upon publication because delay in the effective date would be unnecessary and contrary to the public interest. The changes made in this final rule are technical corrections and do not require any person to adjust his or her conduct to comply with their terms. The interim rule was adopted as final effective on October 7, 2005, and the minor changes adopted today are intended to eliminate confusion resulting from minor errors in the October 2005 interim final rule.

II. How Does the Final Rule Differ From the Interim Final Rule?

This final rule makes three changes to the interim final rule.

1. The original paragraph (d) in section 3141.0–5 should have been removed prior to redesignating paragraph (b) as (d) in the interim final rule. This was not done, which resulted in two paragraphs (d) in the section. This oversight is corrected in the final rule.

2. A grammatical error in redesignated paragraph 3141.0–5(d) is corrected.

3. Section 3141.6–2(b) in the interim final rule makes a reference to 43 CFR 1821.2–1(d), which no longer exists. The reference is corrected to 43 CFR 1821.10 in the final rule.

III. Responses to Comments on the October 2005 Interim Final Rule

The BLM received a total of three comments on the interim final rule.

One of the comments that BLM received expressed general opposition to the oil and gas leasing program.

Two of the comments received pointed out the editing error that caused the duplication of paragraph (d) in section 3141.0–5, which is corrected in this final rule.

Author

The principal author of this rule is Ron Teseneer, Solid Minerals Group (WO320). Jim Kohler, Utah State Office, BLM, Dennis Daugherty, Office of the Solicitor, Department of the Interior, and Frank Bruno, Regulatory Affairs provided assistance during this effort.

List of Subjects in 43 CFR Part 3140

Government contracts, Hydrocarbons, Mineral royalties, Oil and gas exploration, Public lands—mineral resources, Reporting and recordkeeping requirements.

Dated: April 19, 2006.

Chad Calvert,

Assistant Secretary, Land and Minerals Management.

■ Accordingly, BLM amend 43 CFR part 3140 as set forth below:

PART 3140—LEASING IN SPECIAL TAR SAND AREAS

■ 1. The authority citation for part 3140 continues to read as follows:

Authority: 30 U.S.C. 181 *et seq.*; 30 U.S.C. 351–359; 95 Stat. 1070; 43 U.S.C. 1701 *et seq.*; the Energy Policy Act of 2005 (Pub. L. 109–58), unless otherwise noted.

Subpart 3141—Leasing in Special Tar Sand Areas

■ 2. Amend § 3141.0–5 by removing the second paragraph (d) and revising paragraph (b) to read as follows:

§ 3141.0–5 Definitions.

* * * * *

(b) For purposes of this subpart, ''*oil and gas lease*'' means a lease issued in a Special Tar Sand Area for the exploration and development of oil and gas resources other than tar sand.

* * * * *

■ 3. Revise § 3141.6–2(b) to read as follows:

§ 3141.6–2 Publication of a notice of competitive lease offering.

* * * * *

(b) Tar Sand Leases or Oil and Gas Leases. At least 45 days prior to conducting a competitive auction, lands to be offered for a competitive lease sale shall be posted in the proper BLM office having jurisdiction over the lands as specified in § 1821.10 of this chapter, and shall be made available for posting to surface managing agencies having jurisdiction over any of the included lands.

[FR Doc. 06–4625 Filed 5–17–06; 8:45 am]

BILLING CODE 4310–84–P

Proposed Rules

Federal Register
Vol. 71, No. 96
Thursday, May 18, 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 AGRICULTURE

Cooperative State Research, Education, and Extension Service

7 CFR Part 3403

RIN 0524–AA31

Small Business Innovation Research Grants Program

AGENCY: Cooperative State Research, Education, and Extension Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Cooperative State Research, Education, and Extension Service (CSREES) proposes to revise the Small Business Innovation Research (SBIR) Grants Program Administrative Regulations to implement changes and be compliant with the Small Business Innovation Research Policy Directive (67 FR 60072, September 24, 2002).

DATES: Submit comments on or before June 19, 2006.

ADDRESSES: You may submit comments, identified by this RIN number 0524–AA31, by any of the following methods: *E-mail: RFP-OEP@csrees.usda.gov.* Include Proposed Rule for Small Business Innovation Research Grants Program and/or RIN number in the subject line of the message; *Fax:* 202) 401–7752; *Mail:* Policy, Oversight, and Funds Management Branch; Office of Extramural Programs; Cooperative State Research, Education, and Extension Service; U.S. Department of Agriculture; STOP 2299; 1400 Independence Avenue, SW.; Washington, DC 20250–2299; Hand Delivery/Courier: Policy, Oversight, and Funds Management Branch; Office of Extramural Programs; Cooperative State Research, Education, and Extension Service; U.S. Department of Agriculture; Waterfront Centre, Room 2248; 800 9th Street, SW.; Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Dr. Deborah Sheely, Director, Integrated Programs, Competitive Programs Unit, Cooperative State Research, Education, and Extension Service, USDA, STOP 2241, 1400 Independence Avenue, SW., Washington, DC 20250–2241; telephone, (202) 401–1924; e-mail, *dsheely@csrees.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background and Purpose

In 1982, Congress enacted the Small Business Innovation Development Act of 1982, Public Law 97–219 (15 U.S.C. 638), which established the Small Business Innovation Research (SBIR) Program. The statutory purpose of the SBIR Program is to strengthen the role of innovative small business concerns in Federally-funded research and research and development (R/R&D). The SBIR Program is a phased process, uniform throughout the Federal Government, of soliciting proposals and awarding funding agreements for R/R&D to meet stated agency needs or missions. To stimulate and foster scientific and technological innovation, including increasing commercialization of Federal R/R&D, the program must follow a uniform competitive process.

In December of 2000, Congress enacted the Small Business Innovation Research Program Reauthorization Act of 2000, Public Law 106–554. The Reauthorization Act extends the SBIR Program through September 30, 2008, and requires the Small Business Administration (SBA) to clarify that rights to data generated during the performance of an SBIR award apply to all SBIR awards. In addition, the Act requires that each application for a Phase II award contain a succinct commercialization plan.

On September 24, 2002, the SBA revised the SBIR Program Policy Directive to reflect statutory amendments to the SBIR Program, and provided guidance to Federal agencies for the general conduct of the program.

The U.S. Department of Agriculture participates in the SBIR Program through the issuance of competitive research grants by CSREES. The Agency proposes revising the existing rule, at 7 CFR part 3403, to comply with recent statutory revisions and changes to the SBA Policy Directive.

The following definitions have been added to clarify the provisions and in compliance with the Policy Directive: Intellectual Property; Innovation; Joint Venture; Outcomes and Outputs; Authorized Departmental Officer; Authorized Organizational Representative; Essentially equivalent Work; SBIR Technical Data Rights; SBIR Technical Data; SBIR Participants; Prototype; Research Project Grant; Small Business Concern; and Socially and Economically Disadvantaged Small Business Concern. In addition, in Part 3403.4, language was added to clarify the eligibility of Phase I recipients, specifically allowing those organizations receiving Phase I rights via successor-in-interest or novation agreement to be eligible to receive Phase II awards. In addition, language clarifying the timing of the submission of Phase II proposals during the funding cycle was added. In Part 3403.5 the mention of specific forms was deleted in anticipation of electronic submission of proposals. The requirement was inserted into Part 3403.7 that a small business concern that is submitting a proposal for a Phase I award must document the extent to which it was able to secure Phase III funding if it has received more than 15 Phase II awards during the preceding five years.

Classification

This rule has been reviewed under Executive Order 12866, and it has been determined that it is not a ''significant regulatory action'' rule because it will not have an annual effect on the economy of $100 million or more or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This rule will not create any serious inconsistencies or otherwise interfere with any actions taken or planned by another agency. It will not materially alter the budgetary impact of entitlements, grants, user fees or loan programs and does not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or principles set forth in Executive Order No. 12866.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), this rule will not have a significant economic impact on a substantial number of small entities for the rule only applies to awards issued under the SBIR program.

CSREES issues SBIR awards to small business concerns (SBC). SBC means a concern that, on the date of award for

both Phase I and Phase II funding agreements: (1) Is organized for profit, with a place of business located in the United States, which operates primarily within the United States, or which makes a significant contribution to the United States economy through the payment of taxes or use of American products, materials or labor; (2) is in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the form is a joint venture, there can be no more than 49 percent participation by foreign business entities in the joint venture; (3) is at least 51 percent owned and controlled by one or more individuals who are citizens of, or permanent resident aliens in, the United States, except in the case of a joint venture, where each entity in the venture must be 51 percent owned and controlled by one or more individuals who are citizens of, or permanent resident aliens in the United States; and (4) has, including its affiliates, not more than 500 employees. The term ''affiliates'' is defined in greater detail in 13 CFR 121.103. The term ''number of employees'' is defined in 13 CFR 121.106.

The Small Business Administration (SBA) was given the responsibility of issuing policy directives for the general conduct of the SBIR Program. In September 1984, the SBA issued a Policy Directive, which was subsequently revised in January 1993. To implement statutory changes in the Reauthorization Act and to streamline the Policy Directive, SBA modified the Policy Directive in 2002 (67 FR 60072, Sept 24, 2002). This rule is compliant with the 2002 Policy Directive. The 2002 Policy Directive provides guidance to the SBIR participatory Federal agencies for the general operation of the program. Since such agencies are compliant with the Policy Directive there is a reduction of burden inherent in the consistency amongst the agencies. Furthermore, awardees are able to use amounts awarded for indirect costs to meet the costs of implementing the regulations. In FY 2007 funds awarded by CSREES under the SBIR program are available to pay full allowable indirect costs. As of April 6, 2006, CSREES has 151 active SBIR awards which are subject to this rule.

Paperwork Reduction Act

In accordance with the Office of Management and Budget (OMB) regulations (5 CFR Part 1320) which implements the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements that will be imposed in the implementation of this proposed rule have been approved under OMB No. 0524–0024, Grant Application Forms for the Small Business Innovation Research Grants Programs.

Federalism

We have analyzed this rule under Executive Order 13132, Federalism, and have determined that it does not have federalism implications to warrant the preparation of a federalism assessment under that order.

Intergovernmental Review

The Department published notice of the exclusion of this program from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials in the Final Rule-Related Notice for 7 CFR part 3015, subpart V, (48 FR 29115, June 24, 1983).

Environmental Impact Statement

This proposed regulation does not significantly affect the environment. Therefore an environmental impact statement is not required under the National Environmental Policy Act of 1969, as amended.

Regulatory Analysis

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. All State and local laws and regulations that are in conflict with this rule are preempted. No retroactive effect is to be given to this rule. This rule does not require administrative proceedings before parties may file suit in court.

Unfunded Mandates Reform Act

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), the Department assessed the effects of this rulemaking action on State, local, and tribal governments, and the public. This action does not compel the expenditure of $100 million or more by any State, local, or tribal government, or anyone in the private sector. Therefore, a statement under section 202 of the Unfunded Mandates Reform Act of 1995 is not required.

Consultation and Coordination With Indian Tribal Governments

This rule does not have tribal implications and thus no further action is required under Executive Order 13175.

Energy Supply

The proposed rule is not a significant energy action for purposes of Executive Order 13211, Actions Concerning Regulations that Significantly Affect Supply (May 18, 2001).

CSREES is soliciting public comments regarding this proposed rule and will consider and address such comments in subsequent rulemaking on this subject. Comments should be submitted as provided for in the **ADDRESSES** and **DATES** portions of this proposed rule.

List of Subjects in 7 CFR Part 3403

Small business innovation research, Small business, Research, Research and development.

For the reasons stated in the preamble, CSREES proposes to revise 7 CFR part 3403 to read as follows:

PART 3403—SMALL BUSINESS INNOVATION RESEARCH GRANTS PROGRAM

Subpart A—General Information

Sec.
3403.1 Applicability of regulations.
3403.2 Definitions.
3403.3 Eligibility requirements.

Subpart B—Program Description

3403.4 Three-phase program.

Subpart C—Preparation of Proposals

3403.5 Program solicitation.
3403.6 Content of proposals.
3403.7 Proposal format for Phase I applications.
3403.8 Proposal format for Phase II applications.

Subpart D—Submission and Evaluation of Proposals

3403.9 Submission of proposals.
3403.10 Proposal review.
3403.11 Availability of information.

Subpart E—Supplementary Information

3403.12 Terms and conditions of grant awards.
3403.13 Notice of grant awards.
3403.14 Use of funds; changes.
3403.15 Other Federal statutes and regulations that apply.
3404.16 Other considerations.

Authority: 15 U.S.C. 638.

Subpart A—General Information

§ 3403.1 Applicability of regulations.

(a) The regulations of this part apply to small business innovation research grants awarded under the general authority of section 630 of the Act making appropriations for Agriculture, Rural Development, and Related Agencies' programs for fiscal year ending 1987, and for other purposes as made applicable by section 101(a) of Pub. L. 99–591, 100 Stat. 3341, and the provisions of the Small Business Innovation Development Act of 1982, as amended (15 U.S.C. 638), and the Small

Business Innovation Research Program Reauthorization Act of 2000, Pub. L. 106–554, which extends the SBIR Program through September 30, 2008. The Small Business Innovation Development Act of 1982, as amended, mandates that each Federal agency with an annual extramural budget for research or research and development in excess of $100 million participate in a Small Business Innovation Research (SBIR) program by reserving a statutory percentage of its annual extramural budget for award to small business concerns for research or research and development in order to stimulate technological innovation, use small business to meet Federal research and development needs, increase private sector commercialization of innovations derived from Federal research and development, and foster and encourage the participation of socially and economically disadvantaged small business concerns and women-owned small business concerns in technological innovation. The Department will participate in this program through the issuance of competitive research grants which will be administered by the Office of Extramural Programs, CSREES.

(b) The regulations of this part do not apply to research grants awarded by the Department under any other authority.

§ 3403.2 Definitions.

As used in this part:

Ad hoc reviewers means experts or consultants, qualified by training and experience in particular scientific or technical fields to render expert advice on the scientific technical merit of the grant applications in those fields, who review on an individual basis one or several of the eligible proposals submitted to this program in their area of expertise and who submit to the Department written evaluations of such proposals.

Applicant is the organizational entity that, at the time of award, will qualify as a small business concern and that submits a grant application for a funding agreement under the SBIR Program.

Authorized departmental officer (ADO) means the Secretary or any employee of the Department who has the authority to issue or modify grant instruments on behalf of the Secretary. The ADO is also referred to as the Funding Agreement Officer.

Authorized organizational representative (AOR) means the president, director, or chief executive officer or other designated official of the applicant organization who has the authority to commit the resources of the organization.

Budget Period means the interval of time into which the project period is divided for budgetary and reporting purposes.

Commercialization is the process of developing marketable products or services and producing and delivering products or services for sale (whether by the originating party or by others) to Government or commercial markets.

CSREES means the Cooperative State Research, Education and Extension Service.

Department means the U.S. Department of Agriculture.

Essentially equivalent work occurs when:

(1) Substantially the same research is proposed for funding in more than one grant application submitted to the same Federal agency;

(2) Substantially the same research is submitted to two or more different Federal agencies for review and funding consideration; or

(3) A specific research objective and the research design for accomplishing an objective are the same or closely related in two or more proposals or awards, regardless of the funding source.

Funding agreement is any contract, grant, or cooperative agreement entered into between any Federal agency and any small business concern for the performance of experimental, developmental, or research work, including products or services funded in whole or in part by the Federal Government.

A grant is a financial assistance mechanism providing money, property, or both to an eligible entity to carry out the approved project or activity, and substantial programmatic involvement by Government is not anticipated.

Grantee means the small business concern designated in the grant award document as the responsible legal entity to whom the grant is awarded under this part.

Innovation is something new or improved, having marketable potential including:

(1) Development of new technologies,

(2) Refinement of existing technologies, or

(3) Development of new applications for existing technologies.

Intellectual property means the separate and distinct types of intangible property that are referred to collectively as ''intellectual property,'' including but not limited to: Patents, trademarks, copyrights, trade secrets, SBIR technical data (as defined in this section), ideas, designs, know-how, business, technical and research methods, other types of intangible business assets, and all types of intangible assets either proposed or generated by a small business concern as a result of its participation in the SBIR Program.

Joint venture is an association of concerns with interests in any degree or proportion by way of contract, express or implied, consorting to engage in and carry out a single specific business venture for joint profit, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. A joint venture is viewed as a business entity in determining power to control its management.

Outcomes are the measure of long-term, eventual, program impact.

Outputs are the measures of near-term program impact.

Peer review group means experts or consultants, qualified by training and experience in particular scientific or technical fields to give expert advice on the scientific and technical merit of grant applications to those fields, who assemble as a group to discuss and evaluate all of the eligible proposals submitted to this program in their area of expertise.

Principal investigator/project director is the one individual designated by the applicant to provide the scientific and technical direction to a project supported by the funding agreement.

Professional Employer Organization is an organization that provides an integrated approach to the management and administration of the human resources and employer risk of its clients, by contractually assuming substantial employer rights, responsibilities, and risk, through the establishment and maintenance of an employer relationship with the workers assigned to its clients.

Program solicitation is a formal request for proposals whereby an agency notifies the small business community of its research or research and development needs and interests in broad and selected areas, as appropriate to the agency, and requests proposals from small business concerns in response to these needs and interests.

Project period means the total length of time that is approved by the Department for conducting the research project as outlined in an approved grant application.

Prototype is a model of something to be further developed, which includes designs, protocols, questionnaires, software, and devices.

Research or research and development (R/R&D) means any activity which is:

(1) A systematic, intensive study directed toward greater knowledge or understanding of the subject studied;

(2) A systematic study directed specifically toward applying new knowledge to meet a recognized need; or

(3) A systematic application of knowledge toward the production of useful materials, devices, and systems or methods, including design, development, and improvement of prototypes and new processes to meet specific requirements.

Research project grant means the award by the Department of funds to a grantee to assist in meeting the costs of conducting for the benefit of the public an identified project which is intended and designed to establish, discover, elucidate, or confirm information or the underlying mechanisms relating to a research topic area identified in the annual solicitation of applications.

SBIR Participants are business concerns that have received SBIR awards or that have submitted SBIR proposals/applications.

SBIR Technical Data is defined as all data generated during the performance of an SBIR award.

SBIR Technical Data Rights are the rights a small business concern obtains in data generated during the performance of any SBIR award that an awardee delivers to the Government during or upon completion of a Federally-funded project, and to which the government receives a license.

Small business concern (SBC) means a concern that, on the date of award for both Phase I and Phase II funding agreements:

(1) Is organized for profit, with a place of business located in the United States, which operates primarily within the United States, or which makes a significant contribution to the United States economy through the payment of taxes or use of American products, materials or labor;

(2) Is in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the form is a joint venture, there can be no more than 49 percent participation by foreign business entities in the joint venture;

(3) Is at least 51 percent owned and controlled by one or more individuals who are citizens of, or permanent resident aliens in, the United States, except in the case of a joint venture, where each entity in the venture must be 51 percent owned and controlled by one or more individuals who are citizens of, or permanent resident aliens in the United States; and

(4) Has, including its affiliates, not more than 500 employees. The term ''affiliates'' is defined in greater detail in 13 CFR 121.103. The term ''number of employees'' is defined in 13 CFR 121.106.

Socially and economically disadvantaged small business concern is defined in 13 CFR Part 124–8(A) Business Development/Small Disadvantaged Business Status Determinations, § 124.103 (Who is socially disadvantaged?) and § 124.104 (Who is economically disadvantaged?).

United States means the 50 states, the territories and possessions of the Federal Government, the Commonwealth of Puerto Rico, the District of Columbia, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.

Women-owned small business concern means a small business concern that is at least 51 percent owned by one or more women, or in the case of any publicly owned business, at least 51 percent of the stock is owned by women, and women control the management and daily business operations.

§ 3403.3 Eligibility requirements.

(a) *Eligibility of organization.* (1) To receive SBIR funds, each awardee of a SBIR Phase I or Phase II must qualify as a small business concern.

(2) For Phase I, a minimum of two-thirds of the research or analytical effort, as measured by the budget, must be performed by the awardee. Occasionally, deviations from this requirement may occur, and must be approved in writing by the ADO after consultation with the agency SBIR National Program Leader.

(3) For Phase II, a minimum of one-half of the research or analytical effort, as measured by the budget, must be performed by the awardee. Occasionally, deviations from this requirement may occur, and must be approved in writing by the ADO after consultation with the agency SBIR National Program Leader.

(4) For both Phase I and Phase II, the primary employment of the principal investigator must be with the SBC at the time of award and during the conduct of the proposed project. Primary employment means that more than one-half of the principal investigator's time is spent in the employ of the SBC. This precludes full-time employment with another organization. Occasionally, deviations from this requirement may occur, and must be approved in writing by the ADO after consultation with the agency SBIR National Program Leader. Further, an SBC may replace the principal investigator on an SBIR Phase I or Phase II award, subject to approval in writing by the ADO after consultation with the SBIR National Program Leader. For purposes of the SBIR Program, personnel obtained through a Professional Employer Organization or other similar personnel leasing company must be considered employees of the awardee. This is consistent with SBA's size regulations, 13 CFR 121.106–Small Business Size Regulations.

(5) For both Phase I and Phase II, the R/R&D must be performed in the United States. However, based on a rare and unique circumstance, ADO approval may be granted to perform a particular portion of the research or research and development work outside of the United States, for example, if a supply of material or other item or project requirement is not available in the United States. The ADO, after consultation with the agency SBIR National Program Leader, must approve each such specific condition in writing.

(b) [Reserved]

Subpart B—Program Description

§ 3403.4 Three-phase program.

The Small Business Innovation Research Grants Program is carried out in three separate phases described in this section. The first two phases are designed to assist USDA in meeting its research or research and development objectives and will be supported with SBIR Program funds. The purpose of the third phase is to pursue the commercial applications or objectives of the research carried out in Phases I and II through the use of private or Federal non-SBIR funds.

(a) *Phase I.* Phase I involves a solicitation of grant applications (hereinafter referred to as proposals) to conduct feasibility-related experimental research and development related to described agency requirements. These requirements, as defined by agency topics contained in the solicitation, may be general or narrow in scope, depending on USDA needs. The object of this phase is to determine the scientific and technical merit and feasibility of the proposed effort and the quality of performance of the small business concern with a relatively small agency investment before consideration of further Federal support in Phase II. The project period normally should not exceed six months, however a longer period, where appropriate for a particular project, may be granted.

(b) *Phase II* is the principal research or research and development effort in which the results from Phase I are expanded upon and further pursued, normally for a period not to exceed 24 months. Only SBIR awardees in Phase I are eligible to participate in Phase II. This includes those awardees identified via a ''novated'' or ''successor in interest'' or similarly-revised funding agreement, or those that have reorganized with the same key staff, regardless of whether they have been assigned a different tax identification number. For each Phase I project funded, the awardee may apply for a Phase II award only once. Phase I awardees who for valid reasons cannot apply for Phase II support in the next fiscal year funding cycle may normally apply for support no later than the second fiscal year funding cycle.

(c) *Phase III* refers to work that derives from, extends, or logically concludes effort(s) performed under prior SBIR funding agreements, but is funded by sources other than the SBIR Program. Phase III work is typically oriented towards commercialization of SBIR research or technology. This portion of a project is funded by a non-SBIR source through the use of a follow-on funding commitment. A follow-on funding commitment is an agreement between the small business concern and a provider of the follow-on capital for a specified amount of funds to be made available to the small business concern for future development of their effort upon achieving certain mutually agreed upon technical objectives.

Subpart C—Preparation of Proposals

§ 3403.5 Program solicitation.

(a) *Phase I.* A program solicitation requesting Phase I proposals will be prepared each fiscal year in which funds are made available for this purpose. This solicitation will contain information sufficient to enable eligible applicants to prepare grant proposals and will include descriptions of specific research topic areas which the Department will support during the fiscal year involved. A notice of solicitation, and the entire contents of the program solicitation will be published, at a minimum, on the agency's Web site.

(b) *Phase II.* For each fiscal year in which funds are made available for this purpose, the Department will send correspondence requesting Phase II proposals from the Phase I grantees eligible to apply for Phase II funding in that fiscal year. The correspondence will contain information sufficient to enable eligible applicants to prepare grant proposals.

§ 3403.6 Content of proposals.

(a) The proposed research must be responsive to one of the USDA program interests stated in the research topic descriptions of the program solicitation.

(b) Proposals must cover only scientific/technological research activities. A small business concern must not propose product development, technical assistance, demonstration projects, classified research, or patent applications. Many of the research projects supported by the SBIR program lead to the development of new products based upon the research results obtained during the project. However, projects that seek funding solely for product development where no research is involved, i.e., funds are needed to permit the development of a project based on previously completed research, will not be accepted. Literature surveys should be conducted prior to preparing proposals for submission and must not be proposed as a part of the SBIR Phase I or Phase II effort. Proposals principally for the development of proven concepts toward commercialization or for market research should not be submitted since such efforts are considered the responsibility of the private sector and therefore are not supported by USDA.

(c) A proposal must be limited to only one topic. The same proposal may not be submitted under more than one topic as defined in the solicitation. However, an organization may submit separate proposals on the same topic. Where similar research is discussed under more than one topic, the proposer should choose that topic whose description appears most relevant to the proposer's research concept. USDA will not consider funding duplicate (essentially equivalent work) proposals. In addition, essentially equivalent work funded by another entity will be returned to the applicant without review.

§ 3403.7 Proposal format for Phase I applications.

(a) The following items relate to Phase I applications. Further instructions or descriptions for these items as well as any additional items to be included will be provided in the annual solicitation, as necessary.

(1) *Proposal cover sheet.* Applicants must submit basic proposal identification information on the first page of the proposals. Applicants must also certify on the first page of the proposals that they meet the definition of a small business concern as stated in the solicitation, and must certify as to whether or not they qualify as socially and economically disadvantaged small business concerns, or women-owned small business concerns.

(2) *Project summary.* The technical abstract should include a brief description of the problem or opportunity, project objectives, and a description of the effort. Anticipated results and potential commercial applications of the proposed research also should be summarized in the space provided. Keywords should characterize the most important aspects of the project. The project summary of successful proposals may be published by USDA and therefore should not contain proprietary information.

(3) *Technical Content.* The main body of the proposal should include:

(i) Identification and significance of the problem or opportunity.

(ii) Background and rationale.

(iii) Relationship with future research or research and development.

(iv) Phase I technical objectives.

(v) Phase I work plan.

(vi) Related research or research and development.

(vii) References. For each reference cited in the proposal provide the complete name for each author, the date of publication, the full title of the article, name of the journal, etc.

(4) *Key personnel and bibliography.* Identify key personnel involved in the effort, including information on their directly related education and experience. For each key person, provide a chronological list of the most recent representative publications in the topic area.

(5) *Facilities and equipment.* Describe the types, location, and availability of instrumentation and physical facilities necessary to carry out the work proposed. Items of equipment to be purchased must be fully justified under this section.

(6) *Outside services.* Involvement of university or other consultants in the planning and research stages of the project as consultants or through subcontracting arrangements is permitted and may be particularly helpful to small business concerns that have not previously received Federal research awards. If such involvement is intended, it should be described in detail.

(7) *Satisfying the public interest.* Specify how the proposed research will satisfy one or more of the following objectives:

(i) Develops sustainable agriculture production systems;

(ii) Protects natural resources and the environment;

(iii) Creates a safe, nutritious and affordable food supply;

(iv) Develops value-added food and non-food products from agricultural materials;

(v) Enhances global competitiveness; and

(vi) Enhances economic opportunity and quality of life, especially for people in rural areas.

(8) *Potential post applications.* Briefly describe the commercialization potential of the proposed research. Indicate whether and by what means there appears to be a potential for the Federal Government to use the proposed research. Include a brief description of the proposing company (e.g., date founded, number of employees) and its field of interest. What are the major competitive products in this field, and what advantages will the proposed research have over existing technology (in application, performance, technique, efficiency or cost)?

(9)(i) *Similar Proposals or Awards.* WARNING—While it is permissible with proposal notification to submit identical proposals containing a significant amount of essentially equivalent work for consideration under numerous Federal program solicitations, it is unlawful to enter into funding agreements requiring essentially equivalent work. If there is any question concerning this, it must be disclosed to the soliciting agency or agencies before award. If an applicant elects to submit identical proposals or proposals containing a significant amount of essentially equivalent work under other Federal program solicitations, a statement must be included in each such proposal indicating:

(A) Name and address of the agency(ies) to which the proposal was submitted, or will be submitted, or from which an award is expected or has been received.

(B) Date of actual or anticipated proposal submission or date of award, as appropriate.

(C) Title of proposal or award, identifying number assigned to the solicitation or proposal by the agency involved, and the date the proposal(s) was submitted or the award was received.

(D) Applicable research topic area for each proposal submitted or award received.

(E) Titles of research projects.

(F) Name and title of principal investigator for each proposal submitted or award received.

(ii) *USDA will not make awards that duplicate research funded (or to be funded) by other Federal agencies.*

(10) *Cost breakdown on proposal budget.* Complete a budget form for the phase under which you are currently applying. (An applicant for Phase I funding should not submit both Phase I and Phase II budgets.) A budget narrative with supporting detail for each budget category must be included.

(11) *Special Considerations.* If the proposed research will include laboratory animals or human subjects at risk, the applicant may be required to have the research plan reviewed and approved by an Institutional Animal Care and Use Committee (IACUC) or Institutional Review Board (IRB) prior to commencing actual substantive work. If such approval is required, USDA may not release funds for the award until proper documentation is submitted and accepted by USDA. It is suggested that applicants contact local universities, colleges, or nonprofit research organizations which have established reviewing mechanisms to have this service performed.

(12) *Proprietary information.* (i) If proprietary information is provided by an applicant in a proposal which constitutes a trade secret, proprietary commercial or financial information, confidential personal information, or data affecting the national security, it will be treated in confidence to the extent permitted by law. This information must be clearly marked by the applicant with the term ''confidential proprietary information'' and the following legend must appear on the title page of the proposal: ''These data shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed in whole or in part for any purpose other than evaluation of this proposal. If a funding agreement is awarded to this applicant as a result of or in connection with the submission of these data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the funding agreement and pursuant to applicable law. This restriction does not limit the Government's right to use information contained in the data if it is obtained from another source without restriction. The data subject to this restriction are contained on pages____of this proposal.''

(ii) USDA, by law, is required to make the final decision as to whether the information is required to be kept in confidence. Information contained in unsuccessful proposals will remain the property of the applicant. However, USDA will retain for three years one copy of all proposals received; extra copies will be destroyed. Public release of information for any proposal submitted will be subject to existing statutory and regulatory requirements. Any proposal which is funded will be considered an integral part of the award and normally will be made available to the public upon request through the Freedom of Information Act, except for designated proprietary information.

(iii) The inclusion of proprietary information is discouraged unless it is necessary for the proper evaluation of the proposal. If proprietary information is to be included, it should be limited, set apart from other text on a separate page, and keyed to the text by numbers. It should be confined to a few critical technical items which, if disclosed, could jeopardize the obtaining of foreign or domestic patents. Trade secrets, salaries, or other information which could jeopardize commercial competitiveness should be similarly keyed and presented on a separate page. Proposals or reports which attempt to restrict dissemination of large amounts of information may be found unacceptable by USDA.

(13) *Rights in data developed under SBIR funding agreement.* The legend (or statements) in the SBIR datarights clause included in the SBIR award must be affixed to any submissions of technical data. Where such legend is affixed, rights in technical data, including software developed under the terms of any funding agreement resulting from a proposal submitted in response to the program solicitation shall remain with the grantee. The Government may not use, modify, reproduce, release, perform, display, or disclose technical data or computer software marked with this legend for 4 years. After expiration of the 4-year period, the Government has a royalty-free license to use, and to authorize others to use on its behalf, these data for Government purposes, and is relieved of all disclosure prohibitions and assumes no liability for unauthorized use of these data by third parties, except that any such data that is also protected and referenced under a subsequent SBIR award shall remain protected through the protection of that subsequent SBIR award.

(14) *Patents and Inventions.* Allocation of rights to inventions shall be in accordance with 35 U.S.C. 202–206 and the Department of Commerce implementing regulations entitled ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms under government Grants, Contracts and Cooperative Agreements'' at 37 CFR Part 401. These regulations provide that small businesses normally may retain the principal worldwide patent rights to any

invention developed with USDA support. USDA receives a royalty-free license for Federal Government use, reserves the right to require the patentee to license others in certain circumstances, and requires that anyone exclusively licensed to sell the invention in the United States must normally manufacture it domestically. To the extent authorized by 35 U.S.C. 205, USDA will not make public any information disclosing a USDA-supported invention for a four-year period. SBIR awardees must report inventions to the awarding agency within two months of the inventor's report to the awardee. The reporting of inventions shall be made through submission to Interagency Edison as specified in the terms and conditions of the grant.

(15) *Organizational management information.* Before the award of an SBIR funding agreement, USDA requires the submission of certain organizational management, personnel, and financial information to assure responsibility of the applicant. This information is not required unless a project is recommended for funding, and then it is submitted on a one-time basis only. However, new information should be submitted if a small business concern has undergone significant changes in organization, personnel, finance or policies, including those relating to civil rights.

(16) *Documentation of commercialization record of firms with multiple phase II awards.* A small business concern submitting a proposal for a Phase I award that has received more than 15 Phase II SBIR awards during the preceding five fiscal years must document the extent to which it was able to secure Phase III funding to develop concepts resulting from previous Phase II SBIR awards.

(b) [Reserved]

§ 3403.8 Proposal format for Phase II applications.

(a) The following items relate to Phase II applications. Further instructions or descriptions for these items as well as any additional items to be included will be identified in the annual program solicitation as necessary. See § 3403.9.

(1) *Proposal cover sheet.* Follow instructions found in § 3403.7(a)(1).

(2) *Project summary.* Follow instructions found at § 3403.7(a)(2).

(3) *Phase I results.* The proposal should contain an extensive section that lists Phase I objectives and makes detailed presentation of the Phase I results. This section should establish the degree to which Phase I objectives were met and feasibility of the proposed research project was established.

(4) *Proposal.* Since Phase II is the principal research and development effort, proposals should be more comprehensive than those submitted under Phase I. However, the outline and information contained in § 3403.7(a)(3)–(9) and § 3403.7(a)(11)–(14) should be followed, tailoring the information requested to the Phase II project.

(5) *Cost breakdown on proposal budget.* For Phase II, a detailed budget is required for each year of requested support. In addition, a summary budget is required detailing the requested support for the overall project period. A budget narrative, with supporting budget detail for each budget category must be included.

(6) *Organizational management information.* Each Phase II awardee will be asked to submit an updated statement of financial condition (such as the latest audit report, financial statements or balance sheet) and report any changes in management or principals.

(7) *Commercialization Plan.* A succinct commercialization plan must be included in each SBIR Phase II proposal moving toward commercialization. Elements of a commercialization plan may include the following:

(i) *Company information.* Focused objectives/core competencies; size; specialization area(s); products with significant sales; and history of previous Federal and non-Federal funding, regulatory experience, and subsequent commercialization.

(ii) *Customer and competition.* Clear description of key technology objectives, current competition, and advantages compared to competing products or services; description of hurdles to acceptance of the innovation.

(iii) *Market.* Milestone, target dates, analyses of market size, and estimated market share after first year sales and after five years; explanation of plan to obtain market share.

(iv) *Intellectual property.* Patent status, technology lead, trade secrets or other demonstration of a plan to achieve sufficient protection to realize the commercialization state and attain at least a temporary competitive advantage.

(v) *Financing.* Plans for securing necessary funding in Phase III.

(vi) *Assistance and mentoring.* Plans for securing needed technical or business assistance through mentoring, partnering, or through arrangements with state assistance programs, Small Business Development Centers, Federally-funded research laboratories, manufacturing extension Partnership Centers, or other assistance providers.

(8) *Data Collection.* Each Phase II applicant will be required to provide information to the Tech-Net Database System (*http://technet.sba.gov*) per OMB No. 3245–03356. The following are examples of the data to be entered by applicants into Tech-Net:

(i) Any business concern or subsidiary established for the commercial application of a product or service for which an SBIR award is made;

(ii) Revenue from the sale of new products or services resulting from the research conducted under each Phase II award;

(iii) Additional investment from any source, other than Phase I or Phase II awards, to further the research and development conducted under each Phase II award; and

(iv) Updates to information in the Tech-Net database for any prior Phase II award received by the small business concern.

(b) [Reserved]

Subpart D—Submission and Evaluation of proposals

§ 3403.9 Submission of proposals.

The SBIR program solicitation for Phase I proposals and the correspondence requesting Phase II proposals will provide the deadline date for submitting proposals, and instructions for submitting the proposal to CSREES for funding consideration.

§ 3403.10 Proposal review.

(a) The receipt of all proposals will be acknowledged.

(b) All Phase I and II proposals will be evaluated and judged on a competitive basis. Proposals will be initially screened to determine responsiveness. Proposals passing this initial screening will be technically evaluated by scientists to determine the most promising technical and scientific approaches. Each proposal will be judged on its own merit. USDA is under no obligation to fund any proposal or any specific number of proposals in a given topic. It also may elect to fund several or none of the proposed approaches to the same topic or subtopic.

(c) Phase I and II proposal evaluation criteria will be published in the ''Method of Selection and Evaluation Criteria'' section of the program solicitation.

(d) External peer reviewers may be used during the technical evaluation stage of this process. Selections will be made from among recognized specialists who are uniquely qualified by training

and experience in their respective fields to render expert advice on the merit of proposals received. It is anticipated that such experts will include those located in universities, government, and nonprofit research organizations. If possible, USDA intends that peer review groups shall be balanced with minority and female representation and with an equitable age distribution.

(e) Technical reviewers will base their conclusions and recommendations on information contained in the Phase I or Phase II proposal. It cannot be assumed that reviewers are acquainted with any experiments referred to within a proposal, with key individuals, or with the firm itself. Therefore, the proposals should be self-contained and written with the care and thoroughness accorded papers for publication.

(f) Final decisions will be made by USDA based upon the rating assigned by reviewers and consideration of other factors, including the commercial potential of the application, duplication of research, any critical USDA requirements, and budget limitation. In the event that two or more proposals are of approximately equal merit, the existence of a cooperative research and development agreement (CRADA) with a USDA laboratory will be an important consideration. The existence of a follow-on funding commitment for continued development in Phase III will also be an important consideration. The value of any commitment will depend upon the degree of financial commitment made by investors, with the maximum value resulting from a signed agreement with reasonable terms for an amount at least equal to funding requested from USDA in Phase II.

§ 3403.11 Availability of information.

Information regarding the peer review process will be made available to the extent permitted under the Freedom of Information Act (5 U.S.C. 552), the Privacy Act (5 U.S.C. 552a), the SBIR Policy Directive, and implementing Departmental and other Federal regulations. Implementing Departmental regulations are found at 7 CFR Part 1.

Subpart E—Supplementary Information

§ 3403.12 Terms and conditions of grant awards.

Within the limit of funds available for such purposes, the Authorized Departmental Officer shall make research project grants to those responsible, eligible applicants whose proposals are judged most meritorious in the announced program areas under the evaluation criteria and procedures set forth in the annual program solicitation. The beginning of the project period shall be no later than September 30 of the Federal fiscal year in which the project is approved for support. All funds granted under this part shall be expended solely for the purpose for which funds are granted in accordance with the approved application and budget, the regulations of this part, the terms and conditions of award, the Federal Acquisition Regulations (48 CFR Part 31), and the Department's Uniform Federal Assistance Regulations (7 CFR Part 3015).

§ 3403.13 Notice of grant awards.

(a) The grant award document may include the following:

(1) Legal name and address of performing organization or institution;

(2) Title of project;

(3) Name and institution of PD's chosen to direct and control approved activities;

(4) Identifying grant number assigned by the Department;

(5) Project period, specifying the amount of time the Department intends to support the project;

(6) Total amount of Departmental financial assistance approved for the project period;

(7) Legal authority(ies) under which the grant is awarded;

(8) Appropriate Catalog of Federal Domestic Assistance (CFDA) number;

(9) Applicable award terms and conditions;

(10) Approved budget plan for categorizing allocable project funds to accomplish the stated purpose of the grant award; and

(11) Other information or provisions deemed necessary by CSREES to carry out its respective granting activities or to accomplish the purpose of a particular grant.

(b) [Reserved]

§ 3403.14 Use of funds; changes.

(a) *Delegation of fiscal responsibility.* Unless the terms and conditions of the grant state otherwise, the grantee may not in whole or in part delegate or transfer to another person, institution, or organization the responsibility for use or expenditure of grant funds.

(b) *Changes in Project Plans.* (1) The permissible changes by the grantee, Project Director, or other key project personnel in the approved project grant shall be limited to changes in methodology, techniques, or other similar aspects of the project to expedite achievement of the project's approved goals. If the grantee or the Project Director (PDs) is uncertain as to whether a change complies with this provision, the question must be referred to the Authorized Departmental Officer (ADO) for a final determination. The signatory of the award document is the ADO, not the program contact.

(2) Changes in approved goals or objectives shall be requested by the grantee and, in consultation with the CSREES SBIR National Program Leader, approved in writing by the ADO prior to effecting such changes. In no event shall requests for such changes be approved which are outside the scope of the original approved project.

(3) Changes in approved project leadership or the replacement or reassignment of other key project personnel shall be requested by the grantee and, in consultation with the CSREES SBIR National Program Leader, approved in writing by the ADO prior to effecting such changes.

(4) Transfers of actual performance of the substantive programmatic work in whole or in part and provisions for payment of funds, whether or not Federal funds are involved, shall be requested by the grantee and, in consultation with the CSREES SBIR National Program Leader, approved in writing by the ADO prior to effecting such transfers, unless prescribed otherwise in the terms and conditions of the grant.

(c) *Changes in Project Period.* The project period may be extended by CSREES without additional financial support, for such additional period(s) as the ADO determines may be necessary to complete or fulfill the purposes of an approved project provided Federal funds remain. Any extension of time shall be conditioned upon prior request by the grantee and approval in writing by the ADO unless otherwise noted in the award terms and conditions. In such cases the extension will not normally exceed 12 months. The Phase I award will still be limited to the approved award amount, and the submission of a Phase II proposal will normally be delayed by no more than one year. The extension allows the grantee to continue expending the remaining Federal funds for the intended purpose over the extension period. In instances where no Federal funds remain, it is unnecessary to approve an extension since the purpose of the extension is to continue using Federal funds. The grantee may opt to continue the Phase I project after the grant's termination and closeout, however, the grantee would have to do so without additional Federal funds. In the latter case, no communication with USDA is necessary.

(d) *Changes in approved budget.* Changes in an approved budget must be requested by the grantee and approved

in writing by the ADO prior to instituting such changes if the revision will involve transfers or expenditures of amounts requiring prior approval as set forth in the applicable Federal cost principles, Departmental regulations, or grant award.

(e) *Use of Change of Name and Novation Agreement* (1) Occasionally, after an award has been made the name of the Awardee may change. CSREES requires execution of a ''Change of Name Agreement'' in such instance. The specific circumstances of each situation will determine which kind of agreement should be executed. This decision will be determined by the ADO.

(i) A Change of Name Agreement is a legal instrument executed by the Awardee and the Government that recognizes a change of the legal name of the Awardee without disturbing the original rights and obligations of the parties. If only a change of the Awardee's name is involved and the Government's and Awardee's rights and obligations remain unaffected, the parties should execute an agreement to reflect the name change.

(ii) In order to execute the actual Change of Name Agreement with USDA, the Awardee is required to submit the following information:

(A) The document effecting the name change, authenticated by a proper official of the State having jurisdiction;

(B) The opinion of the Grantee's legal counsel stating that the change of name was properly effected under applicable law and showing the effective date;

(C) A list of all affected awards between the Grantee and CSREES.

(iii) When CSREES is notified that a change of name has taken place, the ADO will request the aforementioned information from the Grantee. Upon receipt and review of this information, parties will properly execute a Change of Name Agreement and the appropriate changes will be made to the Agency's records.

(iv) The following suggested format for an agreement may be adapted for specific cases:

Change of Name Agreement

THE ABC CORPORATION (Grantee), a corporation duly organized and existing under the laws of _____(insert State), and the COOPERATIVE STATE RESEARCH, EDUCATION, AND EXTENSION SERVICE, USDA (Government) enter into this Agreement as of_____(insert date when the change of name became effective under applicable State law).

(a) THE PARTIES AGREE TO THE FOLLOWING FACTS:

1. The Government, represented by the ADO, has entered into certain awards with XYZ CORPORATION, namely _____(insert award number or delete ''namely'' and insert ''as shown in the attached list marked 'Exhibit A' and incorporated in this Agreement by reference.'') The term ''the awards,'' as used in this Agreement, means the above awards and all other awards, including all modifications, made by the Government and the Grantee before the effective date of this Agreement (whether or not performance and payment have been completed and releases executed if the Government or the Grantee has any remaining rights, duties, or obligations under these awards.)

2. The XYZ CORPORATION, by an amendment to its certificate of incorporation, dated _____, 20____, has changed its corporate name to ABC CORPORATION.

3. This amendment accomplishes a change of corporate name only and all rights and obligations of the Government and of the Grantee under the awards are unaffected by this change.

4. Documentary evidence of this change of corporate name has been filed with the Government.

(b) IN CONSIDERATION OF THESE FACTS, THE PARTIES AGREE THAT:

1. The awards covered by this Agreement are amended by substituting the name ''ABC CORPORATION'' for the name ''XYZ CORPORATION'' wherever it appears in the awards; and

2. Each party has executed this Agreement as of the day and year first above written.

COOPERATIVE STATE RESEARCH, EDUCATION, AND EXTENSION SERVICE, USDA

BY: _____

TITLE: _____

ABC CORPORATION

BY: _____

TITLE: _____

CERTIFICATE

I, _____, certify that I am the Secretary of ABC CORPORATION, that_____ , who signed this Agreement for this corporation, was then_____of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporation powers.

WITNESS MY HAND, and the seal of this corporation, this_____day of _____, 20____. ____

BY: _____

(CORPORATE SEAL)

(2) From time to time the legal entity performing the research under the award may have to be changed. In such instances, USDA will ensure that all parties properly execute a Novation Agreement (Successor in Interest Agreement).

(i) A Novation Agreement is a legal instrument executed by the Grantee (transferor), the successor in interest (transferee), and the Government by which, among other things, the transferor guarantees performance of the award, the transferee assumes all obligations under the award, and the Government recognizes the transfer of the award and related assets. This occurs when the third party's interest in the award arises out of the transfer of all the Grantee's assets or the entire portion of the assets involved in performing the award. Examples include, but are not limited to: the sale of these assets with a provision for assuming liabilities; the transfer of these assets incident to a merger or corporate consolidation; and the incorporation of a proprietorship or partnership, or the formation of a partnership.

(ii) When a Grantee asks the Government to recognize a successor in interest, the responsible ADO shall obtain the following from the Grantee:

(A) an authenticated copy of the instrument effecting the transfer of assets; *e.g.*, bill of sale, certificate of merger, contract, deed, agreement, or court decree;

(B) a list of all affected awards;

(C) a certified copy of each resolution of the corporate parties' boards of directors authorizing the transfer of assets;

(D) a certified copy of the minutes of each corporate party's stockholder meeting necessary to approve the transfer of assets;

(E) the opinion of legal counsel for the transferor and transferee stating that the transfer was properly effected under applicable law and the effective date of transfer;

(F) an authenticated copy of the transferee's certificate and articles of incorporation, if a corporation was formed for the purpose of receiving the assets involved in performing the Government award;

(G) evidence of transferee's capability to perform the award; and

(H) balance sheets of the transferor and transferee as of the dates immediately before and after the transfer of assets, certified for accuracy by independent accountants.

(iii) The ADO will review the Agency's financial records concerning the correct cash-on-hand balances held

by the transferor to ensure that they are properly accounted for in the transfer process. If recognizing a successor in interest to a Government award is consistent with the Government's interest, the ADO will prepare a Novation Agreement for execution by all three parties. The agreement will provide that:

(A) The transferee assumes all the transferor's obligations under the award(s);

(B) The transferor waives all rights under the award against the Government;

(C) The transferor guarantees performance of the award by the transferee (a satisfactory performance bond may be accepted instead of the guarantee); and

(D) Nothing in the agreement shall relieve the transferor or transferee from compliance with any Federal law.

(iv) The following suggested format for an agreement may be adapted for specific cases:

Novation Agreement (Successor in Interest Agreement)

THE ABC CORPORATION (Transferor), a corporation duly organized and existing under the laws of _____(insert state) with its principal office in _____(insert city); the XYZ CORPORATION (Transferee), a corporation duly organized and existing under the laws of_____ (insert state) with its principal office in_____(insert city); and the COOPERATIVE STATE RESEARCH, EDUCATION, AND EXTENSION SERVICE, USDA (Government) enter into this Agreement as of_____ (insert the date transfer of assets became effective under applicable State law).

(a) THE PARTIES AGREE TO THE FOLLOWING FACTS:

1. The Government, represented by the ADO has entered into certain awards with the Transferor, namely:_____ (insert award number or delete ''namely'' and insert ''as shown in the attached list marked 'Exhibit A' and incorporated in this Agreement by reference.'') The term ''the awards,'' as used in this Agreement, means the above awards and all other awards, including all modifications, made between the Government and Transferor before the effective date of this Agreement (whether or not performance and payment have been completed and releases executed if the Government or the Transferor has any remaining rights, duties, or obligations under these awards.) Included in the term ''award'' are also all modifications made under the terms and conditions of these awards between the Government and the Transferor, on or after the effective date of this Agreement.

2. As of_____, 20____, the Transferor has transferred to the Transferee all the assets of the Transferor by virtue of a_____(insert terms or legal transaction involved) between the Transferor and the Transferee.

3. The Transferee has acquired all the assets of the Transferor by virtue of the above transfer.

4. The Transferee has assumed all obligations and liabilities of the Transferor under the awards by virtue of the above transfer.

5. The Transferee is in a position to fully perform all obligations that may exist under the awards.

6. It is consistent with the Government's interest to recognize the Transferee as the successor party to the awards.

7. Evidence of the above transfer has been filed with the Government.

(b) IN CONSIDERATION OF THESE FACTS, THE PARTIES AGREE THAT BY THIS AGREEMENT:

1. The Transferor confirms the transfer to the Transferee, and waives any claims and rights against the Government that it now has or may have in the future in connection with the awards.

2. The Transferee agrees to be bound by and to perform each award in accordance with the conditions contained in the awards. The Transferee also assumes all obligations and liabilities of, and all claims against, the Transferor under the awards as if the Transferee were the original party to the awards.

3. The Transferee ratifies all previous actions taken by the Transferor with respect to the awards, with the same force and effect as if the action had been taken by the Transferee.

4. The Government recognizes the Transferee as the Transferor's successor in interest in and to the awards. The Transferee by this Agreement becomes entitled to all rights, titles, and interests of the Transferor in and to the awards as if the Transferee were the original party to the awards. Following the effective date of this Agreement, the term Grantee, as used in the awards, shall refer to the Transferee.

5. Except as expressly provided in this Agreement, nothing in it shall be construed as a waiver of any rights of the Government against the Transferor.

6. All payments and reimbursements previously made by the Government to the Transferor, and all other previous actions taken by the Government under the awards, shall be considered to have discharged those parts of the Government's obligations under the awards. All payments and reimbursements made by the Government after the date of this Agreement in the name of or to the Transferor shall have the same force and effect as if made to the Transferee, and shall constitute a complete discharge of the Government's obligations under the awards, to the extent of the amounts paid or reimbursed.

7. The Transferor and the Transferee agree that the Government is not obligated to pay or reimburse either of them for, or otherwise give effect to, any costs, taxes, or other expenses, or any related increases, directly or indirectly arising out of or resulting from the transfer or this Agreement, other than those that the Government in the absence of this transfer or Agreement would have been obligated to pay or reimburse under the terms of the awards.

8. The Transferor guarantees payment of all liabilities and the performance of all obligations that the Transferee (i) assumes under this Agreement or (ii) may undertake in the future should these awards be modified under their terms and conditions. The Transferor waives notice of, and consents to, any such future modifications.

9. The awards shall remain in full force and effect, except as modified by this Agreement. Each party has executed this Agreement as of the day and year first above written.

COOPERATIVE STATE RESEARCH, EDUCATION AND EXTENSION SERVICE, USDA
BY: _____
TITLE: _____
ABC CORPORATION
BY: _____
TITLE: _____
XYZ CORPORATION
BY: _____
TITLE: _____

Certificate

I _____, certify that I am the Secretary of ABC CORPORATION, that____ , who signed this Agreement for this corporation, was then__of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporation powers. WITNESS MY HAND, and the seal of this corporation, this _____day of_____ , 20____.

BY: _____
(CORPORATE SEAL)

Certificate

I _____, certify that I am the Secretary of XYZ CORPORATION, that_____ , who signed this Agreement for this corporation, was then_____of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporation powers. WITNESS MY HAND, and the seal of this corporation, this __day of_____ , 20____.
BY: _____
(CORPORATE SEAL)

§ 3403.15 Other Federal statutes and regulations that apply.

Several other Federal statutes and regulations apply to grant proposals considered for review or to research project grants awarded under this part. These include but are not limited to:

7 CFR Part 1, subpart A—USDA implementation of the Freedom of Information Act.

7 CFR Part 1c—USDA implementation of the Federal Policy for the Protection of Human Subjects.

7 CFR Part 3—USDA implementation of the Debt Collection Act.

7 CFR Part 15, subpart A—USDA implementation of Title VI of the Civil Rights Act of 1964, as amended.

7 CFR Part 331 and 9 CFR Part 121—USDA implementation of the Agricultural Bioterrorism Protection Act of 2002.

7 CFR Part 3015—USDA Uniform Federal Assistance Regulations, implementing OMB directives (i.e., OMB Circular Nos. A–21 and A–122) and incorporating provisions of 31 U.S.C. 6301–6308 (formerly the Federal Grant and Cooperative Agreement Act of 1977, Pub. L. 95–224), as well as general policy requirements applicable to recipients of Departmental financial assistance.

7 CFR Part 3017—USDA implementation of Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants).

7 CFR Part 3018—USDA implementation of Restrictions on Lobbying. Imposes prohibitions and requirements for disclosure and certification related to lobbying on recipients of Federal contracts, grants, cooperative agreements, and loans.

7 CFR Part 3019—USDA implementation of OMB Circular A–110, Uniform Administrative Requirements for Grants and Other Agreements With Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations.

7 CFR Part 3052—USDA implementation of OMB Circular No. A–133, Audits of States, Local Governments, and Non-profit Organizations.

7 CFR Part 3407—CSREES procedures to implement the National Environmental Policy Act of 1969, as amended.

9 CFR Parts 1, 2, 3, and 4—USDA implementation of the Act of August 24, 1966, Pub. L. 89–544, as amended (commonly known as the Laboratory Animal Welfare Act).

48 CFR Part 31—Contract Cost Principles and Procedures of the Federal Acquisition Regulations.

29 U.S.C. 794 (section 504, Rehabilitation Act of 1973) and 7 CFR Part 15b (USDA implementation of statute)— prohibiting discrimination based upon physical or mental handicap in Federally assisted programs.

35 U.S.C. 200 *et seq.*—Bayh-Dole Act, controlling allocation of rights to inventions made by employees of small business firms and domestic nonprofit organizations, including universities, in Federally assisted programs (implementing regulations are contained in 37 CFR Part 401).

§ 3403.16 Other considerations.

The Department may, with respect to any research project grant, impose additional conditions prior to or at the time of any award when, in the Department's judgment, such conditions are necessary to assure or protect advancement of the approved project, the interests of the public, or the conservation of grant funds.

Done at Washington, DC, on this 10th day of May, 2006.

Colien Hefferan,

Administrator, Cooperative State Research, Education, and Extension Service.

[FR Doc. 06–4649 Filed 5–17–06; 8:45 am]

BILLING CODE 3410–22–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 327

RIN–3064–AD03

Assessments

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of proposed rulemaking and request for comment.

SUMMARY: The FDIC proposes to amend 12 CFR part 327 to make the deposit insurance assessment system react more quickly and more accurately to changes in institutions' risk profiles, and in so doing to eliminate several causes for complaint by insured depository institutions. The proposed revisions would provide for assessment collection after each quarter ends, which would allow for consideration of more current supervisory information. The computation of institutions' assessment bases would change in the following ways: institutions with $300 million or more in assets would be required to determine their assessment bases using average daily deposit balances, and the float deduction used to determine the assessment base would be eliminated. In addition, the rules governing assessments of institutions that go out of business would be simplified; newly insured institutions would be assessed for the assessment period they become insured; prepayment and double payment options would be eliminated; institutions would have 90 days from each quarterly certified statement invoice to file requests for review and requests for revision; the rules governing quarterly certified statement invoices would be adjusted for a quarterly assessment system and for a three-year retention period rather than the present five-year period.

DATES: Comments must be received on or before July 17, 2006.

ADDRESSES: You may submit comments, identified by RIN number by any of the following methods:

- Agency Web Site: *http://www.fdic.gov/regulations/laws/federal.propose.html.* Follow instructions for submitting comments on the Agency Web site.
- E-mail: *Comments@FDIC.gov.* Include the RIN number in the subject line of the message.
- Mail: Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- Hand Delivery/Courier: Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Instructions: All submissions received must include the agency name and RIN for this rulemaking. All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal/propose.html* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Munsell W. St. Clair, Senior Policy Analyst, Division of Insurance and Research, (202) 898–8967; Donna M. Saulnier, Senior Assessment Policy Specialist, Division of Finance, (703)

562–6167; and Christopher Bellotto, Counsel, Legal Division, (202) 898–3801.

SUPPLEMENTARY INFORMATION:

I. Background

Prior to passage of the Federal Deposit Insurance Reform Act of 2005 and the Federal Deposit Insurance Reform Conforming Amendments Act of 2005 (collectively, the Reform Act),[1] the FDIC was statutorily required to set assessments semiannually. The FDIC did so by setting assessment rates and assigning institutions to risk classes prior to each semiannual assessment period. The semiannual assessment was collected in two installments, one near the start of the semiannual period and the other three months into the period, so that, in practice, assessment collection was accomplished prospectively every quarter.

Provisions in the Reform Act have removed longstanding restraints on the format of the deposit insurance assessment system and granted the FDIC discretion to revamp and improve the manner in which assessments are determined and collected from insured depository institutions. The FDIC has been vested with discretion to set assessment rates, classify institutions for risk-based assessment purposes and collect assessments within a system and on a schedule designed to track more accurately the degree of risk to the deposit insurance fund posed by depository institutions. The Reform Act also eliminated any requirement that the assessment system be semiannual.

The risk-based system has been in operation for 13 years. The FDIC's experience with that system and with approaches and arguments made by institutions that have filed requests for review with the FDIC's Division of Insurance and Research (DIR) and subsequent appeals to the FDIC's Assessment Appeals Committee (AAC) have prompted some of the present proposals to revise the FDIC's deposit insurance assessment system. For example, many appeals to the AAC involved assertions by insured institutions that the FDIC's system did not take into account their improved condition quickly enough. The proposed changes to the assessment system will enable the FDIC to make changes to an institution's assessment rate closer in time to changes in the institution's risk profile. The revisions will enhance the assessment process for institutions and eliminate many of the bases for requests for review filed with DIR by insured institutions as well as appeals filed with the AAC. These proposals would become effective on January 1, 2007, except for the use of average daily assessment bases which may be delayed pending appropriate changes to the reports of condition.

The amendments to the FDIC's operational processes governing assessments affect 12 CFR 327.1 through 12 CFR 327.8.[2] These sections detail the procedures governing deposit insurance assessment and collection as well as calculation of the assessment base; risk differentiation and pricing of deposit insurance will be the subject of a separate rulemaking.

II. Description of the Proposal

A. Collect Quarterly Assessments in Arrears

Under the present system assessments are collected from insured institutions on a semiannual basis in two installments. The first collection is made at the beginning of the semiannual period; the second collection is made in the middle of the semiannual period.[3] The FDIC proposes changing this approach to collect assessments in arrears, that is, after the period being insured. The assessment for each quarter would be due approximately at the end of the following quarter, on the specified payment date.[4] The charts below present a comparison of the current and proposed processes.

CURRENT PROCESS

Quarterly installment	Date of capital and supervisory evaluation	Assessment base[5]	Invoice date	Payment date
First Semiannual Period: January 1–June 30, 2007				
1	September 30, 2006	September 30, 2006	December 15, 2006	January 2, 2007.[6]
2	September 30, 2006	December 31, 2006	March 15, 2007	March 30, 2007.
Second Semiannual Period: July 1–December 31, 2007				
1	March 31, 2007	March 31, 2007	June 15, 2007	June 30, 2007.
2	March 31, 2007	June 30, 2007	September 15, 2007	September 30, 2007.

PROPOSED PROCESS

Quarter	Date of capital evaluation[7]	Assessment base[8]	Invoice date	Payment date
1	March 31, 2007	March 31, 2007	June 15, 2007	June 30, 2007.
2	June 30, 2007	June 30, 2007	September 15, 2007	September 30, 2007.

[1] Federal Deposit Insurance Reform Act of 2005, Public Law 109–171, 120 Stat. 9; Federal Deposit Insurance Conforming Amendments Act of 2005, Pubic Law 109–173, 119 Stat. 3601.

[2] The Reform Act requires the FDIC, within 270 days of enactment, to prescribe final regulations, after notice and opportunity for comment, providing for assessments under section 7(b) of the Federal Deposit Insurance Act. See Section 2109(a)(5) of the Reform Act. Section 2109 also requires the FDIC to prescribe, within 270 days, rules on the designated reserve ratio, changes to deposit insurance coverage, the one-time assessment credit, and dividends. An interim final rule on deposit insurance coverage was published on March 23, 2006. See 71 FR 14629. A notice of proposed rulemaking on the one-assessment credit and a notice of proposed rulemaking on dividends are both being considered by the Board of Directors at the same time as this notice on operational changes to part 327. Additional rulemakings on the designated reserve ratio and risk-based assessments are expected to be proposed in the near future.

[3] In December of 1994, the FDIC modified the procedure for collecting deposit insurance assessments, changing from semiannual to quarterly collection.

[4] Adjustments to prior period invoices will continue to be reflected in invoices for later periods.

[5] That is, the date of the report of condition on which the assessment base is determined.

[6] Under the existing process, December 30, 2006 is the alternate payment date.

PROPOSED PROCESS—Continued

Quarter	Date of capital evaluation [7]	Assessment base [8]	Invoice date	Payment date
3	September 30, 2007	September 30, 2007	December 15, 2007	December 30, 2007.
4	December 31, 2007	December 31, 2007	March 15, 2008	March 30, 2008.

The FDIC proposes that the new rule take effect January 1, 2007. The last deposit insurance collection under the present system (made on September 30, 2006, in the middle of the semiannual period before the new system becomes effective) would represent payment for insurance coverage through December 31, 2006. The first deposit insurance collection under the new system (made on June 30, 2007, at the end of the second quarter under the new system) would represent payment for insurance coverage from January 1 through March 31, 2007. No deposit insurance assessments would be based upon September 30 or December 31, 2006 reported assessment bases. However, institutions would continue to make the scheduled quarterly FICO payments on January 2 and March 30, 2007, using, respectively, these two reported assessment bases. No changes to the way FICO payments are charged or collected are proposed.[9]

Generally Accepted Accounting Principles (GAAP) will allow the FDIC to estimate and recognize income in advance of receipt, which will diminish any effect on the Deposit Insurance Fund reserve ratio in the transition between systems.

Invoices would continue to be presented using FDICconnect, and institutions would continue to be required to designate and fund deposit accounts from which the FDIC could make direct debits. Invoices would, as at present, be made available no later than 15 days prior to the payment date on FDICconnect. However, the payment dates themselves, in relation to the coverage period, would shift in keeping with the proposal. Collections would be made at or near the end of the following quarter (i.e., June 30, September 30, December 30, and March 30). In this way, the proposed assessment system would synchronize the insurance coverage period with the reporting dates and the institutions' risk classifications.

The FDIC would set assessment rates for each risk classification no later than 30 days before the date of the invoice for the quarter, which would give the FDIC's Board of Directors the option of setting rates before the beginning of a quarter or after its completion. For example, the FDIC could set rates for the first quarter of the year in December of the prior year (or earlier if it so chose) or any time up to May 16 of the following year (30 days before the June 15 invoice date). However, the FDIC would not necessarily need to continually reconsider or update assessment rates. Once set, rates would remain in effect until changed by the FDIC's Board. Institutions would have at least 45 days notice of the applicable rates before assessment payments are due.

The FDIC invites comment on whether to adopt the proposed system of assessing in arrears or whether to keep the present assessment process of collecting premiums in advance.

B. Ratings Changes Effective When the Change Occurs

An insured institution at present retains its supervisory and capital group ratings throughout a semiannual period. Any change is reflected in the next semiannual period; in this way, an examination can remain the basis for an institution's assessment rating long after newer information has become available. The FDIC proposes that any changes to an institution's supervisory rating be reflected when the change occurs.[10] If an examination (or targeted examination) led to a change in an institution's CAMELS composite rating that would affect the institution's insurance risk classification, the institution's risk classification would change as of the date the examination or targeted examination began, if such a date existed.[11] Otherwise, it would change as of the date the institution was notified of its rating change by its primary federal regulator (or state authority), assuming in either case that the FDIC, after taking into account other information that could affect the rating, agreed with the classification implied by the examination, or it would change as of the date that the FDIC determines that the change in the supervisory rating occurred.[12] In this way, assessments for prior quarters might increase or decrease if an examination is started during a quarter but not completed until some time after the quarter ends, which could result in institutions being billed additional amounts for earlier quarters or refunded amounts already paid for earlier quarters. Interest as provided at 12 CFR 327.7 would be charged on additional amounts billed and would be paid on any amounts refunded.

For example, an institution's primary federal regulator might begin an examination of an institution one month into a quarter. If the examination results in an upgrade to the institution's CAMELS composite rating that would affect the institution's risk classification, the institution would obtain the benefit of the improved risk rating for the last two months of the quarter, rather than waiting until the next period. In a similar situation, if the institution were downgraded, the effect would be an increased assessment for the last two months.

The FDIC proposes that this new rule take effect January 1, 2007.

[7] The FDIC is proposing that supervisory rating changes would become effective as they occur. In connection with rulemaking on risk differentiation and assessment rates, the FDIC is contemplating proposing that an institution's capital evaluation be determined based upon information in its report of condition as of the last day of each quarter.

[8] That is, the date of the report of condition on which the assessment base is determined.

[9] Pursuant to statute and a memorandum of understanding with the Financing Corporation (FICO), the FDIC collects FICO assessments from insured depository institutions based upon quarterly report dates. See 12 U.S.C. 1441(f)(2). FICO payments represent funds remitted to FICO to ensure sufficient funding to distribute interest payments for the outstanding FICO obligations. FICO collections will continue during the transition period and will not be affected by the FDIC's proposals. (The method for determining assessment bases would change for institutions that report average daily assessment bases, but the date of the assessment base on which FICO payments are based would not change.)

[10] As discussed in an earlier footnote, the FDIC is contemplating proposing in another rulemaking that capital evaluations be determined based upon information in reports of condition as of the last day of the quarter. The FDIC is also contemplating proposing that, as at present, the FDIC continue to have the discretion to determine an institution's risk rating.

[11] Small institutions generally have an examination start date; very infrequently, however, a smaller bank's CAMELS rating can change without an exam, or there may be no exam start date. Large institutions, on the other hand—especially those with resident examiners—often have no exam start date.

[12] An examination that began before the proposed amendments are implemented (*i.e.*, before January 1, 2007) would be deemed to have begun on the first day of the first assessment period subject to the amendments.

C. Minor Modifications to the Present Assessment Base

At present, an institution's assessment base is principally derived from total domestic deposits. The current definition of the assessment base is detailed in 12 CFR 327.5. Generally, the definition is deposit liabilities as defined by section 3(l) of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1813(l)) with some adjustments. However, because the total deposits that institutions report in their reports of condition do not coincide with the section 3(l) definition, institutions report several adjustments elsewhere in their reports of condition; these adjustments are used to determine the assessment base.

For example, banks are specifically instructed to exclude Uninvested Trust Funds from deposit liabilities as reported on Schedule RC–E of their Reports of Income and Condition (Call Reports). However, these funds are considered deposits as defined by section 3(l) and are therefore included in the assessment base. Line item 3 on Schedule RC–O of the Call Report was included to facilitate the reporting of these funds. For this line item and for the many others, banks simply report the amount of each item that was excluded from the RC–E calculation. Other line items require the restoration of amounts that were netted for reporting purposes on Schedule RC–E. For example, when banks were instructed to file Call Reports in accordance with Generally Accepted Accounting Principles (GAAP), they were permitted to offset deposit liabilities against assets in certain circumstances. In order to comply with the statutory definition of deposits, lines 12a and 12b were added to Schedule RC–O to recapture those amounts.

The FDIC proposes retaining the current assessment base as applied in practice with minor modifications. The definition would be reworded in concert with a proposed simplification of the associated reporting requirements on insured institutions' reports of condition.[13] The assessment base definition would continue to be deposit liabilities as defined by section 3(l) of the FDI Act with enumerated allowable adjustments. These adjustments would include drafts drawn on other depository institutions, which meet the definition of deposits per section 3(l) of the FDI Act but are specifically excluded from the assessment base in section 7(a)(4) of the FDI Act (12 U.S.C. 1817(a)(4)). Similarly, although depository institution investment contracts meet the definition of deposits as defined by section 3(l), they are presently excluded from the assessment base under section 327.5 and would continue to be excluded, as would pass through reserves. Certain reciprocal bank balances would also be excluded. Unposted debits and unposted credits would be excluded from the definition of the assessment base for institutions that report average daily balances because these debits and credits are captured in the next day's deposits (and thus reflected in the averages). For consistency and because they should not materially affect assessment bases, unposted debits and unposted credits would be excluded from the definition of the assessment base for institutions that report quarter end balances. The FDIC, however, is concerned that excluding unposted credits from the assessment base could lead to manipulation of assessment bases by institutions that report quarter end balances and requests comment on this issue.

The current definition of the assessment base as detailed in 12 CFR 327.5 has been driven by reporting requirements that have evolved over time. These requirements have changed because of the evolving reporting needs of all of the Federal regulators. As a result, the FDIC's regulatory definition of the assessment base has required periodic updates when reporting requirements in reports of condition are changed for other purposes.[14] By rewording the definition of the assessment base to deposit liabilities as defined by section 3(*l*) of the FDI Act with allowable exclusions, the FDIC will not be required to update its regulation periodically in response to outside factors.

The FDIC proposes that the new rule take effect on January 1, 2007.

The FDIC invites comment on whether this proposal should be adopted or whether the current regulatory language and regulation should remain in place.

D. Average Daily Deposit Balance for Institutions With Assets of $300 Million or More

Currently, an insured institution's assessment base is computed using quarter-end deposit balances. Most schedules of the Call Report and the TFR are based on quarter-end data, but there are drawbacks to using quarter-end balances for assessment determinations. Under the current system, deposits at quarter-end are used as a proxy for deposits for an entire quarter, but balances on a single day in a quarter may not accurately reflect an institution's typical deposit level. For example, if an institution receives an unusually large deposit at the end of a quarter and holds it only briefly, the institution's assessment base and deposit insurance assessment may increase disproportionately to the amount of deposits it typically holds. A misdirected wire transfer received at the end of a quarter can create a similar result. Using quarter-end balances creates incentives to temporarily reduce deposit levels at the end of a quarter for the sole purpose of avoiding assessments. Institutions of various sizes have raised these issues with the FDIC.

Instead of using quarter-end deposits, therefore, the FDIC proposes using average daily balances over the quarter, which should give a more accurate depiction of an institution's deposits. This proposal, when combined with the FDIC's previous proposals, will provide a more realistic and timely depiction of actual events.

Institutions do not at present report average daily balances on Call Reports and TFRs. Reporting average assessment bases will therefore necessitate changes to Call Reports and TFRs requiring the approval of the FFIEC and time to implement. Until these changes to the Call Report and TFR are made, the FDIC proposes continuing to determine

[13] At present, 26 items are required in the Reports of Condition and Income (Call Reports) to determine a bank's assessment base and 11 items are required in the Thrift Financial Report (TFRs) to determine a thrift's assessment base. The FDIC is contemplating proposing changes to the way the assessment base is reported that could reduce these items to as few as two. Essentially, instead of starting with deposits as reported in the report of condition and making adjustments, banks would start with a balance that approximates the statutory definition of deposits. The FDIC believes that this balance is typically found within most insured institutions' deposit systems. In this way, institutions would be required to track far fewer adjustments. In any case, this approach should impose no additional burden on insured institutions since the items required to be reported would remain essentially the same under the revised regulatory definition. The changes to reporting requirements should also allow institutions to report daily average deposits more easily, since they will not have to track and average adjustment items separately. As now, the Call Report and TFR instructions would continue to specify the items required to meet the requirements of section 3(l) for reporting purposes. The FDIC is contemplating proposing that appropriate changes to reports of condition become effective March 31, 2007, and will coordinate with the Federal Financial Institutions Examination Council (FFIEC) on the necessary changes to the reports of condition.

[14] In fact, the regulatory definition has not kept pace with these reporting changes. In practice, however, the assessment base is calculated as if the regulatory definition had kept pace.

assessment bases using quarter end balances.

In addition, for one year after the necessary changes to the Call Report and TFR have been made, the FDIC proposes giving each existing institution the option of using average balances to determine its assessment base. Thereafter, institutions with $300 million or more in assets would be required to report average daily balances. To avoid burdening smaller institutions, which might have to modify their accounting and reporting systems, existing institutions with less than $300 million in assets would continue to be offered the option of using average daily balances to determine their assessment bases.[15]

If its assessment base were growing, a smaller institution would pay smaller assessments if it reported daily averages rather than quarter-end balances, all else equal. Nevertheless, a smaller institution that elected to report quarter-end balances could continue to do so, so long as its assets, as reported in its Call Report or TFR did not equal or exceed $300 million in two consecutive reports. Otherwise, the institution would be required to begin reporting average daily balances for the quarter that begins six months after the end of the quarter in which the institution reported that its assets equaled or exceeded $300 million for the second consecutive time. An institution with less than $300 million in assets would be allowed to switch from reporting quarter-end balances to reporting average daily balances for an upcoming quarter.

Any institution, once having begun to report average daily balances, either voluntarily or because required to, would not be allowed to switch back to reporting quarter-end balances. Any institution that becomes insured after the necessary modifications to the Call Report and TRF have been made would be required to report average daily balances for assessment purposes.

E. Eliminate the Float Deduction

The largest overall adjustments to the current assessment base are deductions for float, deposits reported as such for assessment purposes that were created by deposits of cash items (checks) for which the institution has not itself received credit or payment. These deductions are currently a 16⅔ percent float deduction for demand deposits and a 1 percent float deduction for time and savings deposits. Two basic rationales exist for allowing institutions to deduct float. First, without a float deduction, institutions would be assessed for balances created by deposits of checks for which they had not actually been paid. Second, crediting an uncollected cash item (a check) to a deposit account can temporarily create double counting in the aggregate assessment base—once at the institution that credited the cash item to the deposit account, and again at the payee insured institution on which the cash item is drawn. Deducting float from deposits when calculating the assessment base reduces this double counting.

Before 1960, institutions computed actual float and deducted it from deposits when computing their assessment bases. This proved to be onerous at the time. In 1960, Congress by statute established the standardized float deductions in an effort to simplify and streamline the assessment-base calculation. Section 7(b) of the FDI Act defined the deposit insurance assessment base until passage of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA), which removed the statutory definition. Since then, the FDIC's regulations alone have defined the assessment base. The current definition, at 12 CFR 327.5, generally tracks the former statutory definition.

The basis for the percentages chosen by Congress is not clear. Even if the percentages were a realistic approximation of average bank float when they were selected over 40 years ago, legal, technological and payment systems changes—such as Check 21—that have accelerated check clearing should have reduced float, everything else equal, and made the existing standard float deductions obsolete, at least in theory.[16]

The FDIC does not collect information on actual float from institutions. However, commercial banks and FDIC-supervised savings banks that have $300 million or more in total assets or that have foreign offices report an item on the Call Report called ''Cash items in process of collection.'' This item appears to include actual float, but includes other amounts as well.[17]

Cash items in the process of collection as a percent of domestic deposits for commercial banks with total assets greater than or equal to $300 million has been decreasing. Over the long term, the ratio of cash items to total domestic deposits has fallen significantly, as Table 1 illustrates:

TABLE 1.—RATIO OF CASH ITEMS TO TOTAL DOMESTIC DEPOSITS [18]

Year-end	Cash items as a percent of total domestic deposits
1985	7.35
1990	5.19
1995	4.97
2000	4.18
2005	2.93

The FDIC proposes eliminating the float deductions on the grounds that, based on available information, the standard float deductions appear to be obsolete and arbitrary, actual float appears to be small and decreasing as the result of legal, technological and payment systems changes, and requiring institutions to calculate actual float would appear to increase regulatory burden.

Eliminating the float deductions would favor some institutions over others. Institutions with larger percentages of time and savings deposits would see the least increase in their assessment bases; conversely, those with large percentages of demand deposits would see the greatest increases in their assessment bases. However, eliminating the float deductions would only minimally affect the relative distribution of the aggregate assessment base among institutions of different asset sizes and between banks and thrifts (although it would have a

[15] In those instances where a parent bank or savings association files its Call Report or TFR on a consolidated basis by including a subsidiary bank(s) or savings association(s), all institutions included in the consolidated reporting must file in the same manner. For example, if the parent bank submits a consolidated Call Report and must report daily averages on the Call Report, then all subsidiary banks that have been consolidated must also report daily averages on their respective Call Reports. Each institution's daily averages must be determined separately.

[16] Congress enacted Check 21 on October 28, 2004. Check 21 allows banks to electronically transfer check images instead of physically transferring paper checks. The Federal Reserve Board, What You Should Know About Your Checks, *http://www.federalreserve.gov/pubs/check21/shouldknow.htm* (updated Feb. 16, 2005). As a result, the transmission and processing of electronic checks can be done faster than transferring paper checks through the clearing process. A recent Federal Reserve payment survey indicates that, for the first time, bank-to-bank electronic payments have exceeded payments by check. Treasury and Risk Management, Just Another Step Along the Way to a Checkless Economy, *http://www.treasuryandrisk.com*, September 2005. With Check 21, the volume of paper checks processed is expected to continue to decline with more payments processed electronically resulting in a smaller float.

[17] For example, this item includes, among other things: (1) redeemed United States savings bonds and food stamps; and (2) brokers' security drafts and commodity or bill-of-lading drafts payable immediately upon presentation in the U.S. The full Call Report instructions for ''Cash items in process of collection'' are included in Attachment A.

[18] Table 1 includes all Call Report filers with $300 million or more in assets.

greater effect on the assessment bases of some individual institutions).[19] While eliminating the float deductions would increase assessment bases and affect the distribution of the assessment burden among institutions, it should not, in itself, increase assessments. The assessment rates that the FDIC will propose in the new pricing system will take into account the elimination of the float deduction.

Based upon available information, the FDIC proposes to eliminate the float deduction, with the new rule taking effect January 1, 2007. However, in light of the alternatives discussed below, the FDIC believes that comment would be particularly helpful in evaluating this proposal, especially on how much float remains, how accurate the present float deductions are, and how burdensome calculation of actual float would be. The FDIC invites comment on the following two alternatives, as well as on the proposal to eliminate the float deduction.

Deduct Actual Float

One alternative to eliminating the float deduction would be to deduct actual float to determine the assessment base.[20] While legal, technological and payment systems changes that have accelerated check clearing appear to have reduced float, there is evidence that actual float has not been completely eliminated as indicated in Table 1 above.

Deducting actual float rather than the standard float deductions to arrive at the assessment base would favor some institutions over other institutions. Institutions with float percentages on demand deposits that exceed 16⅔ percent would have a larger assessment base deduction than they currently have. Institutions with float percentages on demand deposits less than 16⅔ percent would have a smaller assessment base deduction than they currently have.

The smallest banks (and all savings associations, which file TFRs) do not report cash items in process of collection separately. All other banks separately report cash items in process of collection, and among these banks the assessment bases of medium-sized banks would, as a whole, increase by the greatest percentage if institutions deducted actual float rather than 16⅔ percent. It appears unlikely that using actual float would result in a major change in the relative distribution of the aggregate assessment base among institutions of different sizes, at least among the medium to largest institutions. However, the FDIC has no proxy for actual float at smaller banks or for Office of Thrift Supervision (OTS) supervised savings institutions of any size, and thus cannot estimate the distributional effects on these institutions as a group.[21]

Deducting actual float rather than the standard float deductions to arrive at the assessment base would require that institutions report actual float. Institutions that determine their assessment base using average daily balances would be required to report average daily float. This would necessitate a new information requirement for float data.[22] Before 1960, institutions computed actual float and deducted it from deposits when computing their assessment bases. Because this proved to be onerous at one time, Congress established the standardized float deductions by statute. Asking institutions to again report actual float could create significant regulatory burden. In addition, if actual float were deducted, institutions that report their assessment bases using average daily balances would be required to report their float deduction the same way.

Retain the Existing Float Deduction

The FDIC considered retaining the current float deduction. The current deduction has largely been in place for over 40 years and is well known. This option would impose no conversion costs and would neither increase nor decrease record keeping or reporting costs at present.[23] Current standardized float deductions, however, probably do not reflect real float for most institutions.

F. Modify the Terminating Transfer Rule

At present, complex rules apply to terminating transfers[24] to ensure that the assessment of a terminating institution is paid. Determining and collecting assessments after the end of each quarter and using average daily assessment bases make these complex rules obsolete and unnecessary. An acquiring institution (or institutions) would remain liable for the assessment owed by a terminating institution, but the assessment base of the disappearing institution would be zero for the remainder of the quarter after the terminating transfer.

The proposed terminating transfer provision would deal with a few remaining situations. When a terminating transfer occurs, if the terminating institution does not file a report of condition for the quarter in which the terminating transfer occurred or for the prior quarter, calculation of its quarterly certified statement invoices for those quarters would be based on its assessment base from its most recently filed report of condition. For the quarter before the terminating transfer occurred, the acquired institution's assessment premium would be determined using its rate, but for the quarter in which the terminating transfer occurs, the acquired institution's assessment premium would be pro rated according to the portion of the quarter in which it existed and assessed at the rate of the acquiring institution.

Under the proposal, once institutions begin reporting average daily deposits, the average assessment base of the acquiring institution will properly reflect the terminating transfer and will increase after the terminating transfer. For an acquiring institution that does not report average daily deposits, however, the FDIC proposes that its assessment base as reported at the end of the quarter be reduced to reflect that

[19] See Attachment B for further analysis of the effect of eliminating the float deductions.

[20] One possible basic definition of actual float would be limited to the actual amount of cash items in process of collection: (1) included in the assessment base; and (2) for which the institution has not been paid. As soon as an institution received payment or credit for a cash item, the item would no longer be eligible for the float deduction. A variation on this definition would limit float to cash items in process of collection: (1) included in the assessment base; (2) due from another insured depository institution, a clearinghouse, or the Federal Reserve System; and (3) for which the institution has not been paid. A third alternative would be similar to the second alternative except that the actual amount of cash items in the process of collection would have to be credited to customer deposit accounts. Other definitions are possible and any definition adopted would probably be complex. Comments are particularly sought on the definition that should be used if actual float were deducted in determining the assessment base.

[21] See Attachment B for further analysis of the effect of deducting actual float.

[22] The Call Report item ''Cash items in process of collection'' could not be used to determine the actual float deduction for individual institutions. Because ''Cash items in process of collection'' contains items other than float, it may overstate actual float. For a few institutions, ''Cash items in process of collection,'' exceeds the institutions' assessment bases. (These institutions' ''Cash items'' are not included in the approximation of actual float in the text.) Conversely, given the small size of the ''Cash items in process of collection'' reported by many institutions, this item may understate float at some institutions.

[23] For assessment base reporting, the FDIC would need to retain a breakout of demand deposits and time and savings deposits.

[24] Generally speaking, a *terminating transfer* occurs when an institution assumes another institution's liability for deposits—often through merger or consolidation—when the terminating institution essentially goes out of business. Neither the assumption of liability for deposits from the estate of a failed institution nor a transaction in which the FDIC contributes its own resources in order to induce a surviving institution to assume liabilities of a terminating institution is a terminating transfer.

the acquiring institution did not hold the acquired institution's assessment base for the full quarter. Thus, for example, an institution that reports end-of-quarter balances might acquire another institution by merger one month (one-third of the way) into a quarter. In that case, the acquiring institution's assessment base for that quarter would be decreased by one-third of the acquired institution's assessment base.

The FDIC proposes that this rule become effective January 1, 2007.

G. Assess Newly Insured Institutions for the Quarter They Become Insured

At present, a newly insured institution is not liable for assessments for the semiannual period in which it becomes insured, but is liable for assessments for the following semiannual period. The institution's assessment base as of the day before the following semiannual period begins is deemed to be its assessment base for the entire semiannual period. These special rules are needed because, at present, assessments are based upon assessment bases that an institution has reported in the past. A newly insured institution reports an assessment base at the end of the quarter in which it becomes insured but that assessment base is not used to calculate its assessment until the following semiannual period. Further, if an institution becomes insured in the second half of a semiannual period, it will have no reported assessment base on which to calculate the first installment of its premium for the next semiannual period.

Under the FDIC's proposals, each quarterly assessment will be based upon the assessment base that an institution reports at the end of that quarter. Thus, a newly insured institution will have reported an assessment base for the quarter in which it becomes insured and the special assessment rules for newly insured institutions will no longer be needed.

The FDIC proposes that the special assessment rules for newly chartered institutions be eliminated, that the normal rules for determining assessment bases apply to newly chartered institutions and that these new rules go into effect January 1, 2007.

H. Allow 90 Days Each Quarter To File a Request for Review or Request for Revision

The current deadline for an institution to request a review of its assessment risk classification is 90 days from the invoice date for the first quarterly installment of a semiannual period. Under the FDIC's proposal, each quarterly assessment will be separately computed in the future. Consequently, a conforming change is needed to the rules for requesting review, so that institutions would have 90 days from the date of each quarterly certified statement invoice to file a request for review. Institutions would also have 90 days from the date of any subsequent invoice that adjusted the assessment of an earlier assessment period to request a review.

A parallel amendment would be made so that requests for revision of an institution's quarterly assessment payment computation would be made within 90 days of the quarterly assessment invoice for which revision is requested (rather than the present 60 days).

The FDIC proposes that these amendments go into effect January 1, 2007.

I. Conforming Changes to the Certified Statement Rules

The Reform Act eliminated the requirement that the deposit insurance assessment system be semiannual and provided a new three-year statute of limitations for assessments. Accordingly, the FDIC proposes to revise the provisions of 12 CFR 327.2 to clarify that the certified statement is the quarterly certified statement invoice and to provide for the retention of the quarterly certified statement invoice by insured institutions for three years, rather than five years under the prior law.

The FDIC proposes that these amendments take effect January 1, 2007.

J. Eliminate the Prepayment and Double Payment Options

When the present assessment system was proposed more than 10 years ago, the original quarterly dates for payment of assessments were: March 30, June 30, September 30, and December 30. The FDIC recognized that the December 1995 collection date could present a one-time problem for institutions using cash-basis accounting, since these institutions would, in effect, be paying assessments for five quarters in 1995. The FDIC believed that few institutions would be adversely affected. Soon after the new system was adopted, however, the FDIC began to receive information that more institutions than had originally been identified would be adversely affected by the December collection date. As a result, the FDIC amended the regulation in 1995 to move the collection date to January 2, but allowed institutions to elect to pay on December 30, thus establishing the prepayment date.

The FDIC proposes eliminating the prepayment option. With implementation of the revamped assessment system, a transition period will be created in which institutions will not be subject to deposit insurance assessment premiums after the September 30, 2006 payment date until June 30, 2007. Consequently, reestablishing the original December 30 payment date should have no adverse consequences for institutions that use cash-basis accounting. No institution would make more than four insurance payments in calendar year 2006; those using the December 30, 2005 payment date would make only three payments in 2006. All institutions would make four payments annually thereafter. This change will keep all assessment payments within each calendar year.[25]

In addition, insured institutions presently have the regulatory option of making double payments on any payment date except January 2. Under the proposed system, this option would also be eliminated. The double payment option has its origins in the 1995 amendment, when the payment date was modified from December 30, 1995 to January 2, 1996. The double payment option was adopted to provide cash basis institutions the opportunity to pay the full amount of their semiannual assessment premium on December 30 so as to have the complete benefit of this modification. The transition period from September 30, 2006 to June 30, 2007 and four payments annually beginning in 2007 should eliminate the need for the double payment option. Moreover, the FDIC will no longer be charging semiannual premiums.

The FDIC proposes that these amendments take effect January 1, 2007. Comment from interested parties is elicited on the elimination of the prepayment and double payment options.

III. Regulatory Analysis and Procedure

A. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106–102, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. We invite your comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?

[25] The allowance for payment on the following business day—should January 2 fall on a non-business day—will be eliminated as well.

• Are the requirements in the proposed regulation clearly stated? If not, how could the regulation be more clearly stated?

• Does the proposed regulation contain language or jargon that is not clear? If so, which language requires clarification?

• Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?

• What else could we do to make the regulation easier to understand?

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that each Federal agency either certify that a proposed rule would not, if adopted in final form, have a significant economic impact on a substantial number of small entities or prepare an initial regulatory flexibility analysis of the proposal and publish the analysis for comment. See 5 U.S.C. 603, 604, 605. Certain types of rules, such as rules of particular applicability relating to rates or corporate or financial structures, or practices relating to such rates or structures, are expressly excluded from the definition of ''rule'' for purposes of the RFA. 5 U.S.C. 601. The proposed rule provides operational procedures governing assessments and relates directly to the rates imposed on insured depository institutions for deposit insurance, by providing for the determination of assessment bases to which the rates will apply. Consequently, no regulatory flexibility analysis is required.

Moreover, if adopted in final form, the proposed rule would not have a significant economic impact on a substantial number of small institutions within the meaning of those terms as used in the RFA. The proposed rule would provide the operational format for the FDIC's assessment system for the collection of deposit insurance assessments. Most of the processes within this proposed regulation are analogous to existing FDIC assessment processes; variances occur largely in timing, not in the processes themselves; no additional reporting requirements or record retention requirements are created by the proposed rules.

The provisions dealing with determining assessment bases using average daily balances include an opt-out for insured institutions with assets of less than $300 million, which would permit small institutions under the RFA (i.e., those with $165 million or less in assets) to continue (as they do now) reporting quarter end balances. Newly insured institutions with $165 million or less in assets, however, would be required to report average daily balances. Most small, newly insured institutions (for the period from 2001 through 2005, the average number of small institutions that became insured each year was approximately 126) will ordinarily implement systems permitting calculation of average daily balances and therefore will not be significantly burdened by this requirement.

Similarly, elimination of the float deduction in calculating assessment bases would not have a significant economic impact on a substantial number of small ($165 million in assets or less) insured depository institutions within the meaning of the RFA. Based on December 31, 2005 reports of condition, small institutions represented 5.09 percent of the total assessment base, with large institutions (i.e., those with more than $165 million in assets) representing 94.91 percent. Without the existing float deduction, those percentages would have been 5.14 and 94.86, respectively, a change of only .05 percent. By way of example, if a flat 2 basis point annual charge had been assessed on the December 31, 2005 assessment base without the float deduction (i.e., with the float deduction added back to the assessment base), the amount collected would have been approximately $1.267 billion. To collect the same amount from the industry on the same assessment base, but allowing the float deduction, approximately a 2.05 basis point charge would have been required, since the assessment base would have been smaller. The average difference in assessment charged a small institution for one year if the float deduction were eliminated (charging 2 basis points) versus allowing the float deduction (charging 2.05 basis points) would be about $110. The actual increase in assessments charged small institutions for one year if the float deduction were eliminated (charging 2 basis points) versus allowing the float deduction (charging 2.05 basis points) would be greater than or equal to $1,000 for only 38 out of 5,362 small institutions.[26] The largest resulting increase for any small institution would be about $2,500. In addition, the actual amount collected would in many cases be reduced by one-time credit use while these credits last. Accordingly, pursuant to section 605 of the RFA, the FDIC is not required to do an initial regulatory flexibility analysis of the proposed rule.

Commenters are invited to provide the FDIC with any information they may have about the likely quantitative effects of the proposal on small insured depository institutions.

C. Paperwork Reduction Act

No collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) are contained in the proposed rule. Any paperwork created as the result of the conversion to reporting average daily assessment balances will be submitted to the Office of Management and Budget (OMB) for review and approval as an adjustment to the Consolidated Reports of Condition and Income (call reports), an existing collection of information approved by OMB under Control No. 3064–0052.

D. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the proposed rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681).

List of Subjects in 12 CFR Part 327

Bank deposit insurance, Banks, banking, Savings associations.

For the reasons set forth in the preamble, the FDIC proposes to amend chapter III of title 12 of the Code of Federal Regulations as follows:

PART 327—ASSESSMENTS

1. The authority citation for part 327 is revised to read as follows:

Authority: 12 U.S.C. 1441, 1813, 1815, 1817–1819, 1821; Sec. 2101–2109, Pub. L. 109–171, 120 Stat. 9–21 , and Sec. 3, Pub. L. 109–173, 119 Stat. 3605.

2. Revise §§ 327.1 through 327.8 of Subpart A to read as follows:

§ 327.1 Purpose and scope.

(a) *Scope*. This part 327 applies to any insured depository institution, including any insured branch of a foreign bank.

(b) *Purpose*. (1) Except as specified in paragraph (b)(2) of this section, this part 327 sets forth the rules for:

(i) The time and manner of filing certified statements by insured depository institutions;

(ii) The time and manner of payment of assessments by such institutions; and

[26] Of the 8,832 insured depository institutions, there were 5,362 small insured depository institutions (i.e., those with $165 million or less in assets) as of December 31, 2005.

(iii) The payment of assessments by depository institutions whose insured status has terminated.

(2) Deductions from the assessment base of an insured branch of a foreign bank are stated in subpart B part 347 of this chapter.

§ 327.2 Certified statements.

(a) *Required*. (1) The certified statement shall also be known as the quarterly certified statement invoice. Each insured depository institution shall file and certify its quarterly certified statement invoice in the manner and form set forth in this section.

(2) The quarterly certified statement invoice shall reflect the institution's assessment base, assessment computation, and assessment amount, for each quarterly assessment period.

(b) *Availability and access*. (1) The Corporation shall make available to each insured depository institution via the FDIC's e-business Web site FDICconnect a quarterly certified statement invoice each assessment period.

(2) Insured depository institutions shall access their quarterly certified statement invoices via FDICconnect, unless the FDIC provides notice to insured depository institutions of a successor system. In the event of a contingency, the FDIC may employ an alternative means of delivering the quarterly certified statement invoices. A quarterly certified statement invoice delivered by any alternative means will be treated as if it had been downloaded from FDICconnect.

(3) Institutions that do not have Internet access may request a renewable one-year exemption from the requirement that quarterly certified statement invoices be accessed through FDICconnect. Any exemption request must be submitted in writing to the Chief of the Assessments Section.

(4) Each assessment period, the FDIC will provide courtesy e-mail notification to insured depository institutions indicating that new quarterly certified statement invoices are available and may be accessed on FDICconnect. E-mail notification will be sent to all individuals with FDICconnect access to quarterly certified statement invoices.

(5) E-mail notification may be used by the FDIC to communicate with insured depository institutions regarding quarterly certified statement invoices and other assessment-related matters.

(c) *Review by institution*. The president of each insured depository institution, or such other officer as the institution's president or board of directors or trustees may designate, shall review the information shown on each quarterly certified statement invoice.

(d) *Retention by institution*. If the appropriate officer of the insured depository institution agrees that to the best of his or her knowledge and belief the information shown on the quarterly certified statement invoice is true, correct and complete and in accordance with the Federal Deposit Insurance Act and the regulations issued under it, the institution shall pay the amount specified on the quarterly certified statement invoice and shall retain it in the institution's files for three years as specified in section 7(b)(4) of the Federal Deposit Insurance Act.

(e) *Amendment by institution*. If the appropriate officer of the insured depository institution determines that to the best of his or her knowledge and belief the information shown on the quarterly certified statement invoice is not true, correct and complete and in accordance with the Federal Deposit Insurance Act and the regulations issued under it, the institution shall pay the amount specified on the quarterly certified statement invoice, and may:

(1) Amend its Report of Condition, or other similar report, to correct any data believed to be inaccurate on the quarterly certified statement invoice; amendments to such reports timely filed under section 7(g) of the Federal Deposit Insurance Act but not permitted to be made by an institution's primary Federal regulator may be filed with the FDIC for consideration in determining deposit insurance assessments; or

(2) Amend and sign its quarterly certified statement invoice to correct a calculation believed to be inaccurate and return it to the FDIC by the applicable payment date specified in § 327.3(c).

(f) *Certification*. Data used by the Corporation to complete the quarterly certified statement invoice has been previously attested to by the institution in its Reports of Condition, or other similar reports, filed with the institution's primary Federal regulator. When an insured institution pays the amount shown on the quarterly certified statement invoice and does not correct that invoice as provided in paragraph (e) of this section, the information on that invoice shall be deemed true, correct, complete, and certified for purposes of paragraph (a) of this section and section 7(c) of the Federal Deposit Insurance Act.

(g) *Requests for revision of assessment computation*. (1) The timely filing of an amended Report of Condition or other similar report, or an amended quarterly certified statement invoice, that will result in a change to deposit insurance assessments owed or paid by an insured depository institution shall be treated as a timely filed request for revision of computation of quarterly assessment payment under § 327.3(f).

(2) The rate multiplier on the quarterly certified statement invoice shall be amended only if it is inconsistent with the assessment risk classification assigned to the institution by the Corporation for the assessment period in question pursuant to § 327.4(a). Agreement with the rate multiplier shall not be deemed to constitute agreement with the assessment risk classification assigned.

§ 327.3 Payment of assessments.

(a) *Required*—(1) In general. Except as provided in paragraph (b) of this section, each insured depository institution shall pay to the Corporation for each assessment period an assessment determined in accordance with this part 327.

(2) *Notice of designated deposit account*. For the purpose of making such payments, each insured depository institution shall designate a deposit account for direct debit by the Corporation. No later than 30 days prior to the next payment date specified in paragraph (b)(2) of this section, each institution shall provide written notice to the Corporation of the account designated, including all information and authorizations needed by the Corporation for direct debit of the account. After the initial notice of the designated account, no further notice is required unless the institution designates a different account for assessment debit by the Corporation, in which case the requirements of the preceding sentence apply.

(b) *Assessment payment*—(1) *Quarterly certified statement invoice*. Starting with the first assessment period of 2007, no later than 15 days prior to the payment date specified in paragraph (b)(2) of this section, the Corporation will provide to each insured depository institution a quarterly certified statement invoice showing the amount of the assessment payment due from the institution for the prior quarter (net of credits or dividends, if any), and the computation of that amount. Subject to paragraph (e) of this section, the invoiced amount on the quarterly certified statement invoice shall be the product of the following: The assessment base of the institution for the prior quarter computed in accordance with § 327.5 multiplied by the institution's rate for that prior quarter as assigned to the institution pursuant to §§ 327.4(a) and 327.9.

(2) *Quarterly payment date and manner.* The Corporation will cause the amount stated in the applicable quarterly certified statement invoice to be directly debited on the appropriate payment date from the deposit account designated by the insured depository institution for that purpose, as follows:

(i) In the case of the assessment payment for the quarter that begins on January 1, the payment date is the following June 30;

(ii) In the case of the assessment payment for the quarter that begins on April 1, the payment date is the following September 30;

(iii) In the case of the assessment payment for the quarter that begins on July 1, the payment date is the following December 30; and

(iv) In the case of the assessment payment for the quarter that begins on October 1, the payment date is the following March 30.

(c) *Necessary action, sufficient funding by institution.* Each insured depository institution shall take all actions necessary to allow the Corporation to debit assessments from the insured depository institution's designated deposit account. Each insured depository institution shall, prior to each payment date indicated in paragraph (b)(2) of this section, ensure that funds in an amount at least equal to the amount on the quarterly certified statement invoice are available in the designated account for direct debit by the Corporation. Failure to take any such action or to provide such funding of the account shall be deemed to constitute nonpayment of the assessment.

(d) *Business days.* If a payment date specified in paragraph (b)(2) falls on a date that is not a business day, the applicable date shall be the previous business day.

(e) *Payment adjustments in succeeding quarters.* Quarterly certified statement invoices provided by the Corporation may reflect adjustments, initiated by the Corporation or an institution, resulting from such factors as amendments to prior quarterly reports of condition, retroactive revision of the institution's assessment risk classification, and revision of the Corporation's assessment computations for prior quarters.

(f) *Request for revision of computation of quarterly assessment payment.*

(1) *In general.* An institution may submit a written request for revision of the computation of the institution's quarterly assessment payment as shown on the quarterly certified statement invoice in the following circumstances:

(i) The institution disagrees with the computation of the assessment base as stated on the quarterly certified statement invoice;

(ii) The institution determines that the rate multiplier applied by the Corporation is inconsistent with the assessment risk classification assigned to the institution in writing by the Corporation for the assessment period for which the payment is due; or

(iii) The institution believes that the quarterly certified statement invoice does not fully or accurately reflect adjustments provided for in paragraph (e) of this section.

(2) *Inapplicability.* This paragraph (f) is not applicable to requests for review of an institution's assessment risk classification, which are covered by § 327.4(c).

(3) *Requirements.* Any such request for revision must be submitted within 90 days of the date of the quarterly assessment invoice for which revision is requested. The request for revision shall be submitted to the Chief of the Assessments Section and shall provide documentation sufficient to support the revision sought by the institution. If additional information is requested by the Corporation, such information shall be provided by the institution within 21 days of the date of the request for additional information. Any institution submitting a timely request for revision will receive written notice from the Corporation regarding the outcome of its request. Upon completion of a review, the DOF Director shall promptly notify the institution in writing of his or her determination of whether revision is warranted.

(g) *Quarterly certified statement invoice unavailable.* Any institution whose quarterly certified statement invoice is unavailable on FDICconnect by the fifteenth day of the month in which the payment is due shall promptly notify the Corporation. Failure to provide prompt notice to the Corporation shall not affect the institution's obligation to make full and timely assessment payment. Unless otherwise directed by the Corporation, the institution shall preliminarily pay the amount shown on its quarterly certified statement invoice for the preceding assessment period, subject to subsequent correction.

§ 327.4 Assessment rates.

(a) *Assessment risk classification.* For the purpose of determining the annual assessment rate for insured depository institutions under § 327.9, each insured depository institution will be assigned an ''assessment risk classification.'' Notice of an institution's current assessment risk classification will be provided to the institution with each quarterly certified statement invoice. Adjusted assessment risk classifications for prior periods may also be provided by the Corporation. Notice of the procedures applicable to requests for review will be included with the assessment risk classification.

(b) *Payment of assessment at rate assigned.* Institutions shall make timely payment of assessments based on the assessment risk classification assigned in the notice provided to the institution pursuant to paragraph (a) of this section. Timely payment is required notwithstanding any request for review filed pursuant to paragraph (c) of this section. If the classification assigned to an institution in the notice is subsequently changed, any excess assessment paid by the institution will be credited by the Corporation, with interest, and any additional assessment owed shall be paid by the institution, with interest, in the next assessment payment after such subsequent assignment or change. Interest payable under this paragraph shall be determined in accordance with § 327.7.

(c) *Requests for review.* An institution that believes any assessment risk classification provided by the Corporation pursuant to paragraph (a) if this section is incorrect and seeks to change it must submit a written request for review of that assessment risk classification. Any such request must be submitted within 90 days of the date of the assessment risk classification being challenged pursuant to paragraph (a) of this section. The request shall be submitted to the Corporation's Director of the Division of Insurance and Research in Washington, DC, and shall include documentation sufficient to support the reclassification sought by the institution. If additional information is requested by the Corporation, such information shall be provided by the institution within 21 days of the date of the request for additional information. Any institution submitting a timely request for review will receive written notice from the Corporation regarding the outcome of its request. Upon completion of a review, the Director of the Division of Insurance and Research (or designee) or the Director of the Division of Supervision and Consumer Protection (or designee), as appropriate, shall promptly notify the institution in writing of his or her determination of whether reclassification is warranted. Notice of the procedures applicable to reviews will be included with the assessment risk classification notice to be provided pursuant to paragraph (a) of this section.

(d) *Disclosure restrictions.* The portion of an assessment risk classification assigned to an institution by the Corporation pursuant to paragraph (a) of this section that reflects any supervisory evaluation or confidential information is deemed to be exempt information within the scope of § 309.5(g)(8) of this chapter and, accordingly, is governed by the disclosure restrictions set out at § 309.6 of this chapter.

(e) *Limited use of assessment risk classification.* The assignment of a particular assessment risk classification to a depository institution under this part 327 is for purposes of implementing and operating a risk-based assessment system. Unless permitted by the Corporation or otherwise required by law, no institution may state in any advertisement or promotional material the assessment risk classification assigned to it pursuant to this part.

(f) *Effective date for changes to risk classification.* Any change in risk classification that results from a change in an institution's supervisory rating shall be applied to the institution's assessment:

(1) If an examination causes the change in an institution's supervisory rating and an examination start date exists, as of the examination start date;

(2) If an examination causes the change in an institution's supervisory rating and no examination start date exists, as of the date the institution's supervisory rating (CAMELS) change is transmitted to the institution; or

(3) Otherwise, as of the date that the FDIC determines that the change in the supervisory rating occurred.

§ 327.5 Assessment base.

(a) *Quarter end balances and average daily balances.* An insured depository institution shall determine its assessment base using quarter end balances until changes in the quarterly report of condition allow it to report average daily deposit balances on the quarterly report of condition, after which—

(1) An institution that becomes newly insured after the first report of condition allowing for average daily balances shall determine its assessment base using average daily balances; otherwise,

(2) An insured depository institution reporting assets of $300 million or more on the first report of condition allowing for average daily balances shall within one year determine its assessment base using average daily balances;

(3) An insured depository institution reporting less than $300 million in assets on the first report of condition allowing for average daily balances ''

(i) May continue to determine its assessment base using quarter end balances; or

(ii) May opt permanently to determine its assessment base using average daily balances after notice to the Corporation, but

(iii) Shall use average daily balances as the permanent method for determining its assessment base for any quarter beginning six months after the institution reported that its assets equaled or exceeded $300 million for two consecutive quarters; and

(4) In any event, an insured depository institution that is a subsidiary of another insured depository institution that determines its assessment base using average daily balances and files its report of condition on a consolidated basis by including a subsidiary bank(s) or savings association(s) shall use average daily balances as the permanent method for determining its assessment base; assessment bases shall be determined separately for each consolidated institution.

(b) *Computation of assessment base.* Whether computed on a quarter-end balance or an average daily balance, the assessment base for any insured institution that is required to file a quarterly report of condition shall be computed by:

(1) Adding all deposit liabilities as defined in section 3(*l*) of the Federal Deposit Insurance Act, to include deposits that are held in any insured branches of the institution that are located in the territories and possessions of the United States; and

(2) Subtracting the following allowable exclusions, in the case of any institution that maintains such records as will readily permit verification of the correctness of its assessment base—

(i) Any demand deposit balance due from or cash item in the process of collection due from any depository institution (not including a foreign bank or foreign office of another U.S. depository institution) up to the total of the amount of deposit balances due to and cash items in the process of collection due to such depository institution that are included in paragraph (b)(1) of this section;

(ii) Any outstanding drafts (including advices and authorization to charge deposit institution's balance in another bank) drawn in the regular course of business;

(iii) Any pass-through reserve balances; and

(iv) Liabilities arising from a depository institution investment contract that are not treated as insured deposits under section 11(a)(5) of the Federal Deposit Insurance Act (12 U.S.C. 1821(a)(5)).

(c) *Newly insured institutions.* A newly insured institution shall pay an assessment for any assessment period during which it became a newly insured institution.

§ 327.6 Terminating transfers; other terminations of insurance.

(a) *Terminating institution's final two quarterly certified statement invoices.* If a terminating institution does not file a report of condition for the quarter prior to the quarter in which the terminating transfer occurs or for the quarter in which the terminating transfer occurs, its assessment base for the quarterly certified statement invoice or invoices for which it failed to file a report of condition shall be deemed to be its assessment base for the last quarter for which the institution filed a report of condition. The acquiring institution in a terminating transfer is liable for paying the final invoices of the terminating institution. The terminating institution's assessment for the quarter in which the terminating transfer occurs shall be reduced by the percentage of the quarter remaining after the terminating transfer and calculated at the acquiring institution's rate. The terminating institution's assessment for the quarter prior to the quarter in which the terminating transfer occurs shall be calculated at the terminating institution's rate.

(b) *Terminating transfer—Assessment base computation.* In a terminating transfer, if an acquiring institution's assessment base is computed as a quarter-end balance pursuant to § 327.5, its assessment base for the assessment period in which the terminating transfer occurred shall be reduced by an amount equal to the percentage of the assessment period prior to the terminating transfer multiplied by the amount of the deposits acquired from the terminating institution.

(c) *Other terminations.* When the insured status of an institution is terminated, and the deposit liabilities of such institution are not assumed by another insured depository institution—

(1) *Payment of assessments; quarterly certified statement invoices.* The terminating depository institution shall continue to file and certify its quarterly certified statement invoice and pay assessments for the assessment period its deposits are insured. Such terminating institution shall not be required to file and certify its quarterly certified statement invoice and pay further assessments after the depository

institution has paid in full its deposit liabilities and the assessment to the Corporation required to be paid for the assessment period in which its deposit liabilities are paid in full, and after it, under applicable law, has ceased to have authority to transact a banking business and to have existence, except for the purpose of, and to the extent permitted by law for, winding up its affairs.

(2) *Payment of deposits; certification to Corporation.* When the deposit liabilities of the depository institution have been paid in full, the depository institution shall certify to the Corporation that the deposit liabilities have been paid in full and give the date of the final payment. When the depository institution has unclaimed deposits, the certification shall further state the amount of the unclaimed deposits and the disposition made of the funds to be held to meet the claims. For assessment purposes, the following will be considered as payment of the unclaimed deposits:

(i) The transfer of cash funds in an amount sufficient to pay the unclaimed and unpaid deposits to the public official authorized by law to receive the same; or

(ii) If no law provides for the transfer of funds to a public official, the transfer of cash funds or compensatory assets to an insured depository institution in an amount sufficient to pay the unclaimed and unpaid deposits in consideration for the assumption of the deposit obligations by the insured depository institution.

(3) *Notice to depositors.* (i) The terminating depository institution shall give sufficient advance notice of the intended transfer to the owners of the unclaimed deposits to enable the depositors to obtain their deposits prior to the transfer. The notice shall be mailed to each depositor and shall be published in a local newspaper of general circulation. The notice shall advise the depositors of the liquidation of the depository institution, request them to call for and accept payment of their deposits, and state the disposition to be made of their deposits if they fail to promptly claim the deposits.

(ii) If the unclaimed and unpaid deposits are disposed of as provided in paragraph (b)(2)(i) of this section, a certified copy of the public official's receipt issued for the funds shall be furnished to the Corporation.

(iii) If the unclaimed and unpaid deposits are disposed of as provided in paragraph (b)(2)(ii) of this section, an affidavit of the publication and of the mailing of the notice to the depositors, together with a copy of the notice and a certified copy of the contract of assumption, shall be furnished to the Corporation.

(4) *Notice to Corporation.* The terminating depository institution shall advise the Corporation of the date on which the authority or right of the depository institution to do a banking business has terminated and the method whereby the termination has been affected (i.e., whether the termination has been effected by the surrender of the charter, the cancellation of its authority or license to do a banking business by the supervisory authority, or otherwise).

(c) *Resumption of insured status before insurance of deposits ceases.* If a depository institution whose insured status has been terminated is permitted by the Corporation to continue or resume its status as an insured depository institution before the insurance of its deposits has ceased, the institution will be deemed, for assessment purposes, to continue as an insured depository institution and must thereafter file and certify its quarterly certified statement invoices and pay assessments as though its insured status had not been terminated. The procedure for applying for the continuance or resumption of insured status is set forth in § 303.5 of this chapter.

§ 327.7 Payment of interest on assessment underpayments and overpayments.

(a) *Payment of interest*—(1) *Payment by institutions.* Each insured depository institution shall pay interest to the Corporation on any underpayment of the institution's assessment.

(2) *Payment by Corporation.* The Corporation will pay interest on any overpayment by the institution of its assessment.

(3) *Accrual of interest.* (i) Interest on an amount owed to or by the Corporation for the underpayment or overpayment of an assessment shall accrue interest at the relevant interest rate.

(ii) Interest on an amount specified in paragraph (a)(3)(i) of this section shall begin to accrue on the day following the regular payment date, as provided for in § 327.3(c)(2), for the amount so overpaid or underpaid, provided, however, that interest shall not begin to accrue on any overpayment until the day following the date such overpayment was received by the Corporation. Interest shall continue to accrue through the date on which the overpayment or underpayment (together with any interest thereon) is paid.

(iii) The relevant interest rate shall be redetermined for each quarterly assessment interval. A quarterly assessment interval begins on the day following a regular payment date, as specified in § 327.3(c)(2), and ends on the immediately following regular payment date.

(b) *Rates after the first payment date in 1996.* (1) On and after January 3, 1996, the relevant interest rate for a quarterly assessment interval that includes the month of January, April, July, and October, respectively, is the coupon equivalent yield of the average discount rate set on the 3-month Treasury bill at the last auction held by the United States Treasury Department during the preceding December, March, June, and September, respectively.

(2) The relevant interest rate for a quarterly assessment interval will apply to any amounts overpaid or underpaid on the payment date (whether regular or alternate) immediately prior to the beginning of the quarterly assessment interval. The relevant interest rate will also apply to any amounts owed for previous overpayments or underpayments (including any interest thereon) that remain outstanding, after any adjustments to such overpayments or underpayments have been made thereon, at the end of the regular payment date immediately prior to the beginning of the quarterly assessment interval.

§ 327.8 Definitions.

For the purpose of this part 327:

(a) *Deposits*—(1) *Deposit.* The term *deposit* has the meaning specified in section 3(*l*) of the Federal Deposit Insurance Act. In particular, the term ''deposit'' includes any liability—without regard for whether the liability is a liability of an insured bank or of an insured savings association—that is of a kind which, had the liability been a liability of an insured bank immediately prior to the effective date of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, would have constituted a deposit in such bank within the meaning of section 3(*l*) of the Federal Deposit Insurance Act as such section 3(*l*) was then in effect.

(2) *Demand deposits.* The term *demand deposits* refers to deposits specified in § 329.1(b) of this chapter, except that any reference to ''bank'' in such section shall be deemed to refer to ''depository institution''.

(3) *Time and savings deposits.* The term *time and savings deposits* refers to any deposits other than demand deposits.

(4) *Exception.* (i) Deposits accumulated for the payment of personal loans, which represent actual loan payments received by the depository institution from borrowers and accumulated by the depository institution in hypothecated deposit

accounts for payment of the loans at maturity, shall not be reported as deposits on the quarterly report of condition. The deposit amounts covered by the exception are to be deducted from the loan amounts for which these deposits have been accumulated and assigned or pledged to effectuate payment.

(ii) Time and savings deposits that are pledged as collateral to secure loans are not ''deposits accumulated for the payment of personal loans'' and are to be reported in the same manner as if they were not securing a loan.

(b) *Quarterly report of condition.* The term *quarterly report of condition* means a report required to be filed pursuant to section 7(a)(3) of the Federal Deposit Insurance Act.

(c) *Assessment period—In general.* The term ''assessment period'' means a period beginning on January 1 of any calendar year and ending on March 31 of the same year, or a period beginning on April 1 of any calendar year and ending on June 30 of the same year; or a period beginning on July 1 of any calendar year and ending on September 30 of the same year; or a period beginning on October 1 of any calendar year and ending on December 31 of the same year.

(d) As used in § 327.6(a) and (b), the following terms are given the following meanings:

(1) *Acquiring institution.* The term *acquiring institution* means an insured depository institution that assumes some or all of the deposits of another insured depository institution in a terminating transfer.

(2) *Terminating institution.* The term *terminating institution* means an insured depository institution some or all of the deposits of which are assumed by another insured depository institution in a terminating transfer.

(3) *Terminating transfer.* The term *terminating transfer* means the assumption by one insured depository institution of another insured depository institution's liability for deposits, whether by way of merger, consolidation, or other statutory assumption, or pursuant to contract, when the terminating institution goes out of business or transfers all or substantially all its assets and liabilities to other institutions or otherwise ceases to be obliged to pay subsequent assessments by or at the end of the assessment period during which such assumption of liability for deposits occurs. The term *terminating transfer* does not refer to the assumption of liability for deposits from the estate of a failed institution, or to a transaction in which the FDIC contributes its own resources in order to induce a surviving institution to assume liabilities of a terminating institution.

Note: The following attachments will not appear in the Code of Federal Regulations.

Attachment A—Call Report Instructions for Cash Items in Process of Collection

Cash items in process of collection include:

(1) Checks or drafts in process of collection that are drawn on another depository institution (or on a Federal Reserve Bank) and that are payable immediately upon presentation in the United States. This includes:

(a) Checks or drafts drawn on other institutions that have already been forwarded for collection but for which the reporting bank has not yet been given credit (''cash letters'').

(b) Checks or drafts on hand that will be presented for payment or forwarded for collection on the following business day.

(c) Checks or drafts that have been deposited with the reporting bank's correspondent and for which the reporting bank has already been given credit, but for which the amount credited is not subject to immediate withdrawal (''ledger credit'' items).

However, if the reporting bank has been given immediate credit by its correspondent for checks or drafts presented for payment or forwarded for collection and if the funds on deposit are subject to immediate withdrawal, the amount of such checks or drafts is considered part of the reporting bank's balances due from depository institutions.

(2) Government checks drawn on the Treasurer of the United States or any other government agency that are payable immediately upon presentation and that are in process of collection.

(3) Such other items in process of collection that are payable immediately upon presentation and that are customarily cleared or collected as cash items by depository institutions in the United States, such as:

(a) Redeemed United States savings bonds and food stamps.

(b) Amounts associated with automated payment arrangements in connection with payroll deposits, federal recurring payments, and other items that are credited to a depositor's account prior to the payment date to ensure that the funds are available on the payment date.

(c) Federal Reserve deferred account balances until credit has been received in accordance with the appropriate time schedules established by the Federal Reserve Banks. At that time, such balances are considered part of the reporting bank's balances due from depository institutions.

(d) Checks or drafts drawn on another depository institution that have been deposited in one office of the reporting bank and forwarded for collection to another office of the reporting bank.

(e) Brokers' security drafts and commodity or bill-of-lading drafts payable immediately upon presentation in the U.S. (See the Glossary entries for ''broker's security draft'' and ''commodity or bill-of-lading draft'' for the definitions of these terms.)

Exclude from cash items in process of collection:

(1) Cash items for which the reporting bank has already received credit, provided that the funds on deposit are subject to immediate withdrawal. The amount of such cash items is considered part of the reporting bank's balances due from depository institutions.

(2) Credit or debit card sales slips in process of collection (report as noncash items in Schedule RC–F, item 5, ''Other'' assets). However, when the reporting bank has been notified that it has been given credit, the amount of such sales slips is considered part of the reporting bank's balances due from depository institutions.

(3) Cash items not conforming to the definition of in process of collection, whether or not cleared through Federal Reserve Banks (report in Schedule RC–F, item 5, ''Other'' assets).

(4) Commodity or bill-of-lading drafts (including arrival drafts) not yet payable (because the merchandise against which the draft was drawn has not yet arrived), whether or not deposit credit has been given. (If deposit credit has been given, report as loans in the appropriate item of Schedule RC–C, part I; if the drafts were received on a collection basis, they should be excluded entirely from the bank's balance sheet, Schedule RC, until the funds have actually been collected.)

Attachment B—Additional Float Analysis

Eliminate the Float Deduction

If the standard float deductions were eliminated, holding all else equal, the aggregate assessment base would have increased by about 2.7 percent, as of December 31, 2005. Table 2 illustrates how individual assessment bases would have changed if the standard float deductions were eliminated as of that date. Institutions in Table 2 are ranked by percentage change in their assessment bases, from least change on the left to greatest change on the right. The table shows, for example, that the median (50th percentile) change would have been a 3 percent increase. Table 2 also demonstrates that the assessment bases of the vast majority of institutions would have increased between 1.3 and 6.1 percent, but the assessment bases of a few institutions would have increased by much larger percentages. (The largest change for a single institution would have been a 20 percent increase.)

TABLE 2.—PERCENTAGE INCREASE IN ASSESSMENT BASES AT VARIOUS PERCENTILES IF THE CURRENT FLOAT DEDUCTION WERE ELIMINATED

Percentile	1	5	10	20	30	40	50	60	70	80	90	95	99
Percent change in assessment base	1.0%	1.3%	1.7%	2.2%	2.6%	2.9%	3.0%	3.5%	3.9%	4.4%	5.2%	6.1%	9.3%

The 100 institutions whose assessment bases would have increased by the greatest percentage include several bankers' banks and trust banks and other banks of many different sizes, but no thrifts or extremely large institutions. Small to medium-sized institutions (including many thrifts) predominate among the 100 institutions whose assessment bases would have increased by the smallest percentage; however, some large institutions are also represented.

Table 3 compares the percentage of the industry aggregate assessment base held by institutions grouped by asset size, with and without float deductions, as of December 31, 2005. Based on this analysis, eliminating the float deductions would only minimally affect the relative distribution of the aggregate assessment base among institutions of different asset sizes (although it would have a greater effect on the assessment bases of some individual institutions).

TABLE 3.—CURRENT FLOAT/NO FLOAT COMPARISON BY INSTITUTION ASSET SIZE

Percentage share of industry assessment base	All insured institutions				
	Very small <$100m (percent)	Small $100–$300m (percent)	Medium $300–$1b (percent)	Large $1b–$100b (percent)	Very large >$100b (percent)
With Float Deduction	2.60	6.51	9.24	37.20	44.45
Without Float Deduction	2.62	6.56	9.25	37.18	44.40
Percent Change	0.97	0.75	0.08	−0.06	−0.13

Table 4 compares the percentage of the industry aggregate assessment base held by charter type (commercial banks versus thrifts), with and without float deductions, as of December 31, 2005. With the current standard float deductions (16 percent for demand deposits, 1 percent for time and savings deposits), institutions that hold a larger percentage of demand deposits'typically, commercial banks'hold a relatively smaller percentage of the aggregate assessment base. Nevertheless, given Table 4, eliminating the float deductions would only minimally affect the relative distribution of the aggregate assessment base between banks and thrifts (although, again, it would have a greater effect on the assessment bases of some individual institutions).

TABLE 4.—CURRENT FLOAT/NO FLOAT COMPARISON BY CHARTER TYPE

[In percent]

Percentage share of industry assessment base	Insured commercial banks	Insured savings institutions
With Float Deduction	82.50	17.50
Without Float Deduction	82.63	17.37
Percent Change	0.16	−0.76

Deduct Actual Float

Using data as of December 31, 2005, Table 5 illustrates how individual assessment bases would have changed if institutions deducted the cash items in process of collection Call Report item as a proxy for actual float. Institutions in Table 5 are ranked by percentage change in their assessment bases, from greatest decrease on the left to greatest increase on the right. The table shows, for example, that the median (50th percentile) change would have been a 1.6 percent increase. Table 5 also demonstrates that the assessment bases of the vast majority of banks would have changed between −1.3 and 4.2 percent. (However, the assessment bases of a few banks would have increased or decreased by much larger percentages.)

TABLE 5.—PERCENTAGE CHANGE IN ASSESSMENT BASES AT VARIOUS PERCENTILES IF CASH ITEMS (AS A PROXY FOR ACTUAL FLOAT) WERE DEDUCTED

Percentile	1	5	10	20	30	40	50	60	70	80	90	95	99
Percent change in assessment base	−5.8%	−1.3%	−0.5%	0.2%	0.7%	1.2%	1.6%	2.0%	2.4%	2.8%	3.5%	4.2%	6.0

Medium-sized banks predominate among those institutions whose assessment bases would have increased by the greatest percentage. Many large banks are included among the institutions whose assessment bases would have decreased by the greatest percentage.

Again using data from December 31, 2005, Table 6 compares the percentage of the aggregate assessment base held by medium-sized, large, and very large banks (collectively, banks with assets of at least $300 million) under the current standard float deduction and the actual float deduction, using the cash items in process of collection Call Report item as a proxy for actual float. Based on this analysis, it appears unlikely that using actual float would result in a major change in the relative distribution of the aggregate assessment base among institutions of different sizes, at least among the medium to largest institutions. However, the FDIC has no proxy for actual float at

smaller banks or for OTS-supervised savings institutions of any size.

TABLE 6.—COMPARISON OF CURRENT FLOAT DEDUCTION TO CASH ITEMS (AS A PROXY FOR ACTUAL FLOAT) DEDUCTION FOR MEDIUM-SIZED, LARGE, AND VERY LARGE BANKS

Percentage Share of Industry Assessment Base**	Banks*		
	Medium $300m–$1b (percent)	Large $1b–$100b (percent)	Very Large >$100b (percent)
With Current Standard Float Deduction	9.78	48.62	41.60
With Estimated Actual Float Deduction	9.97	48.90	41.13
Percent Change	1.91	0.58	−1.12

* Banks include commercial banks and FDIC-supervised savings banks.
** Percentages are of the aggregate base of medium, large, and very large commercial and savings banks only.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC this 9th day of May, 2006.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 06–4657 Filed 5–17–06; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 327

RIN 3064–ADO7

Dividends

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of proposed rulemaking.

SUMMARY: The FDIC is proposing to amend 12 CFR 327 to implement the dividend requirements in the recently enacted Federal Deposit Insurance Reform Act of 2005 (''Reform Act'') and the Federal Deposit Insurance Reform Conforming Amendments Act of 2005 (''Amendments Act'') for an initial two-year period. The proposed rule would sunset on December 31, 2008. If this proposal is adopted, during 2007, the FDIC would plan to undertake a second notice-and-comment rulemaking beginning with an Advanced Notice of Proposed Rulemaking to explore alternative methods for distributing future dividends after this initial two-year period.

DATES: Comments must be received on or before July 17, 2006.

ADDRESSES: You may submit comments, identified by RIN number by any of the following methods:

- Agency Web Site: *http://www.fdic.gov/regulations/laws/federal.propose.html.* Follow instructions for submitting comments on the Agency Web site.
- E-mail: *Comments@FDIC.gov.* Include the RIN number in the subject line of the message.
- Mail: Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- Hand Delivery/Courier: Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Instructions: All submissions received must include the agency name and RIN for this rulemaking. All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal/propose.html* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Munsell W. St.Clair, Senior Policy Analyst, Division of Insurance and Research, (202) 898–8967; Donna M. Saulnier, Senior Assessment Policy Specialist, Division of Finance, (703) 562–6167; and Kymberly K. Copa, Counsel, Legal Division, (202) 898–8832.

SUPPLEMENTARY INFORMATION:

I. Background

The Reform Act requires the FDIC to prescribe final regulations, within 270 days of enactment, to implement the dividend requirements, including regulations governing the method for the calculation, declaration, and payment of dividends and administrative appeals of individual dividend amounts. See sections 2107(a) and 2109(a)(3) of the Reform Act.[1]

Section 7(e)(2) of the Federal Deposit Insurance Act (''FDI Act''), as amended by the Reform Act, requires that the FDIC, under most circumstances, declare dividends from the Deposit Insurance Fund (''DIF'' or ''fund'') when the reserve ratio at the end of a calendar year exceeds 1.35 percent, but is no greater than 1.5 percent. In that event, the FDIC must generally declare one-half of the amount in the DIF in excess of the amount required to maintain the reserve ratio at 1.35 percent as dividends to be paid to insured depository institutions. However, the FDIC's Board of Directors (''Board'') may suspend or limit dividends to be paid, if the Board determines in writing, after taking a number of statutory factors into account, that:

1. The DIF faces a significant risk of losses over the next year; and

2. It is likely that such losses will be sufficiently high as to justify a finding by the Board that the reserve ratio should temporarily be allowed to grow without requiring dividends when the reserve ratio is between 1.35 and 1.5 percent or to exceed 1.5 percent.[2]

In addition, the statute requires that the FDIC, absent certain limited circumstances (discussed in footnote 2), declare a dividend from the DIF when the reserve ratio at the end of a calendar year exceeds 1.5 percent. In that event, the FDIC must declare the amount in the DIF in excess of the amount required to maintain the reserve ratio at 1.5 percent

[1] The Reform Act was included as Title II, Subtitle B, of the Deficit Reduction Act of 2005, Public Law 109–171, 120 Stat. 9, which was signed into law by the President on February 8, 2006. Section 2109 of the Reform Act also requires the FDIC to prescribe, within 270 days, rules on the designated reserve ratio, changes to deposit insurance coverage, the one-time assessment credit, and assessments. An interim final rule on deposit insurance coverage was published on March 23, 2006. See 71 FR 14629. A notice of proposed rulemaking on the one-assessment credit and a notice of proposed rulemaking on operational changes to the FDIC's assessment regulations are both being proposed by the FDIC at the same time as this notice on dividends. Additional rulemakings on the designated reserve ratio and risk-based assessments are expected to be proposed in the near future.

[2] This provision would allow the FDIC's Board to suspend or limit dividends in circumstances where the reserve ratio has exceeded 1.5 percent, if the Board made a determination to continue a suspension or limitation that it had imposed initially when the reserve ratio was between 1.35 and 1.5 percent.

as dividends to be paid to insured depository institutions.

If the Board decides to suspend or limit dividends, it must submit, within 270 days of making the determination, a report to the Committee on Banking, Housing, and Urban Affairs of the Senate and to the Committee on Financial Services of the House of Representatives. The report must include a detailed explanation for the determination and a discussion of the factors required to be considered.[3]

The FDI Act directs the FDIC to consider each insured depository institution's relative contribution to the DIF (or any predecessor deposit insurance fund) when calculating such institution's share of any dividend. More specifically, when allocating dividends, the Board must consider:

1. The ratio of the assessment base of an insured depository institution (including any predecessor) on December 31, 1996, to the assessment base of all eligible insured depository institutions on that date;

2. The total amount of assessments paid on or after January 1, 1997, by an insured depository institution (including any predecessor) to the DIF (and any predecessor fund);[4]

3. That portion of assessments paid by an insured depository institution (including any predecessor) that reflects higher levels of risk assumed by the institution; and

4. Such other factors as the Board deems appropriate.

The statute does not define the term ''predecessor'' for purposes of the distribution of dividends to insured depository institutions.

Predecessor deposit insurance funds are the BIF and the SAIF, as those were the deposit insurance funds in existence after 1996 and prior to enactment of the Reform Act, and which merged into the DIF. That merger was effective on March 31, 2006.

The statute expressly requires the FDIC to prescribe by regulation the method for calculating, declaring, and paying dividends. As with the one-time assessment credit, the dividend regulation must include provisions allowing a bank or thrift a reasonable opportunity to administratively challenge the amount of dividends it is awarded. Any review by the FDIC pursuant to these administrative procedures is to be considered final and not subject to judicial review.

Accordingly, the FDIC today is requesting comment on proposed rules that would implement the dividend requirement added by the Reform Act.

II. Description of the Proposal

As part of this rulemaking, the FDIC must establish the process for the Board's annual determination of whether a declaration of a dividend is required and consideration, to the extent appropriate, of whether circumstances indicate that a dividend should be limited or suspended. In addition, the FDIC must set forth the procedures for calculating the aggregate amount of any dividend, allocating that aggregate amount among insured depository institutions considering the factors provided, and paying such dividends to individual insured depository institutions. Furthermore, these regulations must allow an insured depository institution a reasonable opportunity to challenge the amount of its dividend.

A. Annual Determination of Whether Dividends Are Required/Declaration of Dividends

The statute requires the FDIC to determine whether at the end of each calendar year the reserve ratio of the DIF equals or exceeds 1.35 percent or exceeds 1.5 percent, thereby triggering a dividend requirement.

If the reserve ratio equals or exceeds 1.35 percent of estimated insured deposits, then the FDIC generally is required to declare the amount that is equal to one-half the amount in excess of the amount required to maintain the reserve ratio at 1.35 percent as dividends to be paid to insured depository institutions.[5] As a practical matter, when the reserve ratio is at or only slightly above 1.35 percent, the aggregate amount of a potential dividend would be relatively small, and an individual institution's share would be very small. Nonetheless, the statute expressly provides that the Board may elect to suspend or limit such dividends only in certain circumstances, as discussed further below.

If the reserve ratio exceeds 1.5 percent of estimated insured deposits, then the FDIC generally is required to declare the amount in the DIF in excess of the amount required to maintain the reserve ratio at 1.5 percent as dividends to be paid to insured depository institutions.

In order to limit or suspend the payment of dividends when the reserve ratio is at or above 1.35 percent, the Board must determine in writing that a significant risk of losses to DIF exists over the next year and that it is likely that such losses will be high enough to justify allowing the reserve ratio either—(1) to grow temporarily without requiring dividends; or (2) to exceed the upper end of the range for the reserve ratio (that is, 1.5 percent). The statute directs the Board to consider certain factors in making a determination to limit or suspend dividends:

(1) National and regional conditions and their effect on insured depository institutions;

(2) Potential problems affecting institutions or a specific group or type of institutions;

(3) The degree to which the contingent liability of the FDIC for anticipated failures adequately addresses funding levels in the DIF; and

(4) Any other factors the Board deems appropriate.

As noted above, if the Board elects to suspend or limit dividends pursuant to this authority, it must report to Congress within 270 days of that decision giving a detailed explanation, including a discussion of the statutory factors required to be considered.

A determination to limit or suspend dividends will have to be reviewed annually and must be justified to renew or make a new determination to limit or suspend dividends. Each year, if the decision is to continue to limit or suspend dividends, the Board must report to Congress. If the FDIC does not justify renewal or a new determination, it is required to provide cash dividends based on the amount of the reserve ratio.

The FDIC proposes that the Board announce its determination regarding dividends by May 15th of each year, which will allow for the Board's consideration of the dividend determination using complete data for the reserve ratio for the preceding December 31st. Depending on circumstances, such announcements could include: (1) A determination that no dividend is required because the reserve ratio is below 1.35 percent as of the end of the preceding calendar year; (2) a declaration of a dividend; or (3) a determination that a dividend would otherwise be required, but that circumstances warrant the limitation or suspension of that dividend, to be followed by the required report to Congress.

[3] *See* section 5 of the Amendments Act. Public Law 109–173, 119 Stat. 3601, which was signed into law by the President on February 15, 2006.

[4] This factor is limited to deposit insurance assessments paid to the DIF (or previously to the Bank Insurance Fund (''BIF'') or the Savings Association Insurance Fund (''SAIF'')) and does not include assessments paid to the Financing Corporation (''FICO'') used to pay interest on outstanding FICO bonds, although the FDIC collects those assessments on behalf of FICO. Beginning in 1997, the FDIC collected separate FICO assessments from both SAIF and BIF members.

[5] The FDIC, thus, would have to determine how much is necessary to maintain the reserve ratio at 1.35 percent, once the dividend requirement is triggered by the year-end reserve ratio.

Absent a Board determination that dividends should be limited or foregone, the aggregate amount of a dividend must be calculated as set forth in the statute. If the reserve ratio is between 1.35 percent and 1.5 percent, the FDIC must dividend half of the amount in excess of the amount required to maintain the reserve ratio at 1.35 percent. If the reserve ratio exceeds 1.5 percent, the FDI Act requires the FDIC to dividend the excess of the amount required to maintain the reserve ratio at 1.5 percent.[6]

B. Allocation of Dividends

The FDIC proposes initially adopting a simple system for allocating future dividends. Under the proposal, this system would remain in place for two years with a definite sunset date (December 31, 2008). During the two-year lifespan of the initial dividend regulations, the FDIC would undertake another rulemaking, beginning with the issuance of an advance notice of proposed rulemaking, seeking industry comment on more comprehensive alternatives for allocating future dividends.

Specifically, the FDIC proposes that, initially, any dividends be awarded simply in proportion to an institution's 1996 assessment base ratio (including any predecessors' 1996 ratios), discussed more fully below. The FDI Act requires that the FDIC consider this ratio when allocating dividends.

The statute also requires that the FDIC consider the total amount of assessments paid after 1996 and the portion of those assessments that reflects higher levels of risk. No institution while in the lowest risk category (sometimes referred to as ''the 1A category'') has paid any deposit insurance assessments since the end of 1996. All assessments paid since then have reflected higher levels of risk—that is, since year-end 1996 when the BIF and SAIF were both fully capitalized with reserve ratios in excess of the statutory minimum of 1.25 percent, only those insured depository institutions that exhibited financial, operational, or compliance weaknesses ranging from moderately severe to unsatisfactory, or that were not well capitalized (as defined in section 38 of the FDI Act), were required to pay assessments.

Within the proposed initial two-year period, any assessments that institutions pay that do not reflect higher levels of risk are likely to be small in comparison to the assessments that institutions paid over time to capitalize the deposit insurance funds, for which the 1996 assessment base is intended to act as a proxy. As a result, the FDIC has concluded that payments since 1996 should not be included in the proposed temporary allocation method.[7]

Under the FDI Act, the Board also has discretion to consider such factors as it deems appropriate when allocating dividends. In the FDIC's view, other factors support an initially simple allocation based upon institutions' 1996 ratio. As a practical matter, it appears quite unlikely that the reserve ratio of the DIF will equal or exceed 1.35 percent in the near future given the combined fund's current reserve ratio of 1.25 percent[8] as of December 31, 2005, the continuing trend of high insured deposit growth rates, and the $4.7 billion one-time credit, which will constrain net assessment income. The FDIC has concluded that it is important to obtain and consider carefully public comment before instituting a more comprehensive allocation scheme that may not change for many years. Such a small likelihood of a dividend does not justify adoption of a more complex scheme within the relatively short timeframe required by the statute.

1. 1996 Assessment Base Ratio

As noted above, the FDI Act sets forth three specific factors for consideration in distributing dividends. The first factor is the ratio of the assessment base of an insured depository institution (including any predecessor) on December 31, 1996, to the assessment base of all eligible insured depository institutions on that date. This factor essentially parallels the basis for distribution of the one-time assessment credit.

The 1996 assessment base ratio for each insured depository institution will have been determined under the one-time assessment credit regulations and will continue in effect for dividend purposes, subject to subsequent adjustments for transactions that result in the combination of insured depository institutions, thereby recognizing ''predecessor'' institutions as time goes by.

2. Predecessor Insured Depository Institutions

The FDI Act does not define the term ''predecessor'' for purposes of the distribution of dividends to individual insured depository institutions. In addition, unlike the term ''successor'' used in the context of the one-time assessment credit, the FDI Act does not expressly charge the FDIC with defining ''predecessor.'' Nonetheless, in order to implement the dividend requirements, the FDIC must define ''predecessor'' for these purposes when it is used in connection with an insured depository institution and the distribution of dividends.

The FDIC proposes to adopt a definition of ''predecessor,'' that is consistent with general principles of corporate law and the proposed definition of ''successor'' in the one-time assessment credit notice of proposed rulemaking. Therefore, a ''predecessor'' would be defined as an institution that combined with another institution through merger or consolidation and did not survive as an entity. As with the definition of ''successor'' in the one-time assessment credit notice of proposed rulemaking, the FDIC is seeking comment on whether the definition of ''predecessor'' should include an institution that combined with another institution through a de facto merger. In addition, if the FDIC were to adopt an alternative definition of ''successor'' for purposes of the one-time assessment credit rule, such as a definition that takes into account deposit or branch sales, the FDIC seeks comment on whether that alternative should similarly be applied to the definition of ''predecessor'' for purposes of dividends.

C. Notification and Payment of Dividends

The FDIC proposes that the FDIC advise each institution of its dividend amount as soon as practicable after the Board's declaration of a dividend on or before May 15th. Depending on circumstances, notification would take place through a special notice of dividend or, at the latest, with the institution's next assessment invoice. To allow time for requests for review of dividend amounts, the FDIC proposes that the individual dividend amounts be paid to insured depository institutions

[6] In most circumstances, if the reserve ratio exceeds 1.5 percent, the FDIC would declare a dividend of the excess, as determined by the FDIC, above 1.5 percent. At the same time, the FDIC would generally expect to declare a dividend of half of the amount necessary to maintain the reserve ratio at 1.35 percent, unless the Board makes a determination that suspension or limitation of that dividend is justified under section 7(e)(2)(E) of the FDI Act. That might happen, for example, if based on its consideration of the various statutory factors, the Board determines that it is appropriate to set the designated reserve ratio at 1.5 percent and set assessments to maintain the reserve ratio at that point. Sections 2104(a) and 2105(a) of the Reform Act (to be codified at 12 U.S.C. 1817(b)(2) and (3), respectively).

[7] It is in large part because post-2006 payments may become material over time that the FDIC proposes adoption of an interim rule, with the expectation that in 2007 the process of developing a more comprehensive long-term rule will begin.

[8] When the funds from the SAIF exit fee escrow account are included, the combined reserve ratio for December 31, 2005, would be 1.26 percent.

at the time of the assessment collection for the second calendar quarter beginning after the declaration of the dividend and offset each institution's assessment amount. Under the proposed rule, the settlement would be handled through the Automated Clearing House consistent with existing procedures for underpayment or overpayment of assessments. Thus, in the event that the institution owes assessments in excess of the dividend amount, there will be a net debit (resulting in payment to the FDIC). Conversely, if the FDIC owes an additional dividend amount in excess of the assessment to the institution, there will be a net credit (resulting in payment from the FDIC).

If an institution requests review of the amount of its dividend (as discussed below), and that request is not finally resolved at the time of the collection of the assessment, the FDIC proposes to credit the institution with the dividend amount on the notice or invoice. To the extent that a dividend amount is in dispute between institutions, the FDIC proposes to freeze the availability of the amount in dispute. If the institution prevails on its request for review, then any additional amount of dividend will be remitted to the institution, with interest.

D. Requests for Review of Dividend Amounts

Like the regulations governing the one-time assessment credit, the FDI Act requires the FDIC to include in its dividend regulations provisions allowing an insured depository institution a reasonable opportunity to challenge administratively the amount of its dividend. The FDIC's determination under such procedures is to be final and not subject to judicial review.

It is proposed that the proposed rule largely parallel the procedures for requesting revision of computation of a quarterly assessment payment as shown on the quarterly invoice. As with the one-time credit notice of proposed rulemaking, the FDIC proposes shorter timeframes in the dividend appeals process so that requests for review may be resolved by the time payment of dividends is due, to the extent possible. An institution would have 30 days from the date of the notice or invoice advising each institution of its dividend amount to request review of the dividend determination. Under the proposed rule, an institution could request review if (1) it disagrees with the computation of the dividend as stated on the notice or invoice, or (2) it believes that the notice or invoice does not fully or accurately reflect appropriate adjustments to the institution's 1996 assessment base ratio. For example, the institution may believe that its 1996 assessment base ratio has not been adjusted to reflect its acquisition of an eligible insured depository institution. The FDIC proposes that, if an institution does not submit a timely request for review, the institution be barred from subsequently requesting review of its dividend amount.

The proposed rule would require that a request for review be submitted to Division of Finance and include documentation sufficient to support the change sought by the institution. In addition, the requesting institution would have to identify all other institutions of which it knew or had reason to believe would be directly and materially affected by granting the request for review and provide those institutions with copies of the request for review, supporting documentation, and the FDIC's procedures for these requests for review.

Under the proposal, the FDIC shall make reasonable efforts, based on its official systems of records, to determine that such institutions have been identified and notified. These institutions would then have 30 days to submit a response and any supporting documentation to the FDIC's Division of Finance, copying the institution making the original request for review. The FDIC proposes that, if an institution is identified and notified through this process and does not submit a timely response, the institution be foreclosed from subsequently disputing the information submitted by any other institution on the transaction(s) at issue in the review process. The FDIC may request additional information as part of its review, and the proposed rule would require the institution to supply that information within 21 days of the date of the FDIC's request for additional information.

As previously noted, the FDIC further proposes to freeze temporarily the distribution of the dividend amount in dispute for the institutions involved in the challenge until the challenge is resolved.

The proposed rule requires a written response from the FDIC's Director of the Division of Finance (''Director''): (1) Within 60 days of receipt by the FDIC of the request for revision; (2) if additional institutions have been notified by the requesting institution or the FDIC, within 60 days of the date of the last response to the notification; or, (3) if additional information has been requested by the FDIC, within 60 days of receipt of the additional information, whichever is latest. Whenever feasible, the response is to notify the institution of the determination of the Director as to whether the requested change is warranted. In all instances in which a timely request for review is submitted, the Director will make a determination on the request as promptly as possible and notify the institution in writing of the determination. Notice of the procedures applicable to reviews will be included with the notice or invoice providing notification of the dividend.

Under the proposed rule, an institution that disagrees with the determination of the Director may appeal its dividend determination to the FDIC's Assessment Appeals Committee (''AAC''). An appeal would have to be filed within 15 calendar days from the date of the Director's written determination. Notice of the procedures applicable to appeals will be included with that written determination. The AAC's determination would be final and not subject to judicial review.

III. Regulatory Analysis and Procedure

A. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106–102, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. We invite your comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposed regulation clearly stated? If not, how could the regulation be more clearly stated?
- Does the proposed regulation contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires that each Federal agency either certify that a proposed rule would not, if adopted in final form, have a significant impact on a substantial number of small entities or prepare an initial regulatory flexibility analysis of the proposal and publish the

analysis for comment. See 5 U.S.C. 603, 605. This proposed rule, if adopted in final form, would provide the procedures for the FDIC's declaration, distribution, and payment of dividends to insured depository institutions under the circumstances set forth in the FDI Act. While each insured depository institution would have the opportunity to request review of the amount of its dividend each time a dividend is declared, the proposed rule would rely on information already collected and maintained by the FDIC in the regular course of business. For the limited duration of the proposed rule, it appears unlikely that a dividend would be required. On this basis, the FDIC certifies that this proposal, if it is adopted in final form, would not have a significant impact on a substantial number of small entities, within the meaning of those terms as used in the RFA. Commenters are invited to provide the FDIC with any information they may have about the likely quantitative effects of the proposal.

C. Paperwork Reduction Act

No collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. Ch. 3501 *et seq.*) are contained in the proposed rule.

D. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the proposed rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681).

List of Subjects in 12 CFR Part 327

Bank deposit insurance, Banks, Banking, Savings associations.

12 CFR Chapter III

Authority and Issuance

For the reasons set forth in the preamble, the FDIC proposes to amend chapter III of title 12 of the Code of Federal Regulations as follows:

PART 327—ASSESSMENTS

1. Add subpart C, consisting of § 327.50 through 327.55, to read as follows:

Subpart C—Implementation of Dividend Requirements

Sec.
327.50 Purpose and scope.
327.51 Definitions.
327.52 Annual dividend determination.
327.53 Allocation and payment of dividends.
327.54 Requests for review of dividend amount.
327.55 Sunset date.

Subpart C—Implementation of Dividend Requirements

Authority: 12 U.S.C. 1817(e)(2), (4).

§ 327.50 Purpose and scope.

(a) *Scope.* This subpart C of part 327 implements the dividend provisions of section 7(e)(2) of the Federal Deposit Insurance Act, 12 U.S.C. 1817(e)(2), and applies to insured depository institutions.

(b) *Purpose.* This subpart C of part 327 sets forth the rules for:

(1) The FDIC's annual determination of whether to declare a dividend and the aggregate amount of any dividend;

(2) The FDIC's determination of the amount of each insured depository institution's share of any declared dividend;

(3) The time and manner for the FDIC's payment of dividends; and

(4) An institution's appeal of the FDIC's determination of its dividend amount.

§ 327.51 Definitions.

For purposes of this subpart:

(a) *Board* has the same meaning as under subpart B of this part.

(b) *DIF* means the Deposit Insurance Fund.

(c) An *insured depository institution's 1996 assessment base ratio* means the share of an insured depository institution in the one-time assessment credit under subpart B of this part, adjusted as necessary after the effective date of subpart B of this part to reflect mergers in which the institution succeeds to another institution's share of the one-time assessment credit.

(d) *Merger* has the same meaning as under subpart B of this part.

(e) *Predecessor*, when used in the context of insured depository institutions, refers to the institution merged with or into a resulting institution.

(f) *Resulting institution* has the same meaning as under subpart B of this part.

(g) *Successor*, when used in the context of insured depository institutions, has the same meaning as under subpart B of this part.

§ 327.52 Annual dividend determination.

(a) Before May 15th of each calendar year, beginning in 2007, the Board shall determine whether to declare a dividend based upon the reserve ratio of the DIF as of December 31st of the preceding year, and the amount of the dividend, if any.

(b) Except as provided in paragraph (d) of this section, if the reserve ratio of the DIF equals or exceeds 1.35 percent of estimated insured deposits and does not exceed 1.5 percent, the Board shall declare the amount that is equal to one-half of the amount in excess of the amount required to maintain the reserve ratio at 1.35 percent as the aggregate dividend to be paid to insured depository institutions.

(c) If the reserve ratio of the DIF exceeds 1.5 percent of estimated insured deposits, except as provided in paragraph (d) of this section, the Board shall declare the amount in excess of the amount required to maintain the reserve ratio at 1.5 percent as the aggregate dividend to be paid to insured depository institutions and shall declare a dividend under paragraph (b) of this section.

(d)(1) The Board may suspend or limit a dividend otherwise required to be paid if the Board determines that:

(i) A significant risk of losses to the DIF exists over the next one-year period; and

(ii) It is likely that such losses will be sufficiently high as to justify the Board concluding that the reserve ratio should be allowed:

(A) To grow temporarily without requiring dividends when the reserve ratio is between 1.35 and 1.5 percent; or

(B) To exceed 1.5 percent.

(2) In making a determination under this paragraph, the Board shall consider:

(i) National and regional conditions and their impact on insured depository institutions;

(ii) Potential problems affecting insured depository institutions or a specific group or type of depository institution;

(iii) The degree to which the contingent liability of the FDIC for anticipated failures of insured institutions adequately addresses concerns over funding levels in the DIF; and

(iv) Any other factors that the Board may deem appropriate.

(3) Within 270 days of making a determination under this paragraph, the Board shall submit a report to the Committee on Financial Services and the Committee on Banking, Housing, and Urban Affairs, providing a detailed explanation of its determination, including a discussion of the factors considered.

(e) The Board shall annually review any determination to suspend or limit dividend payments and must either:

(1) Make a new finding justifying the renewal of the suspension or limitation

under paragraph (d) of this section, and submit a report as required under paragraph (d)(3) of this section; or

(2) Reinstate the payment of dividends as required by paragraph (b) or (c) of this section.

§ 327.53 Allocation and payment of dividends.

(a) For any dividend declared before January 1, 2009, allocation of such dividend among insured depository institutions shall be based solely on an insured depository institution's 1996 assessment base ratio.

(b) The FDIC shall notify each insured depository institution of the amount of such institution's dividend payment based on its share as determined pursuant to paragraph (a) of this section. Notice shall be given as soon as practicable after the Board's declaration of a dividend through a special notice of dividend or, at the latest, with the institution's next assessment invoice.

(c) The FDIC shall pay individual dividend amounts to insured depository institutions at the time of the collection by the FDIC of the assessments for the second calendar quarter beginning after the declaration of the dividend. An institution's dividend amount shall be remitted with that institution's assessment. Any excess dividend amount will be a net credit of the FDIC and will be deposited into the deposit account designated by the institution for assessment payment purposes pursuant to subpart A. If the dividend amount is less than the amount of assessment due, then the institution's account will be directly debited to the FDIC to reflect the net amount owed to the FDIC as an assessment.

(d) If an insured depository institution requests review of its dividend amount under § 327.54, and that request is not finally resolved prior to the dividend payment date, the FDIC shall credit the institution with the dividend amount provided on the invoice. If the institution prevails on its request for review, then any additional amount of dividend will be remitted to the institution, with interest, with the institution's assessment in the next calendar quarter after the final determination has been made.

§ 327.54 Requests for review of dividend amount.

(a) An insured depository institution may submit a request for review of the FDIC's determination of the institution's dividend amount as shown on the special notice of dividend or assessment invoice, as appropriate. Such review may be requested if:

(1) The institution disagrees with the calculation of the dividend as stated on the special notice of dividend or invoice; or

(2) The institution believes that the 1996 assessment base ratio attributed to the institution does not fully or accurately reflect appropriate adjustments for predecessors resulting from transactions involving the institution after the FDIC's final determination of the 1996 assessment base ratio under subpart B of this part.

(b) Any such request for review must be submitted within 30 days of the date of the special notice of dividend or invoice for which a change is requested. The request for review shall be submitted to the Division of Finance and shall provide documentation sufficient to support the change sought by the institution. If an institution does not submit a timely request for review, that institution may not subsequently request review of its dividend amount, subject to paragraph (d) of this section. At the time of filing with the FDIC, the requesting institution shall notify, to the extent practicable, any other insured depository institution that would be directly and materially affected by granting the request for review and provide such institution with copies of the request for review, the supporting documentation, and the FDIC's procedures for requests under this subpart. The FDIC shall make reasonable efforts, based on its official systems of records, to determine that such institutions have been identified and notified.

(c) During the FDIC's consideration of the request for review, the amount of dividend in dispute shall not be available for use by any institution.

(d) Within 30 days of the filing of the request for review, those institutions identified as potentially affected by the request for review may submit a response to such request, along with any supporting documentation, to the Division of Finance, and shall provide copies to the requesting institution. If an institution that was notified under paragraph (b) of this section does not submit a response to the request for review, that institution may not subsequently:

(1) Dispute the information submitted by any other institution on the transaction(s) at issue in that review process; or

(2) Appeal the decision by the Director of the Division of Finance.

(e) If additional information is requested of the requesting or affected institutions by the FDIC, such information shall be provided by the institution within 21 days of the date of the FDIC's request for additional information.

(f) Any institution submitting a timely request for review will receive a written response from the FDIC's Director of the Division of Finance (''Director''):

(1) Within 60 days of receipt by the FDIC of the request for revision;

(2) If additional institutions have been notified by the requesting institution or the FDIC, within 60 days of the date of the last response to the notification; or

(3) If additional information has been requested by the FDIC, within 60 days of receipt of the additional information,whichever is later. Whenever feasible, the response will notify the institution of the determination of the Director as to whether the requested change is warranted. In all instances in which a timely request for review is submitted, the Director will make a determination on the request as promptly as possible and notify the institution in writing of the determination. Notice of the procedures applicable to reviews will be included with the special notice of dividend or assessment invoice providing notification of the dividend.

(g) An insured depository institution may appeal the determination of the Director to the FDIC's Assessment Appeals Committee on the same grounds as set forth under paragraph (a) of this section. Any such appeal must be submitted within 15 calendar days from the date of the Director's written determination. Notice of the procedures applicable to appeals under this section will be included with the Director's written determination. The decision of the Assessment Appeals Committee shall be the final determination of the FDIC.

§ 327.55 Sunset date.

Subpart C shall cease to be effective on December 31, 2008.

Dated at Washington, DC, this 9th day of May, 2006.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E6–7585 Filed 5–17–06; 8:45 am]

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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 327

RIN 3064–AD08

One-Time Assessment Credit

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Deposit Insurance Corporation (''FDIC'') is proposing to amend 12 CFR part 327 to implement the one-time assessment credit for certain eligible insured depository institutions required by the Federal Deposit Insurance Act (''FDI Act'') as amended by the Federal Deposit Insurance Reform Act of 2005 (''Reform Act''). The proposed rule covers: the aggregate amount of the one-time credit; the institutions that are eligible to receive credits; and the amount of each eligible institution's credit, which for some institutions may be largely dependent on how the FDIC defines ''successor'' for these purposes. The proposed rule also would establish the qualifications and procedures governing the application of assessment credits, and provide a reasonable opportunity for an institution to challenge administratively the amount of the credit.

DATES: Comments must be received on or before July 17, 2006.

ADDRESSES: You may submit comments, identified by RIN number by any of the following methods:

- Agency Web site: *http://www.fdic.gov/regulations/laws/federal.propose.html.* Follow instructions for submitting comments on the Agency Web site.
- E-mail: *Comments@FDIC.gov.* Include the RIN number in the subject line of the message.
- Mail: Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429
- Hand Delivery/Courier: Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Instructions: All submissions received must include the agency name and RIN for this rulemaking. All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal/propose.html* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Munsell W. St.Clair, Senior Policy Analyst, Division of Insurance and Research, (202) 898–8967; Donna M. Saulnier, Senior Assessment Policy Specialist, Division of Finance, (703) 562–6167; and Kymberly K. Copa, Counsel, Legal Division, (202) 898–8832.

SUPPLEMENTARY INFORMATION:

I. Background

Section 7(e)(3) of the Federal Deposit Insurance Act, as amended by the Reform Act,[1] requires that the FDIC's Board of Directors (''Board'') provide by regulation an initial, one-time assessment credit to each ''eligible'' insured depository institution (or its successor) based on the assessment base of the institution as of December 31, 1996, as compared to the combined aggregate assessment base of all eligible institutions as of that date (''the 1996 assessment base ratio''), taking into account such other factors the Board may determine to be appropriate. The aggregate amount of one-time credits is to equal the amount that the FDIC could have collected if it had imposed an assessment of 10.5 basis points on the combined assessment base of the Bank Insurance Fund (''BIF'') and Savings Association Insurance Fund (''SAIF'') as of December 31, 2001. 12 U.S.C. 1817(e)(3).

An ''eligible'' insured depository institution is one that:

1. Was in existence on December 31, 1996, and paid a Federal deposit insurance assessment prior to that date;[2] or

2. Is a ''successor'' to any such insured depository institution.

The FDI Act requires the Board to define ''successor'' for these purposes and provides that the Board ''may consider any factors as the Board may deem appropriate.'' The amount of a credit to any eligible insured depository institution must be applied by the FDIC to the assessments imposed on such institution that become due for assessment periods beginning after the effective date of the one-time credit regulations required to be issued within 270 days after enactment.[3] 12 U.S.C. 1817(e)(3)(D)(i).

There are three restrictions on the use of credits:

1. As a general rule, for assessments that become due for assessment periods beginning in fiscal years 2008, 2009, and 2010, credits may not be applied to more than 90 percent of an institution's assessment. 12 U.S.C. 1817(e)(3)(D)(ii). (This 90 percent limit does not apply to 2007 assessments.)

2. For an institution that exhibits financial, operational or compliance weaknesses ranging from moderately severe to unsatisfactory, or is not at least adequately capitalized (as defined pursuant to section 38 of the FDI Act) at the beginning of an assessment period, the amount of any credit that may be applied against the institution's assessment for the period may not exceed the amount the institution would have been assessed had it been assessed at the average rate for all institutions for the period. 12 U.S.C. 1817(e)(3)(E).

3. If the FDIC is operating under a restoration plan to recapitalize the Deposit Insurance Fund (''DIF'') pursuant to section 7(b)(3)(E) of the FDI Act, as amended by the Reform Act, the FDIC may elect to restrict credit use; however, an institution must still be allowed to apply credits up to three basis points of its assessment base or its actual assessment, whichever is less. 12 U.S.C. 1817(b)(3)(E)(iii).

The one-time credit regulations must include the qualifications and procedures governing the application of assessment credits. These regulations also must include provisions allowing a bank or thrift a reasonable opportunity to challenge administratively the amount of credits it is awarded.[4] Any determination of the amount of an institution's credit by the FDIC pursuant to these administrative procedures is

[1] The Reform Act was included as Title II, Subtitle B, of the Deficit Reduction Act of 2005, Public Law 109–171, 120 Stat. 9, which was signed into law by the President on February 8, 2006.

[2] Prior to 1997, the assessments that SAIF member institutions paid the SAIF were diverted to the Financing Corporation (''FICO''), which had a statutory priority to those funds. Beginning with enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (''FIRREA,'' Pub. L. 101–73, 103 Stat. 183) and ending with the Deposit Insurance Funds Act of 1996 (''DIFA,'' Pub. L. 104–208, 110 Stat. 3009, 3009–479), FICO had authority, with the approval of the Board of Directors of the FDIC, to assess against SAIF members to cover anticipated interest payments, issuance costs, and custodial fees on FICO bonds. The FICO assessment could not exceed the amount authorized to be assessed against SAIF members pursuant to section 7 of the FDI Act, and FICO had first priority against the assessment. 12 U.S.C. 1441(f), as amended by FIRREA. Beginning in 1997, the FICO assessments were no longer drawn from SAIF. Rather, the FDIC began collecting a separate FICO assessment. 12 U.S.C. 1441(f), as amended by DIFA. Payments to SAIF prior to December 31, 1996, therefore, are considered deposit insurance assessments for purposes of the one-time assessment credit. The new law does not change the existing process through which the FDIC collects FICO assessments.

[3] Section 2109 of the Reform Act also requires the FDIC to prescribe, within 270 days, rules on the designated reserve ratio, changes to deposit insurance coverage, the dividend requirement, and assessments. An interim final rule on deposit insurance coverage was published on March 23, 2006. See 71 FR 14629. A notice of proposed rulemaking on the dividend requirement and a notice of proposed rulemaking on operational changes to the FDIC's assessment regulations are both being proposed by the FDIC at the same time as this notice on the one-time assessment credit. Additional rulemakings on the designated reserve ratio and risk-based assessments are expected to be proposed in the near future.

[4] Similarly, for dividends under the FDI Act as amended by the Reform Act, the regulations must include provisions allowing a bank or thrift a reasonable opportunity to administratively challenge the amount of dividends it is awarded. 12 U.S.C. 1817(e)(4).

final and not subject to judicial review. 12 U.S.C. 1817(e)(4).

Accordingly, the FDIC is requesting comment on proposed rules that would implement the one-time assessment credit requirement added by the Reform Act.

II. Description of the Proposal

As part of this rulemaking, the FDIC must, among other things: determine the aggregate amount of the one-time credit; determine the institutions that are eligible to receive credits; and determine the amount of each eligible institution's credit, which for some institutions may be largely dependent on how the FDIC defines ''successor'' for these purposes. The FDIC also must establish the qualifications and procedures governing the application of assessment credits, and provide a reasonable opportunity for an institution to challenge administratively the amount of the credit. The FDIC's determination after such challenge will be final and not subject to judicial review.

As set out more fully below, the FDIC proposes that the Board: rely on the 1996 assessment base figures contained in the Assessment Information Management System (AIMS II) [5]; define ''successor'' as the resulting institution in a merger or consolidation, while seeking comment on alternative definitions; determine that the FDIC will automatically apply each institution's credit against future assessments to the maximum extent allowed consistent with the limitations in the FDI Act; and provide an appeals process for administrative challenges to the amounts of credits that culminates in review by the Assessment Appeals Committee (AAC).

Shortly after publication of the notice of proposed rulemaking, the FDIC intends to make available to each insured depository institution the FDIC's calculation of that institution's 1996 assessment base (if any), and to give each institution the opportunity to review and verify its 1996 assessment base, as well as information related to mergers or consolidations to which it was a party.

[5] The current Assessment Information Management Systems (commonly referred to as AIMS II) contains a record for quarterly reports of condition data from institutions with bank and thrift charters. The FFIEC Central Data Repository (''FFIEC–CDR'') for banks and the Thrift Financial Report for thrifts provide AIMS II with the values of the deposit line items that are used in the calculation of an institution's assessment base.

A. Aggregate Amount of One-time Assessment Credit

The aggregate amount of the one-time assessment credit is expected to be $4,707,580,238.19, which is calculated by applying an assessment rate of 10.5 basis points to the combined assessment base of BIF and SAIF as of December 31, 2001. The FDIC proposes to rely on the assessment base numbers available from each institution's certified statement (or amended certified statement), filed quarterly and preserved in AIMS II, which records the assessment base for each insured depository institution as of that date. AIMS II is the FDIC's official system of records for determination of assessment bases and assessments due.

B. Determination of Eligible Insured Depository Institutions and Each Institution's 1996 Assessment Base Ratio

The FDIC must determine the assessment base of each eligible institution as of December 31, 1996, and any successor institutions, to determine the 1996 assessment base ratio. In making these determinations, the Board has the authority to take into account such factors as the Board may determine to be appropriate. 12 U.S.C. 1817(e)(3)(A).

Stated simply, the denominator of the 1996 assessment base ratio is the combined aggregate assessment base of all eligible insured depository institutions and their successors. The numerator of each eligible institution's 1996 assessment base ratio is its assessment base as of December 31, 1996, together with the assessment base on December 31, 1996, of each institution (if any) to which it is a successor. An eligible insured depository institution is one in existence as of December 31, 1996, that paid an assessment prior to that date (or a successor to such institution).

1. Determination of Eligible Institutions

As a starting point, the FDIC proposes to use the December 31, 1996 assessment base for each institution, as it appears on the institution's certified statement or as subsequently amended and as recorded in AIMS II. Those numbers reflect the bases on which institutions that existed on December 31, 1996, paid assessments. As of December 31, 2005, it appears that there were approximately 7,400 active insured depository institutions that may be eligible for the one-time assessment credit—that is, they were in existence on December 31, 1996, and had paid an assessment prior to that date.

a. Effect of Voluntary Termination or Failure

The FDIC has identified those institutions that have voluntarily terminated their insurance or failed since December 31, 1996, which otherwise would have been considered eligible insured depository institutions for purposes of the one-time credit. The FDIC proposes that the definition of ''successor'' (discussed more fully below) govern the determination of whether the one-time credits of an institution that voluntarily is eligible and its credits transfer to a successor. Whether an institution that voluntarily terminated would have a successor would depend on the specific circumstances surrounding its termination. The FDIC proposes that an insured depository institution that has failed would not have a successor.

b. De Novo Institutions

The FDIC has identified those institutions newly in existence as of December 31, 1996 (''*de novo* institutions'') that did not pay deposit insurance premiums prior to December 31, 1996. Under the statute, those institutions could not be eligible insured depository institutions for purposes of the one-time assessment credit.

The FDIC's records indicate that there were approximately 90 institutions that became newly insured between July 1, 1996 and December 31, 1996, that did not pay any deposit insurance assessment and did not acquire through merger or consolidation another institution that had paid assessments before year-end 1996. These institutions are not eligible for credits under the terms of the statute.

In addition, the FDIC's records indicate that there are two *de novo* institutions, which did not pay assessments directly, but each acquired by merger an institution that had paid assessments before December 31, 1996. Under traditional general principles of corporate law, the surviving or resulting institution in a merger or consolidation is considered to have acquired the rights, privileges, powers, franchises, and property of the terminating institution, as well as the liabilities, restrictions, and duties of that institution. The surviving or resulting institution effectively continues the business of the terminating institution. 15 William Meade Fletcher *et al.*, Fletcher Cyclopedia of the Law of Private Corporations §§ 7041–7100 (perm. ed., rev. vol. 1999). On that basis, the FDIC proposes that a *de novo* institution that acquired, through

merger or consolidation, an existing insured depository institution that had paid a deposit insurance assessment be considered to have stepped into the shoes of the existing institution for purposes of determining eligibility for the one-time assessment credit.

2. Definition of ''Successor''

As noted above, an insured depository institution in existence on December 31, 1996, that paid insurance premiums is eligible for the one-time assessment credit. An institution also may be eligible as a ''successor'' to such an institution. In making the preliminary determinations of eligible insured depository institutions, their assessment bases as of December 31, 1996, and the combined assessment base of the BIF and the SAIF as of the same date, the FDIC proposes to rely on the institution's certified statement (as amended, if necessary), as recorded in AIMS II.

Many institutions that existed at the end of 1996 no longer exist. Some have disappeared through merger or consolidation. In fact, it appears that approximately 3,850 additional institutions that were in existence on December 31, 1996, have since combined with other institutions. In addition, 38 institutions have failed and no longer exist, while the FDIC has to date identified approximately 90 others that voluntarily relinquished federal deposit insurance coverage or had their coverage terminated. The FDIC does not maintain complete records on sales of branches or blocks of deposits, but various sources suggest that at least 1,400 and possibly over 1,800 branch or deposit transactions have occurred since 1996.

Section 7(e)(3)(F) of the FDI Act expressly charges the FDIC with defining ''successor'' by regulation for purposes of the one-time credit, and it provides the FDIC with broad discretion to do so. The Board may consider any factors it deems appropriate.

In developing its proposal regarding the definition of ''successor,'' the FDIC viewed the issue in the context of two fundamental questions: what would be most consistent with the purpose of the one-time credit and what would be operationally viable. While a number of definitions of ''successor'' are possible in light of the discretion accorded the FDIC in defining the term, on balance, the FDIC concluded that one approach was more consistent with the purpose of the credit and more operationally viable.

The FDIC considered definitions that would focus on the institution itself and definitions that linked credits to deposits and considered the arguments in support of those definitions. Proponents of an institution-based approach might argue that it is the institution that paid deposit insurance premiums to capitalize the insurance funds, that the potential one-time credit would be one of the rights or privileges of an institution that would be acquired through merger or consolidation under general principles of corporate law, and that a different approach could result in institutions that had not paid premiums to capitalize the funds receiving credits. Proponents of a ''follow-the-deposits'' definition, however, might argue that the one-time credit should adhere to deposits because the one-time credit is to be allocated based on deposits and is intended to offset future assessments to be paid on deposits. The FDIC also considered the operational viability of these approaches to the definition and found that the FDIC's existing systems of records could support an institution-based approach, but a ''follow-the-deposits'' approach would require collection of information from the industry before it could be fully implemented.

For the reasons set forth below, the FDIC proposes to define ''successor'' for purposes of the one-time credit as the resulting institution in a merger or consolidation occurring after December 31, 1996. As proposed, the definition would not include a purchase and assumption transaction, even if substantially all of the assets and liabilities of an institution are acquired by the assuming institution. However, the FDIC further requests comment on whether to include in this definition a regulatory definition of a *de facto* merger to recognize that the results of some transactions, which are not technically mergers or consolidations, largely mirror the results of a merger or consolidation.

a. Merger or Consolidation Rule

Defining ''successor'' as the resulting institution in a merger or consolidation is consistent with the clear purpose of the one-time assessment credit—that is, to recognize the contributions that some insured depository institutions made to capitalize the deposit insurance funds and conversely to recognize the fact that many newer institutions have never paid assessments because they were chartered after the reserve ratios of BIF and SAIF reached 1.25 percent and most institutions were charged nothing.[6] In addition, the FDIC believes that this definition is consistent with the general expectations of the industry, because it reflects the common legal meaning of the word ''successor'' and the principle that the resulting corporation in a merger or consolidation generally receives the rights, privileges, interests, and liabilities of the merging or consolidating corporations. 15 William Meade Fletcher *et al.*, Fletcher Cyclopedia of the Law of Private Corporations §§ 7041–7100 (perm. ed., rev. vol. 1999). Institutions that acquired other institutions by way of merger or consolidation will have believed that they were acquiring *all* of the rights and privileges of the acquired institution, known or unknown.

While it is possible that some state banking laws may differ, this definition is consistent with the National Bank Consolidation and Merger Act. 12 U.S.C. 215, 216. The FDIC has significant discretion in defining the term ''successor'' for these purposes, and a single federal standard is essential to allow the FDIC to implement and administer the one-time credit requirement in a timely and efficient manner.

Mergers and consolidations require regulatory approval under section 18(c) of the FDI Act, and the FDIC maintains records on true mergers and consolidations. Only if the FDIC's records are incomplete or in error will institutions have to provide information to the FDIC. Because the ''merger or consolidation rule'' relies principally on existing data, it is operationally viable. In addition, a merger or consolidation rule would not advantage or disadvantage parties simply on the basis of whether they kept records on transactions for which the statute of limitations has expired.[7]

b. *De Facto* Merger Alternative

Some transactions may be viewed as effectively paralleling the results of a merger or consolidation. The FDIC looked to traditional principles of corporate law for guidance on this issue and found a useful analogy. Traditional corporate law principles provide for

[6] Prior to the effective date of changes to the FDIC's assessment authority by the Reform Act, the FDIC is required to set assessments when necessary and only to the extent necessary to maintain the reserve ratio at 1.25 percent of estimated insured deposits, except for those institutions that exhibit financial, operational, or compliance weaknesses ranging from moderately severe to unsatisfactory, or are not well capitalized. 12 U.S.C. 1817(b)(2)(A) (2005).

[7] Section 7(b)(5) of the FDI Act currently requires institutions to maintain assessment-related records for five years, and section 7(g) provides a five-year statute of limitations for assessment actions. The Reform Act includes amendments to those provisions, prospectively shortening both to three years, effective on the date that new assessment regulations take effect. See sections 2104(b), (d) and 2109(a)(5) of the Reform Act.

certain exceptions to the general rule that liabilities do not transfer with the sale of assets, including an exception for a transaction that amounts to a *de facto* merger or consolidation (''*de facto* merger'').

The FDIC recognizes, however, that a *de facto* merger exception could be viewed as a departure to some extent from the clear, bright line that a strictly applied merger or consolidation rule would provide. The FDIC, therefore, seeks comment on whether to include *de facto* mergers in the definition of ''merger'' for purposes of the one-time assessment credit and to provide a regulatory definition of *de facto* merger. A *de facto* merger for these purposes could be defined, for example, as an eligible institution conveying all of its deposit liabilities and substantially all of its assets to a single acquiring institution, so long as the conveying institution subsequently terminated its deposit insurance. This type of transaction might have arisen, for example, as part of a voluntary liquidation. Even under this alternative, unless an eligible institution actually merged or consolidated with another institution, it would not have a successor if it conveyed its assets and deposit liabilities to more than one acquiring institution.

2. Alternative Approaches to Definition of Successor That Would ''Follow the Deposits''

The FDIC also explored alternative definitions of successor that allowed credits to follow deposits (regardless of the means by which deposits were transferred, including merger, consolidation, branch sale, or other deposit transfer). These alternative definitions might be based on a view that credits should adhere to deposits, as described above. Under these alternative definitions, credits could be transferred on a *pro rata* basis with the deposits transferred or they could be split between the parties to the deposit transfer transaction. Splitting the credits associated with a deposit transfer between the buyer and seller would be a compromise solution and would recognize that, as a practical matter, it is unlikely the parties to most of these deposit transfers took into account the potential for assessment credits at the time of the transactions.

After considering the arguments, the FDIC concluded that a ''follow-the-deposits'' approach seemed less consistent with the purpose of the one-time credit and did not reflect the reasonable expectations of parties to transactions based on general corporate law principles. In addition, the FDIC was concerned about the viability of a ''follow-the-deposits'' approach because of: An absence of reliable existing data; the number of interrelated transactions that would have to be resolved due to the passage of time and consolidation in the industry; and the potential inequities and litigation risks inherent in mechanisms (such as thresholds or other choices) that might be used to reduce the number of potential claims to a more manageable level. Potential inequities also arise in connection with the data issue because institutions that engaged in very similar transactions could be treated differently solely because some institutions retained records long past the expiration of the statute of limitations and others did not.

The FDIC does not routinely maintain the detailed data on all deposit transfer transactions that would be necessary to implement a ''follow-the-deposits'' rule. Thus, most, if not all, of the necessary information would have to be collected from the industry and disputes between institutions resolved before a deposit transfer approach to allocating the one-time credit could be fully implemented. As previously noted, available data suggests that, in addition to roughly 3,850 mergers and consolidations, at least 1,400 and perhaps over 1,800 branch or deposit transactions may have occurred since 1996.

Because of the possibility of a chain of mergers, consolidations, and deposit transfers, resolving one institution's claim to one-time credits first might require examining claims from many transactions in the chain. In most cases, the FDIC would have to review and rely on the records of the institutions involved in the deposit transfer. Appeals of credit determinations could become lengthy fact finding exercises involving the comparison of the available evidence from all of the institutions involved.

The FDIC explored developing a type of *de minimis* rule under which, for example, only deposit transfers (or a series of transfers) from one institution to another that, in total, exceeded some percentage threshold, such as 15 percent of the transferor's total domestic deposits or 30 percent of the transferee's deposits as determined at the time of the transfer, might be considered. The FDIC was concerned, however, that thresholds or other choices to limit the number of institutions covered by a rule by their nature may result in disparate treatment of otherwise similarly situated institutions.

Because the statute of limitations will have expired with respect to many deposit transfer transactions from the late 1990s, institutions may not have retained records of these transactions. Institutions that saved their records would have a significant advantage over those that did not, potentially leading to results based solely on the availability of records.

The FDIC is seeking comment on the proposed definition of ''successor,'' as well as alternative ''follow-the-deposits'' approaches, for purposes of the one-time assessment credit. The FDIC requests that commenters address the purpose of the one-time credit and the extent to which the various possible definitions of ''successor'' are viewed as consistent with that purpose. In addition, the FDIC requests that commenters consider whether a ''follow-the-deposits'' approach might be made more operationally viable, including how the data issues might be addressed.

3. No Successor Identified

If there is no successor to an institution that would have been eligible for the one-time assessment credit *before* the effective date of the final rule, because an otherwise eligible institution ceased to be an insured depository institution before that date, then the FDIC proposes that that portion of the aggregate one-time credit amount be redistributed among the eligible institutions. For example, if an otherwise eligible insured depository institution failed after December 31, 1996, but before the issuance of the final rule implementing the one-time credit, and had no successor, that institution would be excluded from the calculation. As a result, the remaining eligible institutions would receive a proportionate share of that failed institution's share of the one-time credit.

On the other hand, if there is no successor to an eligible insured depository institution that ceases to exist *after* the Board issues the final rule and allocates the one-time assessment credit among eligible insured depository institutions, it is proposed that that institution's credits expire unused. One example would be the failure of an eligible institution after it has received its one-time credit amount. Under those circumstances, any remaining one-time credit amount would simply expire.

D. Notification of 1996 Assessment Base Ratio and Credit Amount

The FDIC intends to make available a searchable database provided through the FDIC's public Web site (*http://www.fdic.gov*) that shows each currently existing institution and its predecessors by merger or consolidation from January 1, 1997, onward, based on information

contained in certified statements, AIMS II, and the Structure Information Management System (''SIMS'').[8] The database would include corresponding December 31, 1996 assessment base amounts for each institution and its predecessors and preliminary estimates of the amount of one-time credit that the existing institution would receive based on the proposed definition of successor.

The database will also allow searching by institution name or insurance certificate number to ascertain which current institution (if any) would be considered a successor to an institution that no longer exists. Institutions would have the opportunity to review this information, which could significantly reduce the time needed to determine successors even if one of the ''follow-the-deposits'' alternatives for defining ''successor'' is adopted in the final rule. Institutions should be aware that this preliminary estimate could change, for example, because of a change in the definition of ''successor'' adopted in the final rule or because of a change to the information available to the FDIC for determining successorship.

As soon as practicable after the Board approves the final rule, the FDIC proposes to notify each insured depository institution of its 1996 assessment base ratio and share of the one-time assessment credit, based on the information developed through the FDIC's searchable database. The notice would take the form of a Statement of One-time Credit (or ''Statement''): Informing every institution of its 1996 assessment base ratio; itemizing the 1996 assessment bases to which the institution may now have claims pursuant to the successor rule based on existing successor information in the database; providing the amount of the institution's one-time credit based on that 1996 assessment base ratio as applied to the aggregate amount of the credit; and providing the explanation as to how ratios and resulting amounts were calculated generally. The FDIC proposes to provide the Statement of One-time Credit through FDICconnect and by mail in accordance with existing practices for assessment invoices.

Under the proposal, if an institution has any question as to the calculation of its 1996 assessment base ratio or its credit amount, the institution would be advised to contact the Division of Finance. The FDIC encourages institutions to discuss and attempt to resolve perceived discrepancies due to an omission of a merger or consolidation, or due to disagreement about the size of an institution's 1996 assessment base while the notice of proposed rulemaking is out for comment.[9] As described below, each institution would have the opportunity to challenge formally the amount of its one-time credit, regardless of whether the institution sought an informal resolution during the rulemaking. Depending upon the definition of ''successor'' ultimately adopted, some challenges may not be resolved prior to the collection of assessments after the effective date of the final rule. However, the FDIC proposes to make available any credit amounts that are not in controversy. For example, if an eligible institution argues that it may be entitled to a larger share of the one-time credit as a successor, the amount of its original 1996 base ratio and share will be available (assuming they are not in dispute), and any potential additional credit amounts would be frozen until resolution of the challenge.

E. Requests for Review of Credit Amounts

Section 7(e)(4) of the FDI Act requires the FDIC's credit regulations to include provisions allowing an institution a reasonable opportunity to challenge administratively the amount of its one-time credit. The FDIC's determination of the amount following any such challenge is to be final and not subject to judicial review. The proposed administrative procedures are intended generally to parallel the process for requesting revision of computation of quarterly assessment payments. Deadlines, however, would be shorter because of the need to resolve credit appeals quickly so institutions can use the credits to offset assessments.

As noted above, the FDIC expects to notify each institution of its one-time credit share as soon as practicable after the issuance of the one-time assessment credit final rule through FDICconnect and by mail. The Statement of One-time Credit would include: The 1996 assessment base ratio for the institution; the amount of the assessment credit to be awarded to the institution based on the 1996 ratio; and a discussion of the basis for these calculations, based on the FDIC's definition of ''successor'' and any other relevant factors.

After this initial notification, it is proposed that an updated notice of the remaining amount of one-time credit, as well as any appropriate adjustment to an institution's 1996 assessment base ratio due to a subsequent merger or consolidation, would be included with each quarterly assessment invoice until an institution's credits have been exhausted. The initial Statement and any subsequent assessment invoices advising of the remaining credit amount or an adjustment to the assessment base ratio would also advise institutions of their right to challenge the calculation and the procedures to follow.

The FDIC proposes that an institution could request review if (1) It disagrees with the FDIC's determination of eligibility or ineligibility for the credit; (2) it disagrees with the computation of the credit amount on the initial Statement or any subsequent invoice, or (3) it believes that the Statement or a subsequently updated invoice does not fully or accurately reflect appropriate adjustments to the institution's 1996 assessment base ratio. For example, the institution may believe that its 1996 assessment base ratio has not been adjusted to reflect its acquisition through merger of an eligible institution.

The FDIC also proposes that an institution that disagrees with the FDIC's determination have 30 days from the date the FDIC made available its Statement of One-time Credit or adjusted invoice to file a request for review with the Division of Finance. The request would have to be accompanied by any documentation supporting the institution's claim. The FDIC proposes that, if an institution does not submit a timely request for review, the institution be barred from subsequently requesting review of its one-time assessment credit amount.

In addition, the requesting institution would have to identify all other institutions of which it knew or had reason to believe would be directly and materially affected by granting the request for review and provide those institutions with copies of the request for review and supporting documentation, as well as the FDIC's procedures for these requests for review. The FDIC would make reasonable efforts, based on its official systems of records, to determine that such institutions have been identified and notified. These institutions would then have 30 days to submit a response and any supporting documentation to the FDIC's Division of Finance, copying the institution making the original request

[8] SIMS maintains current and historical non-financial data for all institutions that is retrieved by AIMS II to identify the current assessable universe for each quarterly assessment invoice cycle. SIMS offers institution-specific demographic data, including a complete set of information on merger or consolidation transactions. SIMS, however, does not contain complete information about deposit or branch sales.

[9] Staff believes that the information developed through the searchable database would be useful even if the final rule defines ''successor'' in a way that follows deposits, because a ''follow-the-deposit'' definition would include recognition of the deposits actually transferred as part of a merger or consolidation.

for review. If an institution identified and notified through this process does not submit a timely response, the FDIC proposes that the institution would be: (1) Foreclosed from subsequently disputing the information submitted by any other institution on the transaction(s) at issue in the review process; and (2) foreclosed from any appeal of the decision by the Director of the Division of Finance (discussed below).

Under the proposal, the FDIC also would be able to request additional information as part of its review and require the institution to supply that information within 21 days of the date of the FDIC's request for additional information.

The FDIC proposes to freeze temporarily the amount of the proposed credit in controversy for the institutions involved in the request for review until the request is resolved.

The proposed rule would require a written response from the FDIC's Director of the Division of Finance (''Director''): (1) Within 60 days of receipt by the FDIC of the request for revision; (2) if additional institutions have been notified by the FDIC, within 60 days of the last response; or (3) if additional information has been requested by the FDIC, within 60 days of receipt of any additional information due to such request, whichever is later. Whenever feasible, the response would notify the requesting institution and any materially affected institutions of the determination of the Director as to whether the requested change is warranted. In all instances in which a timely request for review is submitted, the Director will make a determination on the request as promptly as possible and notify the requesting institution and any other materially affected institutions in writing of the determination. Notice of the procedures applicable to reviews will be included with the initial Statement and any subsequent assessment invoice providing notification of the amount of credit and any change to the institution's 1996 assessment base ratio.

Under the proposed rule, the requesting institution, or an institution materially affected by the Director's decision, that disagrees with that decision may appeal its credit determination to the AAC. An appeal would have to be filed within 15 calendar days from the date of the Director's written determination. Notice of the procedures applicable to appeals will be included with that written determination. The AAC's determination would be final and not subject to judicial review.

A number of challenges may arise in connection with the distribution of the one-time credit, in large part because many transactions occurred after 1996 and before the Reform Act provided for a one-time credit, and because this will be the first time that an institution's 1996 assessment base ratio is calculated. Once those challenges are resolved, and each institution's 1996 assessment base ratio for purposes of its one-time credit share is established, unforeseen circumstances or issues may lead to other challenges of credit share, and administrative procedures will remain in place to address those challenges.

Once the Director or the AAC has made the final determination, as appropriate, the FDIC would adjust the affected institutions' 1996 assessment base ratios consistent with that determination and correspondingly update each affected institution's share of the one-time credit.

F. Using Credits

The FDIC proposes that the FDIC track each institution's one-time credit amount and automatically apply an institution's credits to its assessment to the maximum extent allowed by law. For fiscal year 2007 assessment periods, for most institutions, credits generally can offset 100 percent of an institution's assessment. For assessments that become due for assessment periods beginning in fiscal years 2008, 2009, and 2010, the FDI Act provides that credits may not be applied to more than 90 percent of an institution's assessment. Thus, under the proposal, credits would automatically apply to 90 percent of an institution's assessment, assuming the institution has sufficient credits, subject to the two other statutory limitations on usage. The statute does not define a ''fiscal year'' for these purposes. The FDIC, therefore, may define that term and proposes to define it as the calendar year.

One of the other limitations is that, for an institution that exhibits financial, operational or compliance weaknesses ranging from moderately severe to unsatisfactory, or is not adequately capitalized at the beginning of an assessment period, the amount of any credit that may be applied against the institution's assessment for the period may not exceed the amount the institution would have been assessed had it been assessed at the average rate for all institutions for the period. The FDIC proposes to interpret the phrase ''average assessment rate'' to mean the aggregate assessment charged all institutions in a period divided by the aggregate assessment base for that period. The FDI Act does not define ''average assessment rate'' for these purposes, leaving that to the discretion of the FDIC. On balance, the FDIC views the proposed approach as preferable to an average calculated by the sum of all assessment rates divided by the number of institutions, because the proposed approach more accurately reflects the average rate actually charged all insured institutions.

Section 7(e)(3)(E) of the FDI Act, as added by the Reform Act, also gives the FDIC the discretion to limit the application of the one-time credit, when the FDIC establishes a restoration plan to restore the reserve ratio of the DIF to the range established for it.[10] That discretion, however, is restricted by the statute. During the time that a restoration plan is in effect, the FDIC shall apply one-time credit amounts against any assessment imposed on an institution for any assessment period in an amount equal to the lesser of (1) the amount of the assessment, or (2) the amount equal to three basis points of the institution's assessment base.

Credit amounts may not be used to pay FICO assessments pursuant to section 21(f) of the Federal Home Loan Bank Act, 12 U.S.C. 1441(f). The Reform Act does not affect the authority of FICO to impose and collect, with the approval of the FDIC's Board, assessments for anticipated interest payments, issuance costs, and custodial fees on obligations issued by FICO.

G. Transferring Credits

The FDI Act provides for transferring one-time credits through successors to eligible insured depository institutions. A successor institution, as defined by regulation, would succeed to the predecessor institution's credits and to its 1996 assessment base ratio for purposes of any future dividends.

The FDIC is further proposing to allow transfer of credits and adjustments to 1996 assessment base ratios by express agreement between insured depository institutions prior to the FDIC's final determination of an eligible insured depository institution's 1996 assessment base ratio and one-time credit amount pursuant to these regulations. It is possible that such agreements might already be part of deposit transfer contracts drafted in anticipation of deposit insurance reform legislative changes. Alternatively,

[10] Section 2105 of the Reform Act, amending section 7(b)(3) of the FDI Act to establish a range for the reserve ratio of the DIF, will take effect on the date that final regulations implementing the legislation with respect to the designated reserve ratio become effective. Those regulations are required to be prescribed within 270 days of enactment. Section 2109(a)(1) of the Reform Act.

institutions involved in a dispute over successorship, their 1996 assessment base ratio, and their shares of the one-time credit might reach a settlement over the disposition of the one-time credit. In either case, under the proposal, the FDIC would require the institutions to submit a written agreement signed by legal representatives of the involved institutions. Upon the FDIC's receipt of the agreement, appropriate adjustments would be made to the institutions' affected one-time credit amounts and 1996 assessment base ratios. Adjustments to each institution's credit amount and 1996 assessment base ratio would then be reflected with the next quarterly assessment invoice, so long as the institutions submit the written agreement, at least 10 business days prior to the FDIC's issuance of invoices for the next assessment period. If the FDIC does not receive the written agreement at least 10 days before the next assessment invoice, the FDIC shall retroactively adjust the invoice or invoices in later assessment periods.

Similarly, after an institution's credit share has been finally determined and no request for review is pending with respect to that credit amount, the FDIC proposes to recognize an agreement between insured depository institutions to transfer any portion of the one-time credit from the eligible institution to another institution. Adjustments to each institution's credit amount would then be reflected with the next quarterly assessment invoice, so long as the institutions notify the FDIC of such agreement, through a written agreement signed by legal representatives of the institutions, at least 10 business days prior to the FDIC's issuance of invoices for the next assessment period. If the FDIC does not receive the written agreement at least 10 days before the next assessment invoice, the FDIC shall retroactively adjust the invoice or invoices in later assessment periods.

With respect to these transactions, occurring after the determination of each eligible institution's 1996 assessment base ratio and share of the one-time credit as of the effective date of these regulations, the FDIC proposes *not* to adjust the transferring institution's 1996 assessment base ratio. Adjustments to the 1996 ratios would be made only to reflect mergers or consolidations occurring after the effective date of these regulations. There would seem to be less likelihood of disputes over successorship because institutions would be aware of the definition of ''successor'' and could take that into account when entering future contracts as the parties deem appropriate. Thus, there seems little need to allow the sale of an institution's 1996 assessment base ratio, which the FDIC would be required to track on an ongoing basis for dividend purposes.

III. Regulatory Analysis and Procedure

A. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Pub. Law 106–102, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. We invite your comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposed regulation clearly stated? If not, how could the regulation be more clearly stated?
- Does the proposed regulation contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

B. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA) requires that each federal agency either certify that a proposed rule would not, if adopted in final form, have a significant economic impact on a substantial number of small entities or prepare an initial regulatory flexibility analysis of the proposal and publish the analysis for comment. See 5 U.S.C. 603, 604, 605. Certain types of rules, such as rules of particular applicability relating to rates or corporate or financial structures, or practices relating to such rates or structures, are expressly excluded from the definition of ''rule'' for purposes of the RFA. 5 U.S.C. 601. The proposed one-time assessment credit rule relates directly to the rates imposed on insured depository institutions for deposit insurance, as they will offset future deposit insurance assessments. Nonetheless, the FDIC is voluntarily undertaking an initial regulatory flexibility analysis of the proposal and seeking comment on it.

As discussed in detail in the **SUPPLEMENTARY INFORMATION** section, the proposed rule is required by statute to implement the one-time assessment credit added to the FDI Act by the Reform Act, and if it is adopted in final form, would not have a significant impact on a substantial number of small entities within the meaning of those terms as used in the RFA. Section 7(e)(3) of the FDI Act provides for the allocation of the one-time credit among eligible insured depository institutions and their successors, based on each institution's assessment base as of December 31, 1996, as compared to the combined assessment bases of all eligible institutions. The statute defines ''eligible insured depository institution'' and requires the FDIC to define ''successor'' for these purposes. These credits will be used to offset deposit insurance assessments collected after the effective date of the final rule.

All insured depository institutions that are eligible, regardless of size, would be affected by this rule. Of the approximately 8,845 insured depository institutions as of December 31, 2005, approximately 5,360 institutions fell within the definition of ''small entity'' in the RFA—that is, having total assets of no more than $165 million. Approximately 4,390 small institutions appear to be eligible for the one-time credit under the FDI Act definition of ''eligible insured depository institution.'' These institutions would have approximately $241 million in one-time credits out of a total of approximately $4.7 billion in one-time credits, given the FDI Act definition of ''eligible insured depository institution'' and the definition of ''successor'' proposed in this rulemaking.[11] These one-time credits represent approximately 8 basis points of the combined assessment base of small institutions as of December 31, 2005. Assuming, for purposes of illustration, that small institutions were charged an average annual assessment rate of 2 basis points, these one-time credits would last, on average, approximately 4 years. In sum, most small, eligible institutions would benefit if the proposed rule were made final.

The proposed rule relies primarily on information already available to the FDIC and requires little new reporting or recordkeeping. If an eligible institution, regardless of size, disagrees with the FDIC's determination of its credit amount, it may request review of

[11] The present value of these one-time credits depends upon when they are used, which in turn depends on the assessment rates charged. The one-time credits do not earn interest; therefore, the higher the assessment rate charged—and the faster credits are used—the greater their present value. The FDIC has proposed making one-time credits transferable, which could increase their present value.

that determination. The review procedures are required by the statute and largely parallel existing procedures for similar requests for review. Moreover, the FDIC proposes to recognize settlements between institutions if there is a disagreement as to an institution's eligibility or the amount of its credit. The FDIC would merely require the institutions' to demonstrate their agreement with the submission of a signed document. Neither the request for review nor the submission of agreement is required generally, but rather is aimed at responding to questions raised by individual institutions based on their particular circumstances. Thus, the FDIC does not view the proposed rule as imposing a significant burden on small institutions.

Based on these findings, particularly the ability to offset future assessments for some period of time, the FDIC has concluded that the economic impact of the one-time credit rule would be largely positive and could be ''significant'' for some small, eligible institutions. One potentially negative economic impact could be felt by a small number of institutions that would not be eligible under the proposed definition of ''successor,'' but might be eligible if an alternative definition were adopted to recognize acquisitions of deposit or branches. As discussed more fully in the **SUPPLEMENTARY INFORMATION** section, the FDIC concluded that the proposed definition of successor is more consistent with the purpose of the one-time credit and more operationally viable. It is particularly noted, for RFA purposes, that the proposed definition, for the most part, relies on existing data in the FDIC's official systems of records, while the alternatives considered would require collection of information from the industry. (The alternative definitions of ''successor'' also would not affect a substantial number of small institutions.[12])

The FDIC has been unable to identify any other relevant federal rules that may duplicate or conflict with this proposed rule, although the FDIC's Notice of Proposed Rulemaking to implement the dividend requirements added by the Reform Act overlaps with this proposed rule because both statutory provisions rely to some extent on an institution's assessment base as of December 31, 1996. Commenters are invited to provide the FDIC with any information they may have about the likely quantitative effects of the proposal.

C. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) the FDIC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The collection of information contained in this proposed rule has been submitted to OMB for review.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC concerning the Paperwork Reduction Act implications of this proposal. Such comments should refer to ''Notification of Credit Transfers, 3064–AD08.'' Comments may be submitted by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/propose.html.*
- E-mail: *comments@FDIC.gov.* Include ''Notification of Credit Transfers, 3064–AD08'' in the subject line of the message.
- Mail: Steve Hanft (202–898–3907), Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- Hand Delivery: Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.
- A copy of the comments may also be submitted to the OMB desk officer for the FDIC, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

Comment is solicited on:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) 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) The quality, utility, and clarity of the information to be collected;

(4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses; and

(5) Estimates of capital or start-up costs and costs of operation, maintenance, and purchases of services to provide information.

Summary of the collection: The information collection occurs when an institution participates in a transaction that results in the transfer of one-time credits or an institution's 1996 assessment base, as permitted under the proposed rule, and seeks the FDIC's recognition of that transfer. It is expected that most transactions will occur during the first year.

Need and Use of the Information: Institutions are required to notify the FDIC of these transactions so that the FDIC can accurately track the transfer of credits, apply available credits appropriately against institutions' deposit insurance assessments, and determine an institution's 1996 assessment base if the transaction involved both the base and the credit amount. The need for credit transfer information will expire when the credit pool has been exhausted.

Respondents: Insured depository institutions.

Frequency of response: Occasional.

Annual Burden Estimate:

Number of responses: 200–500 during the first year with fewer than 10 per year thereafter.

Average number of hours to prepare a response: 2 hours.

Total annual burden: 400–1,000 hours the first year, and fewer than 100 hours thereafter.

D. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the proposed rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Public Law 105–277, 112 Stat. 2681).

List of Subjects in 12 CFR Part 327

Bank deposit insurance, Banks, Banking, Savings associations.

Authority and Issuance

For the reasons set forth in the preamble, the FDIC proposes to amend chapter III of title 12 of the Code of Federal Regulations as follows:

[12] Preliminary analysis suggests that the eligibility or credit amounts of some small institutions could be affected if the alternative definition of a ''successor'' as the acquirer of deposits, regardless of whether acquired through a merger or consolidation, were adopted. Compared to the proposed definition of ''successor,'' at least 330 small institutions could gain or lose credits. However, the value of the gain or loss is not known because the FDIC does not maintain comprehensive records of deposit transfers.

PART 327—ASSESSMENTS

1. Revise subpart B, consisting of § 327.30 through 327.36, to read as follows:

Subpart B—Implementation of One-time Assessment Credit

Sec.
327.30 Purpose and scope.
327.31 Definitions.
327.32 Determination of aggregate credit amount.
327.33 Determination of eligible institution's credit amount.
327.34 Transferability of credits.
327.35 Application of credits.
327.36 Requests for review of credit amount.

Subpart B—Implementation of One-time Assessment Credit

Authority: 12 U.S.C. 1817(e)(3).

§ 327.30 Purpose and scope.

(a) *Scope.* This subpart B of part 327 implements the one-time assessment credit required by section 7(e)(3) of the Federal Deposit Insurance Act, 12 U.S.C. 1817(e)(3) and applies to insured depository institutions.

(b) *Purpose.* This subpart B of part 327 sets forth the rules for:

(1) Determination of the aggregate amount of the one-time credit;

(2) Identification of eligible insured depository institutions;

(3) Determination of the amount of each eligible institution's December 31, 1996 assessment base ratio and one-time credit;

(4) Transferability of credit amounts among insured depository institutions;

(5) Application of such credit amounts against assessments; and

(6) An institution's request for review of the FDIC's determination of a credit amount.

§ 327.31 Definitions.

For purposes of this subpart and subpart C of this part:

(a) The *average assessment rate* for any assessment period means the aggregate assessment charged all insured depository institutions for that period divided by the aggregate assessment base for that period.

(b) *Board* means the Board of Directors of the FDIC.

(c) An *eligible insured depository institution* means an insured depository institution that:

(1) Was in existence on December 31, 1996, and paid a deposit insurance assessment before December 31, 1996; or

(2) Is a successor to an insured depository institution referred to in paragraph (c)(1) of this section. The term shall not include an institution if its insured status has terminated.

(d) *Merger* means any transaction in which an insured depository institution merges or consolidates with any other insured depository institution. Notwithstanding part 303, subpart D, for purposes of this subpart B and subpart C of this part, *merger* does not include all transactions in which an insured depository institution either directly or indirectly acquires the assets of, or assumes liability to pay any deposits made in, any other insured depository institution.

(e) *Resulting institution* refers to the acquiring, assuming, or resulting institution in a merger.

(f) *Successor* means a resulting institution.

§ 327.32 Determination of aggregate credit amount.

The aggregate amount of the one-time credit shall equal the product of:

(a) The combined assessment base of BIF and SAIF as of December 31, 2001, as reflected in the FDIC's official system of record for determination of assessment bases and assessments due; and

(b) 10.5 basis points.

§ 327.33 Determination of eligible institution's credit amount.

(a) Allocation of the one-time credit shall be based on each eligible insured depository institution's 1996 assessment base ratio.

(b) An institution's 1996 assessment base ratio shall consist of:

(1) Its assessment base as of December 31, 1996 (adjusted as appropriate to reflect the assessment base of December 31, 1996, of all eligible institutions for which it is the successor), as the numerator; and

(2) The combined aggregate assessment bases of all eligible insured depository institutions, including any successor institutions, as of December 31, 1996, as the denominator.

§ 327.34 Transferability of credits

(a) Any remaining amount of the one-time assessment credit and the associated 1996 assessment base ratio shall transfer to a successor of an eligible insured depository institution.

(b) Prior to the final determination of its 1996 assessment base and one-time assessment credit amount, an eligible insured depository institution may enter into an agreement to transfer any portion of such institution's one-time credit amount and 1996 assessment base ratio to another insured depository institution. The parties to the agreement shall submit to the FDIC's Division of Finance a written agreement, signed by legal representatives of both institutions. The adjustment to credit amount and the associated 1996 assessment base ratio shall be made in the next assessment invoice that is sent at least 10 days after the FDIC's receipt of the written agreement. If the FDIC does not receive the written agreement at least 10 days before the next assessment invoice, the FDIC shall retroactively adjust the invoice or invoices in later assessment periods.

(c) An eligible insured depository institution may enter into an agreement after the final determination of its 1996 assessment base ratio and one-time credit amount to transfer any portion of such institution's one-time credit amount to another insured depository institution. The parties to the agreement shall submit to the FDIC's Division of Finance a written agreement, signed by legal representatives of both institutions. The adjustment to the credit amount shall be made in the next assessment invoice that is sent at least 10 days after the FDIC's receipt of the written agreement. If the FDIC does not receive the written agreement at least 10 days before the next assessment invoice, the FDIC shall retroactively adjust the invoice or invoices in later assessment periods.

§ 327.35 Application of credits.

(a) Subject to the limitations in paragraph (b) of this section, the amount of an institution's one-time credit shall be applied to the maximum extent allowable by law against that institution's quarterly assessment payment under subpart A of this part, until the institution's credit is exhausted.

(b) The following limitations shall apply to the application of the credit against assessment payments.

(1) For assessments that become due for assessment periods beginning in calendar years 2008, 2009, and 2010, the credit may not be applied to more than 90 percent of the quarterly assessment.

(2) For an insured depository institution that exhibits financial, operational, or compliance weaknesses ranging from moderately severe to unsatisfactory, or is not at least adequately capitalized (as defined pursuant to section 38 of the Federal Deposit Insurance Act) at the beginning of an assessment period, the amount of the credit that may be applied against the institution's quarterly assessment for that period shall not exceed the amount that the institution would have been assessed if it had been assessed at the average assessment rate for all insured institutions for that period.

(3) If the FDIC has established a restoration plan pursuant to section 7(b)(3)(E) of the Federal Deposit Insurance Act, the FDIC may elect to restrict the application of credit amounts, in any assessment period, to the lesser of:

(i) The amount of an insured depository institution's assessment for that period; or

(ii) The amount equal to 3 basis points of the institution's assessment base.

§ 327.36 Requests for review of credit amount.

(a)(1) An insured depository institution may submit a request for review of the FDIC's final determination of the institution's credit amount as shown on the Statement of One-time Credit (''Statement'') within 30 days of the date the FDIC makes the Statement available. Such review may be requested if:

(i) The institution disagrees with a determination as to eligibility for the credit that relates to that institution's credit amount;

(ii) The institution disagrees with the calculation of the credit as stated on the Statement; or

(iii) The institution believes that the 1996 assessment base ratio attributed to the institution on the Statement does not fully or accurately reflect its own 1996 assessment base or appropriate adjustments for successors.

(2) If an institution does not submit a timely request for review, that institution may not subsequently request review of its credit amount, subject to paragraph (e) of this section.

(b)(1) An insured depository institution may submit a request for review of the FDIC's adjustment to the credit amount in a quarterly invoice within 30 days of the date on which the FDIC provides the invoice. Such review may be requested if:

(i) The institution disagrees with the calculation of the credit as stated on the invoice; or

(ii) The institution believes that the 1996 assessment base ratio attributed to the institution due to the adjustment to the invoice does not fully or accurately reflect appropriate adjustments for successors since the last quarterly invoice.

(2) If an institution does not submit a timely request for review, that institution may not subsequently request review of its credit amount, subject to paragraph (e) of this section.

(c) The request for review shall be submitted to the Division of Finance and shall provide documentation sufficient to support the change sought by the institution. At the time of filing with the FDIC, the requesting institution shall notify, to the extent practicable, any other insured depository institution that would be directly and materially affected by granting the request for review and provide such institution with copies of the request for review, the supporting documentation, and the FDIC's procedures for requests under this subpart. The FDIC shall make reasonable efforts, based on its official systems of records, to determine that such institutions have been identified and notified.

(d) During the FDIC's consideration of the request for review, the amount of credit in dispute shall not be available for use by any institution.

(e) Within 30 days of the filing of the request for review, those institutions identified as potentially affected by the request for review may submit a response to such request, along with any supporting documentation, to the Division of Finance, and shall provide copies to the requesting institution. If an institution that was notified under paragraph (c) of this section does not submit a response to the request for review, that institution may not:

(1) Subsequently dispute the information submitted by other institutions on the transaction(s) at issue in the review process; or

(2) Appeal the decision by the Director of the Division of Finance.

(f) If additional information is requested of the requesting or affected institutions by the FDIC, such information shall be provided by the institution within 21 days of the date of the FDIC's request for additional information.

(g) Any institution submitting a timely request for review will receive a written response from the FDIC's Director of the Division of Finance:

(1) Within 60 days of receipt by the FDIC of the request for revision;

(2) If additional institutions have been notified by the requesting institution or the FDIC, within 60 days of the date of the last response to the notification; or

(3) If additional information has been requested by the FDIC, within 60 days of receipt of the additional information,whichever is later. Whenever feasible, the response will notify the institution of the determination of the Director as to whether the requested change is warranted. In all instances in which a timely request for review is submitted, the Director will make a determination on the request as promptly as possible and notify the institution in writing of the determination. Notice of the procedures applicable to reviews will be included with the Statement and assessment invoices.

(h) Subject to paragraph (e) of this section, the insured depository institution that requested review under this section, or an insured depository institution materially affected by the Director's determination, that disagrees with that determination may appeal to the FDIC's Assessment Appeals Committee on the same grounds as set forth under paragraph (a) of this section. Any such appeal must be submitted within 15 calendar days from the date of the Director's written determination. Notice of the procedures applicable to appeals under this section will be included with the Director's written determination. The decision of the Assessment Appeals Committee shall be the final determination of the FDIC.

By order of the Board of Directors.

Dated at Washington, DC, this 9th day of May, 2006.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E6–7583 Filed 5–17–06; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–24793; Directorate Identifier 2006–NM–056–AD]

RIN 2120–AA64

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

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Airbus Model A330, A340–200, and A340–300 airplanes. This proposed AD would require replacing the attachment landing assemblies of certain blow-down panels of the wing leading edges with new, improved landing assemblies. This proposed AD results from several reports of full or partial loss of certain blow-down panels of the wing leading edges during flight. We are proposing this AD to prevent damage to the airplane and hazards to persons or property on the ground.

DATES: We must receive comments on this proposed AD by June 19, 2006.

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

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

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

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

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposed AD. Send your comments to an address listed in the **ADDRESSES** section. Include the docket number ''FAA–2006–24793; Directorate Identifier 2006–NM–056–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

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

Examining the Docket

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

Discussion

The European Aviation Safety Agency (EASA) notified us that an unsafe condition may exist on certain Airbus A330, A340–200, and A340–300 airplanes. The EASA advises that several operators have reported full or partial loss of certain blow-down panels of the wing leading edges during flight. Analysis showed that wing vibration resulted in wear formation of the rivet slots or complete shearing of the attaching rivets of the blow-down panel landings. This condition, if not corrected, could result in damage to the airplane and hazards to persons or property on the ground.

Relevant Service Information

Airbus has issued Service Bulletins A330–57–3091; and A340–57–4100; both dated October 25, 2005. The service bulletins describe procedures for replacing the attachment landing assemblies of certain blow-down panels of the wing leading edges with new, improved landing assemblies. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. The EASA mandated the service information and issued the EASA airworthiness directive 2006–0048, dated February 16, 2006, to ensure the continued airworthiness of these airplanes in the European Union.

FAA's Determination and Requirements of the Proposed AD

These airplane models are manufactured in France and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to FAA Order 8100.14A, ''Interim Procedures for Working with the European Community on Airworthiness Certification and Continued Airworthiness,'' dated August 12, 2005, the EASA has kept the FAA informed of the situation described above. We have examined the EASA's findings, evaluated all pertinent information, and determined that we need to issue an AD for products of this type design that are certificated for operation in the United States.

Therefore, we are proposing this AD, which would require accomplishing the actions specified in the service information described previously.

Costs of Compliance

The following table provides the estimated costs for U.S. operators of Model A330 airplanes to comply with the modifications required by this proposed AD. The estimated labor rate is $80 per work hour.

ESTIMATED COSTS

Airplane group	Work hours	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
1, 2, 3, 4, 5	68	$25,120	$30,560	5 (group 2 only)	$152,800
6	11	2,480	3,360	22	73,920

Currently, there are no Model A340–200 or A340–300 airplanes on the U.S. Register. However, if an affected Model A340–200 or A340–300 airplane is imported and placed on the U.S. Register in the future, the estimated costs shown in the table above will apply to accomplish the required actions of this proposed AD for that airplane.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII,

Aviation Programs, describes in more detail the scope of the Agency's authority.

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus: Docket No. FAA–2006–24793; Directorate Identifier 2006–NM–056–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by June 19, 2006.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus A330, A340–200, and A340–300 airplanes, certificated in any category; all serial numbers; except for airplanes which have received both Airbus modification 47249 and Airbus modification 53383 in production.

Unsafe Condition

(d) This AD results from several reports of full or partial loss of certain blow-down panels of the wing leading edges during flight. We are issuing this AD to prevent damage to the airplane and hazards to persons or property on the ground.

Compliance

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

Replacement

(f) Within 56 months after the effective date of this AD, replace the landing assemblies of certain blow-down panels of the wing leading edges with new, improved landing assemblies; in accordance with the Accomplishment Instructions of Airbus Service Bulletin A330–57–3091; or Airbus Service Bulletin A340–57–4100; both dated October 25, 2005; as applicable.

Alternative Methods of Compliance (AMOCs)

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

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

Related Information

(h) The European Aviation Safety Agency airworthiness directive 2006–0048, dated February 16, 2006, also addresses the subject of this AD.

Issued in Renton, Washington, on May 9, 2006.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E6–7560 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–22630; Directorate Identifier 2001–NM–323–AD]

RIN 2120–AA64

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

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

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

SUMMARY: The FAA is revising an earlier NPRM for an airworthiness directive (AD) that applies to all Airbus Model A300 B4–600, B4–600R, and F4–600R series airplanes, and Model C4–605R Variant F airplanes (collectively called A300–600 series airplanes); and A310–200 and –300 series airplanes. The original NPRM would have required a one-time inspection of the trimmable horizontal stabilizer actuator (THSA), corrective actions if necessary, and follow-on repetitive tasks. The original NPRM resulted from reports of THSAs that have reached their design operational life. This operational life can be extended provided an initial inspection and follow-on repetitive tasks are accomplished. This action revises the original NPRM by revising the initial compliance time. It also allows the component maintenance manual as an alternative repair method. We are proposing this supplemental NPRM to extend the operational life of the THSA to prevent a possible failure of high-time THSAs, which could result in reduced controllability of the airplane.

DATES: We must receive comments on this supplemental NPRM by June 12, 2006.

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

- *DOT Docket Web site:* Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.

- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590.
- *Fax:* (202) 493–2251.
- *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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

FOR FURTHER INFORMATION CONTACT: Thomas Stafford, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1622; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this supplemental NPRM. Send your comments to an address listed in the **ADDRESSES** section. Include the docket number ''Docket No. FAA–2005–22630; Directorate Identifier 2001–NM–323–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this supplemental NPRM. We will consider all comments received by the closing date and may amend this supplemental NPRM in light of those comments.

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

Examining the Docket

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

Discussion

We proposed to amend 14 CFR part 39 with a notice of proposed rulemaking (NPRM) for an airworthiness directive (AD) (the ''original NPRM''). The original NPRM would have applied to all Airbus Model A300 B4–600, B4–600R, and F4–600R series airplanes, and Model C4–605R Variant F airplanes (collectively called A300–600 series airplanes); and A310–200 and –300 series airplanes. The original NPRM was published in the **Federal Register** on October 6, 2005 (70 FR 58352). The original NPRM proposed to require a one-time inspection of the trimmable horizontal stabilizer actuator (THSA), corrective actions if necessary, and follow-on repetitive tasks.

Comments

We have considered the following comments on the original NPRM.

Request To Withdraw Proposed AD

According to a comment submitted through the Air Transport Association (ATA) on behalf of its member American Airlines, the original NPRM is unnecessary and would impose excessive and inappropriate regulatory requirements. American Airlines alleges that the original NPRM does not address the failure or safe operation of the subject THSA but instead addresses the manufacturer's failure to do its administrative duty—to adequately define the required maintenance and service life limitations of the component in the maintenance planning document (MPD). Because there have been no reports of failed THSAs on affected airplanes, the commenter concludes that the scope of the original NPRM extends beyond addressing a specific unsafe condition, and argues that operation beyond a design service goal does not necessarily constitute an airworthiness concern. American Airlines asserts that corresponding French airworthiness directive 2001–242(B), dated June 27, 2001, ''more appropriately acts as a temporary bridging document in the absence of the necessary MPD data.''

We infer that the commenter requests that we withdraw the original NPRM. We disagree.

First, this supplemental NPRM does not differ from the French airworthiness directive or service information (except for the source of repair approval explained in paragraph (g) of the supplemental NPRM).

Second, an unsafe condition has been identified: Failure of the THSA could result in reduced controllability of the airplane. The THSA on the affected airplanes was designed for a specified operational life; some THSAs installed on those airplanes have reached this operational limit. The DGAC has mandated an inspection and maintenance program to maintain the THSA's design reliability objective beyond its original operational life. In consonance with the DGAC, we find it necessary to require the actions as proposed. We find no basis to withdraw the proposed AD.

Request To Revise Repair Requirements

This same commenter requests that we revise the proposed requirement to obtain FAA or DGAC approval for repairs. American Airlines notes that there is no language in Airbus Service Bulletin A300–27–6044 or the French airworthiness directive or Goodrich Service Bulletin 47142–27–11 that proposes the need for regulatory oversight of repair actions. American Airlines adds that the original NPRM provides no justification for the requirement. According to the commenter, the THSA Component Maintenance Manual (CMM) does provide the necessary instructions for returning a unit to serviceable condition. The commenter reports that the airline is currently ''complying with the DGAC requirements'' and that the repair criterion was approved by the OEM (original equipment manufacturer) and Airbus, and was satisfactory to the DGAC.

We infer that the commenter requests that we revise paragraph (g) to require repair in accordance with the CMM. We concur. We have reviewed TRW Aeronautical Systems/Lucas Aerospace CMM 27–44–13, dated September 14, 2001, and have determined that it contains the necessary repair information. We have revised paragraph (g) in this supplemental NPRM to consider this information an approved method for the repair.

Request To Incorporate Additional Service Information

The same commenter would like to ensure that we are aware of Airbus Operators Information Telex (OIT), Reference SE 999.0074/05/BB, dated August 3, 2005, and that the contents of the OIT are reflected in the final rule, if applicable. The OIT determines the operational life of the THSA at 65,000 flight hours or 40,000 flight cycles or 25 years.

We have reviewed the OIT, as well as Revision 01, dated October 28, 2005,

which informs operators that a new life limit of 25 years applies to the THSA. In concurrence with the DGAC, we have determined that this 25-year life limit must be applied. We have revised paragraphs (g), (h), and (i) in this supplemental NPRM accordingly.

Request for Credit for Prior Inspection

Paragraph (g) of the original NPRM would require an inspection before the THSA accumulates 47,000 total flight hours, or within a grace period of 600 flight hours. The same commenter requests that we revise paragraph (g) to provide credit for the demonstrated prior accomplishment of the inspection for any THSA inspected and approved for the revised operational life of 65,000 hours or 40,000 cycles. The commenter states that including this language would avoid the necessity to pursue accomplishment credit through the alternative method of compliance (AMOC) process.

We find it unnecessary to revise paragraph (g). The language ''unless the actions have already been done'' specified in paragraph (e) in this supplemental NPRM obviates the need to repeat the inspection.

Request To Revise Cost Estimate

The same commenter suggests that we revise the ''Estimated Costs'' table to reflect actual operator experience. The commenter reports that the proposed inspection takes at least 8 work hours based on American Airlines' experience, rather than 3 hours as the original NPRM states. The commenter adds that it was necessary to replace the $6,082 elastic claw stop because of hydraulic fluid ingress. The commenter states that all operators will likely encounter the same results, and requests that we include this cost in the final rule.

We acknowledge the commenter's concerns but don't agree to change the cost estimate. The amount of time for the inspection will vary among operators. The cost estimate specified in the original NPRM reflects the work hour estimate provided by the manufacturer. Further, we do not agree to include the cost of the elastic claw stop. The commenter did not specify the percentage of the fleet that required a replaced elastic claw stop. The requirement to replace it is conditional based on the inspection findings. The information in the Costs of Compliance section in an AD action is limited to the cost of actions actually required by the AD. That section does not consider the costs of conditional actions (e.g., ''repair, if necessary''). Regardless of AD direction, those actions would be required to correct an unsafe condition identified in an airplane and ensure operation of that airplane in an airworthy condition, as required by the Federal Aviation Regulations.

Revised Labor Rate

After the original NPRM was issued, we reviewed the figures we have used over the past several years to calculate AD costs to operators. To account for various inflationary costs in the airline industry, we find it necessary to increase the labor rate used in these calculations from $65 per work hour to $80 per work hour. The cost impact information, below, reflects this increase in the specified hourly labor rate.

FAA's Determination and Proposed Requirements of the Supplemental NPRM

One of the changes discussed above expands the scope of the original NPRM; therefore, we have determined that it is necessary to reopen the comment period to provide additional opportunity for public comment on this supplemental NPRM.

Costs of Compliance

The following table provides the estimated costs for U.S. operators to comply with this supplemental NPRM.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Cost per airplane	Number of U.S.-reg. airplanes	Fleet cost
Inspection	3	$80	None required	$240	146	$35,040
Repetitive follow-on tasks.	12	80	$0	$960, per inspection cycle.	146	$140,160, per inspection cycle.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus: Docket No. FAA–2005–22630; Directorate Identifier 2001–NM–323–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by June 12, 2006.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all of the following Airbus airplanes, certificated in any category:

Model A300 B4–601, B4–603, B4–620, and B4–622 airplanes.

Model A300 B4–605R and B4–622R airplanes.

Model A300 F4–605R and F4–622R airplanes.

Model A300 C4–605R Variant F airplanes.

Model A310–203, –204, –221, and –222 airplanes.

Model A310–304, –322, –324, and –325 airplanes.

Unsafe Condition

(d) This AD results from reports of trimmable horizontal stabilizer actuators (THSAs) that have reached their design operational life. We are issuing this AD to extend the operational life of the THSA to prevent a possible failure of high-time units, which could result in reduced controllability of the airplane.

Compliance

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

Service Bulletin References

(f) Unless otherwise specified in this AD, the term ''service bulletin,'' as used in this AD, means the applicable required service bulletin identified in Table 1 of this AD. The service bulletins refer to Goodrich Actuation Systems Service Bulletin 47142–27–11, Revision 3, dated April 25, 2005, as an additional source of service information for the required actions.

TABLE 1.—SERVICE BULLETINS

Required Airbus service bulletin	Approved Airbus service bulletin version for actions done before the effective date of this AD	Airbus airplane model
A300–27–6044, Revision 04, dated September 10, 2001.	A300–27–6044, Revision 02, dated August 26, 2000; or Revision 03, dated June 28, 2001.	A300 B4–601, B4–603, B4–620, and B4–622. A300 B4–605R and B4–622R. A300 F4–605R and F4–622R. A300 C4–605R Variant F.
A310–27–2089, Revision 02, dated June 28, 2001.	A310–27–2089, Revision 01, dated August 25, 2000	A310–203, –204, –221, and –222. A310–304, –322, –324, and –325.

Inspection

(g) At the applicable time specified in paragraph (g)(1) or (g)(2) of this AD, do a detailed inspection of specified components of the THSA in accordance with paragraph 1.E.(2)(a) and the Accomplishment Instructions of the applicable service bulletin. Repair any discrepancy before further flight in accordance with a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the Direction Générale de l'Aviation Civile (DGAC) (or its delegated agent). TRW Aeronautical Systems/Lucas Aerospace Component Maintenance Manual 27–44–13, dated September 14, 2001, is one acceptable method for the repair.

(1) If the flight hours accumulated on the THSA can be positively determined: Inspect at the earlier of:

(i) Before the accumulation of 47,000 total flight hours on the THSA, or within 600 flight hours after the effective date of this AD, whichever occurs later.

(ii) Within 25 years since the THSA was new or within 600 flight hours after the effective date of this AD, whichever occurs later.

(2) If the flight hours accumulated on the THSA cannot be positively determined: Inspect before the accumulation of 47,000 total flight hours on the airplane, or within 600 flight hours after the effective date of this AD, whichever occurs later.

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

Follow-on Repetitive Tasks

(h) After the inspection required by paragraph (g) of this AD: Do the repetitive tasks in accordance with the Accomplishment Instructions and at the times specified in paragraph 1.E.(2)(b) of the service bulletin, as applicable, except as provided by paragraph (i) of this AD. The repetitive tasks are valid only until the THSA operational life exceeds 65,000 flight hours, 40,000 flight cycles, or 25 years, whichever occurs first. Before the THSA is operated beyond these extended life goals, it must be replaced with a new THSA, except as required by paragraph (i) of this AD.

THSA Replacement

(i) For any THSA, whether discrepant or not, that is replaced with a new THSA: Within 47,000 flight hours or 25 years, whichever occurs first, after the THSA is replaced, do the applicable tasks specified in paragraph 1.E.(2)(a) and the Accomplishment Instructions of the applicable service bulletin. Thereafter repeat the tasks within the repetitive intervals specified in paragraph 1.E.(2)(b) of the applicable service bulletin.

Alternative Methods of Compliance (AMOCs)

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

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

Related Information

(k) French airworthiness directive 2001–242(B), dated June 27, 2001, also addresses the subject of this AD.

Issued in Renton, Washington, on May 8, 2006.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E6–7558 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–23889; Directorate Identifier 2005–NM–252–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A318, A319, A320, and A321 Series Airplanes

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

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

SUMMARY: The FAA is revising an earlier NPRM for an airworthiness directive (AD) that applies to certain Airbus Model A318–111 airplanes; A319–100 series airplanes; A320–111 airplanes; A320–200 series airplanes; and A321–100 and –200 series airplanes. The original NPRM would have required inspecting to determine the part number of the twin motor actuators, and related investigative and corrective actions if necessary. The original NPRM resulted from a report of a low pressure valve of the twin motor actuator found partially open, although the valve detection system indicated that the valve was closed. Investigation revealed that the locating pin in the actuator was too short to engage with the valve slot, resulting in incorrect alignment of the actuator and the drive assembly, causing the valve to remain partially open. This action revises the original NPRM by expanding the applicability. We are proposing this supplemental NPRM to ensure that, in the event of an engine fire, the valve actuator functions properly to block the fuel flow to the engine and prevent an uncontrollable fire.

DATES: We must receive comments on this supplemental NPRM by June 12, 2006.

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

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

Fax: (202) 493–2251.

Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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

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

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this supplemental NPRM. Send your comments to an address listed in the **ADDRESSES** section. Include the docket number ''Docket No. FAA–2006–23889; Directorate Identifier 2005–NM–252–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this supplemental NPRM. We will consider all comments received by the closing date and may amend this supplemental NPRM in light of those comments.

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

Examining the Docket

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

Discussion

We proposed to amend 14 CFR part 39 with a notice of proposed rulemaking (NPRM) for an airworthiness directive (AD) (the ''original NPRM''). The original NPRM applies to certain Airbus Model A318–111 airplanes; A319–100 series airplanes; A320–111 airplanes; A320–200 series airplanes; and A321–100 and –200 series airplanes. The original NPRM was published in the **Federal Register** on February 15, 2006 (71 FR 7878). The original NPRM proposed to require inspecting to determine the part number of the twin motor actuators, and related investigative and corrective actions if necessary.

Since the original NPRM was issued, we have changed the airplane model designations to expand the applicability of this supplemental NPRM and be consistent with the parallel French airworthiness directive.

Comments

We have considered the following comments on the original NPRM.

Requests To Expand Applicability

Airbus asks that the applicability identified in the original NPRM be expanded to match the effectivity in the referenced French airworthiness directive. Airbus states that the referenced French airworthiness directive applies to all Airbus Model A318, A319, A320, and A321 series airplanes, certified according to the type certificate data sheet (TCDS) issued in December 2005. Airbus adds that since the new TCDS was issued, the original NPRM is missing Model A318–112, –121 and –122 airplanes, and Model A321–212, –213, and –232 airplanes. Airbus notes that airplanes delivered after the issuance of the original NPRM with manufacturer serial number (MSN) 2155 or above are not affected by the original NPRM; airplanes delivered with MSN 2154 or below are affected by original NPRM.

JetBlue Airways asks that the applicability in the original NPRM be changed to include the MSNs affected. JetBlue states that the original NPRM is applicable to all Model A320 airplanes.

We agree with Airbus and partially agree with JetBlue; Airbus and the Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, determined that the requirements in the original NPRM do not apply to airplanes with MSN 2155 or above. We have expanded the applicability in this supplemental NPRM as follows: ''Airbus Model A318, A319, A320, and A321 series airplanes,

certificated in any category, except airplanes having manufacturer serial number (MSN) 2155 and subsequent.''

Request To Remove General Visual Inspection (GVI)

JetBlue asks that the original NPRM be changed to remove the GVI and allow accomplishing the inspection/check specified in the Airbus/DGAC guidelines that are currently available. JetBlue states that the GVI, per Note 1 of the original NPRM, differs from the referenced French airworthiness directive and Airbus service bulletin, which specify a check for the discrepant part number (P/N)/serial number (S/N) of the discrepant actuator. JetBlue adds that the inclusion of a GVI will result in considerable retroactive work for U.S. operators who proactively launched/completed the inspection per the referenced Airbus service bulletin. JetBlue adds that it has already initiated the inspections in accordance with the Airbus service bulletin.

We agree with the commenter. The French airworthiness directive requires inspecting the actuators for certain part numbers; the Airbus service bulletin specifies checking for certain P/Ns and S/Ns. The procedures for these actions do not constitute a GVI. We have removed the reference to a GVI in paragraph (f) and removed Note 1 of this supplemental NPRM.

Request To Add New Service Information

US Airways, and the Air Transport Association (ATA) on behalf of US Airways, ask that the supplemental NPRM include a requirement to accomplish the actions specified in Airbus Service Bulletins A320–28–1128 and A320–28–1129, which describe procedures to inspect actuators in the crossfeed valve in the center tank and the additional center tank (ACT) transfer valve in the ACT. The commenters state that inspecting the crossfeed and transfer valve positions is necessary to ensure that no defective actuator is installed.

We do not agree with the commenters. No unsafe condition has been determined to exist other than in low pressure positions in the wing, when combined with an engine fire or engine malfunction when it is critical to shut down an engine. Therefore, the status of the subject service bulletins remains ''recommended;'' Airbus will not upgrade the service bulletins to ''mandatory'' and we will not add them to the supplemental NPRM.

Request To Change Work Hours

US Airways asks that the work hours specified in the original NPRM be increased from 1 to 6. US Airways states that the visual part number check and the corrective actions both require removal/installation of leading edge access panels, and since the affected twin motor actuator could be installed in three to four different positions on each airplane, depending on the airplane type, 1 work hour is not sufficient.

We do not agree with the commenter. The costs of compliance discussed in NPRMs represent only the time necessary to perform the specific actions actually proposed by the NPRM. These figures typically do not include on-condition costs, such as related investigative and corrective actions following an initial inspection finding; nor do they include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions. Although we agree that the work-hours required for an operator to comply with the requirements of the supplemental NPRM may be more than the hours reflected in the cost estimate, we cannot predict on-condition costs for the entire fleet. After the original NPRM was issued, we reviewed the figures we have used over the past several years to calculate AD costs to operators. To account for various inflationary costs in the airline industry, we find it necessary to increase the labor rate used in these calculations from $65 per work hour to $80 per work hour. The cost impact information, below, reflects this increase in the specified hourly labor rate.

FAA's Determination and Proposed Requirements of the Supplemental NPRM

A certain change discussed above expands the scope of the original NPRM; therefore, we have determined that it is necessary to reopen the comment period to provide additional opportunity for public comment on this supplemental NPRM.

Costs of Compliance

This supplemental NPRM would affect about 763 airplanes of U.S. registry. The proposed inspection would take about 1 work hour per airplane, at an average labor rate of $80 per work hour. Based on these figures, the estimated cost of this supplemental NPRM on U.S. operators is $61,040, or $80 per airplane.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus: Docket No. FAA–2006–23889; Directorate Identifier 2005–NM–252–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by June 19, 2006.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A318, A319, A320, and A321 series airplanes, certificated in any category, except airplanes having manufacturer serial number (MSN) 2155 and subsequent.

Unsafe Condition

(d) This AD results from a report of a low pressure valve of the twin motor actuator found partially open, although the valve detection system indicated that the valve was closed. Investigation revealed that the locating pin in the actuator was too short to engage with the valve slot, resulting in incorrect alignment of the actuator and the drive assembly, causing the valve to remain partially open. We are issuing this AD to ensure that, in the event of an engine fire, the valve actuator functions properly to block the fuel flow to the engine and prevent an uncontrollable fire.

Compliance

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

Inspection

(f) Within 6,000 flight hours or 24 months after the effective date of this AD, whichever is first: Inspect to determine the part number (P/N) of the twin motor actuators in accordance with Airbus Service Bulletin A320–28–1122, including Appendix 01, dated November 19, 2004.

(1) For airplanes having any actuator with P/N FRH010041 or P/N FRH010034, no further action is required by this paragraph.

(2) For airplanes having any actuator with P/N HTE190001–2, where the actuator serial number is not identified in Appendix 01 of the service bulletin, no further action is required by this paragraph.

(3) For airplanes having any actuator with P/N HTE190001, HTE190001–1, or HTE190001–2, where the actuator serial number is identified in Appendix 01 of the service bulletin, do all applicable related investigative and corrective actions before further flight, in accordance with the service bulletin.

Note 1: Airbus Service Bulletin A320–28–1122, dated November 19, 2004, refers to FR–HITEMP Service Bulletin HTE190001–28–003, dated March 30, 2004, as an additional source of service information for determining the part number of the twin motor actuators and accomplishing any related investigative and corrective actions.

Parts Installation

(g) As of the effective date of this AD: No person may install an actuator with P/N HTE190001, HTE190001–1, or HTE190001–2, and a serial number identified in Appendix 01 of Airbus Service Bulletin A320–28–1122, dated November 19, 2004, on any airplane unless all applicable related investigative and corrective actions have been done in accordance with the requirements of paragraph (f)(3) of this AD.

Alternative Methods of Compliance (AMOCs)

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

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

Related Information

(i) French airworthiness directive F–2005–189, dated November 23, 2005, also addresses the subject of this AD.

Issued in Renton, Washington, on May 9, 2006.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E6–7557 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20080; Directorate Identifier 2003–NM–193–AD]

RIN 2120–AA64

Airworthiness Directives; Various Aircraft Equipped With Honeywell Primus II RNZ–850/–851 Integrated Navigation Units

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

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

SUMMARY: The FAA is revising an earlier NPRM for an airworthiness directive (AD) that applies to various aircraft equipped with a Honeywell Primus II RNZ–850/–851 Integrated Navigation Unit (INU). The original NPRM would have superseded an existing AD that, as one alternative for compliance, provides for a one-time inspection to determine whether a certain modification has been installed on the Honeywell Primus II NV850 Navigation Receiver Module (NRM), which is part of the INU. In lieu of accomplishing this inspection, and for aircraft found to have an affected NRM, the existing AD provides for revising the aircraft flight manual to include new limitations for instrument landing system approaches. The original NPRM proposed to require inspecting to determine whether certain other modifications have been done on the NRM; and doing related investigative, corrective, and other specified actions, as applicable. The original NPRM resulted from reports of erroneous glideslope indications on certain aircraft equipped with subject INUs. This new action revises the original NPRM by describing further modifications to address additional anomalies. We are proposing this supplemental NPRM to ensure that the flightcrew has an accurate glideslope deviation indication. An erroneous glideslope deviation indication could lead to the aircraft making an approach off the glideslope, which could result in impact with an obstacle or terrain.

DATES: We must receive comments on this supplemental NPRM by June 12, 2006.

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

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

Contact Honeywell Aerospace Electronic Systems, CES—Phoenix, P.O. Box 2111, Phoenix, Arizona 85036–1111, for service information identified in this proposed AD.

FOR FURTHER INFORMATION CONTACT: J. Kirk Baker, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5345; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposal. Send your comments to an address listed in the **ADDRESSES** section. Include the docket number ''Docket No. FAA–2005–20080; Directorate Identifier 2003–NM–193–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this supplemental NPRM. We will consider all comments received by the closing date and may amend this supplemental NPRM in light of those comments.

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

Examining the Docket

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

Discussion

We proposed to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) with a notice of proposed rulemaking (NPRM) for an AD (the ''original NPRM'') for various aircraft equipped with a Honeywell Primus II RNZ–850/–851 Integrated Navigation Unit (INU). The original NPRM proposed to supersede AD 2003–04–06, amendment 39–13054 (68 FR 8539, February 24, 2003), which applies to various aircraft equipped with the subject INU. AD 2003–04–06 stated that it was considered ''interim action'' because the manufacturer was developing final corrective modifications for the unsafe condition specified in AD 2003–04–06; and that we might consider further rulemaking when those modifications were released. The original NPRM followed from the release of those modifications. The original NPRM was published in the **Federal Register** on January 19, 2005 (70 FR 2982). The original NPRM proposed to require inspecting to determine whether certain other modifications have been done on the Honeywell Primus II NV850 Navigation Receiver Module (NRM), which is part of the subject INU; and doing related investigative, corrective, and other specified actions, as applicable. The original NPRM resulted from reports of erroneous glideslope indications on certain aircraft equipped with subject INUs. That condition, if not corrected, could lead to the aircraft making an approach off the glideslope, which could result in impact with an obstacle or terrain.

Actions Since Original NPRM Was Issued

Since we issued the original NPRM, there have been reports of additional anomalies during instrument landing system (ILS) landings on several Empresa Brasileira de Aeronautica S.A. (EMBRAER) airplanes equipped with subject INUs. Reports specified that the localizer deviation displayed by the INU changed quickly from a centered position to a full-scale deviation for a few seconds, then was flagged as invalid data. Honeywell has issued service information to address such ILS anomalies.

Relevant Service Information Specified in Original NPRM

We have reviewed Honeywell Service Bulletin 7510100–34–A0035, dated July 11, 2003, which describes procedures for inspecting the NRM to determine whether Mod L has been done. If Mod L has not been done, the service bulletin specifies re-identifying the NRM with a new part number. If Mod L has been done, the service bulletin specifies inspecting to determine if Mod N, P, or R has also been done. (Mod N, P, and R test the NRM for discrepant signals.) If any of those mods has been done, the specified actions are replacing the existing modification plates on the NRM and INU with new plates bearing new part numbers. If Mod L has been done, but neither Mod N, P, nor R has been done, the service bulletin specifies doing further investigative actions and corrective actions in accordance with Honeywell Service Bulletin 7510100–34–A0034, dated February 28, 2003, then replacing the existing modification plates on the NRM and INU with new plates bearing new part numbers.

Honeywell Service Bulletin 7510100–34–A0034 describes procedures for inspecting to determine the NRM part number and marking the modification plates of the NRM and INU accordingly. This service bulletin also describes procedures for a related investigative action if neither Mod N nor P is marked, which consists of testing the INU for discrepant signals. If any discrepant signal is detected, corrective action consists of replacing the unit with a new or modified INU. Honeywell Service Bulletin 7510100–34–A0034 refers to Honeywell Service Bulletin 7510134–34–A0016, currently at Revision 001, dated March 4, 2003, as an additional source of service information for re-identifying the INU.

New Relevant Service Information

We have reviewed Honeywell Service Bulletin 7510100–34–0037, dated July 8, 2004. The service bulletin describes procedures for replacing the NRM, which is part of the subject INU, with an NRM that is at Mod T. Service Bulletin 7510100–34–0037 also specifies Honeywell Service Bulletin 7510134–34–0018, dated July 8, 2004, as an additional source of service information for modifying the NRM to the ''Mod T'' configuration.

We have reviewed Honeywell Service Bulletin 7510134–34–0018. The service bulletin describes procedures for determining the part number of a certain circuit card assembly (CCA) inside the NRM; replacing the RF absorber in the CCA, if necessary, with an improved RF absorber having a different part number and marking the appropriate revision letter on the CCA; and marking the NRM as Mod T.

Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition.

Comments

We have considered the following comments on the original NPRM.

Request for Increased Compliance Time

One commenter, Express Jet, requests that we extend the compliance time. The commenter states it has already returned about 106 suspect units to Honeywell for modification. Express Jet asserts that program data collected for 475,000 flight hours for the modified units show no occurrence of the described anomalies. Express Jet further states it has a large number of airplanes still to be inspected and modified and asserts that accomplishing the inspections and modifications within

the specified 12 months will be very cumbersome. Express Jet requests that we extend the compliance time to 24 months.

We agree with this request. The revisions specified in paragraph (h) of the proposed AD for the Limitations section of the aircraft flight manual (AFM) will continue to be required until all aircraft have been modified. Further, Express Jet has submitted data showing no occurrence of the described anomalies for any of its modified units. Therefore, we have determined that these combined factors demonstrate that extending the compliance time as requested will pose no increased risk to affected aircraft. Accordingly, we have revised the 12-month compliance time specified in paragraph (j) of the original NPRM to 24 months in this supplemental NPRM.

Request for Clarification of Inspection To Determine Modification Level

One commenter, a private citizen, requests that we clarify the proposed requirements of the original NPRM for inspecting to determine the modification level of the NRM. The commenter states that the proposed requirements of paragraph (k) of the original NPRM as currently written do not make sense. Paragraph (k) states: ''If the inspection to determine whether Mod L is installed, as required by paragraph (j) of this AD, is done within the compliance time specified in paragraph (f) of this AD, paragraph (f) of this AD does not need to be done.'' The commenter explains that, since paragraph (f) was required to be accomplished within 5 days after March 11, 2003, it would not be possible to comply with paragraph (j) within that same time frame, since March 16, 2003, has already gone by. The commenter also states that the requirement of paragraph (j) to inspect for the installation of modification L, N, P, or R, is contradicted by the opening clause of paragraph (k), and asserts that this can't be the intent of paragraph (k) in the original NPRM. The commenter suggests that, to clear up this confusion and make it possible to accomplish the requirements of the related paragraphs, paragraph (k) should be reworded as follows: ''If the inspection to determine whether Mod L is installed, as required by paragraph (g) of this AD, is done within the compliance time specified in paragraph (f) of this AD, paragraph (j) of this AD does not need to be done.''

We do not agree with this request. We have determined that the wording of paragraph (k) of the original NPRM reflects the correct compliance time for both paragraphs (f) and (g) of the original NPRM. Further, paragraph (j) is required regardless of compliance time or the findings of paragraph (f). Therefore, we have not changed paragraph (k) in this supplemental NPRM.

FAA's Determination and Proposed Requirements of the Supplemental NPRM

The changes discussed above expand the scope of the original NPRM; therefore, we have determined that it is necessary to reopen the comment period to provide additional opportunity for public comment on this supplemental NPRM. This proposed AD would supersede AD 2003–04–06. This proposed AD would retain the requirements of the existing AD. This proposed AD would also require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between the Proposed AD and Service Information.''

Differences Between the Proposed AD and Service Information

The service information specifies reporting certain information and returning parts to the manufacturer. However, this proposed AD would not require those actions.

Explanation of Changes Made to This Proposed Supplemental NPRM

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

After the original NPRM was issued, we reviewed the figures we have used over the past several years to calculate AD costs to operators. To account for various inflationary costs in the airline industry, we find it necessary to increase the labor rate used in these calculations from $65 per work hour to $80 per work hour. The cost impact information, below, reflects this increase in the specified hourly labor rate.

Costs of Compliance

For the purposes of this proposed AD, we estimate that there are 3,063 aircraft worldwide that may be equipped with a part that is subject to this proposed AD, including about 1,500 aircraft of U.S. registry.

The inspection to determine whether Mod L has been done, which is currently required by AD 2003–04–06 and retained in this proposed AD, takes about 1 work hour per aircraft, at an average labor rate of $80 per work hour. Based on these figures, the estimated cost of the currently required actions is $80 per aircraft.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing amendment 39–13054 (68 FR 8539, February 24, 2003) and adding the following new airworthiness directive (AD):

Various Aircraft: Docket No. FAA–2005–20080; Directorate Identifier 2003–NM–193–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by June 12, 2006.

Affected ADs

(b) This AD supersedes AD 2003–04–06.

Applicability

(c) This AD applies to aircraft, certificated in any category, equipped with a Honeywell Primus II RNZ–850/–851 Integrated Navigation Unit (INU) having a part number identified in Table 1 of this AD; including, but not limited to, BAE Systems (Operations) Limited (Jetstream) Model 4101 airplanes; Bombardier BD–700–1A10 series airplanes; Bombardier CL–215–6B11 (CL415 variant) series airplanes; Cessna Model 560, 560XL, and 650 airplanes; Dassault Model Mystere-Falcon 50 series airplanes; Dornier Model 328–100 and –300 series airplanes; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–135 and –145 series airplanes; Learjet Model 45 airplanes; Raytheon Model Hawker 800XP and Hawker 1000 airplanes; and Sikorsky Model S–76A, S–76B, and S–76C aircraft.

TABLE 1.—INU PART NUMBERS

Part numbers			
7510100–811	through	7510100–814	inclusive.
7510100–831	through	7510100–834	inclusive.
7510100–901	through	7510100–904	inclusive.
7510100–911	through	7510100–914	inclusive.
7510100–921	through	7510100–924	inclusive.
7510100–931	through	7510100–934	inclusive.

Note 1: This AD applies to Honeywell Primus II RNZ–850/–851 INUs installed on any aircraft, regardless of whether the aircraft has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For aircraft that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (m) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Unsafe Condition

(d) This AD results from reports indicating that erroneous glideslope indications have occurred on certain aircraft equipped with the subject INUs. We are issuing this AD to ensure that the flightcrew has an accurate glideslope deviation indication. An erroneous glideslope deviation indication could lead to the aircraft making an approach off the glideslope, which could result in impact with an obstacle or terrain.

Compliance

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

Requirements of AD 2003–04–06

Compliance Time for Action

(f) Within 5 days after March 11, 2003 (the effective date of AD 2003–04–06, amendment 39–13054), accomplish the requirements of either paragraph (g) or (h) of this AD. After the effective date of this AD, only accomplishing the requirements of paragraph (g) of this AD is acceptable for compliance with this paragraph.

Inspection To Determine Part Number

(g) Perform a one-time general visual inspection of the modification plate for the Honeywell Primus II NV–850 Navigation Receiver Module (NRM); part number 7510134–811, –831, –901, or –931; which is part of the Honeywell Primus II RNZ–850/–851 INU; to determine if Mod L has been installed. The modification plate is located on the bottom of the Honeywell Primus II RNZ–850/–851 INU, is labeled NV–850, and contains the part number and serial number for the Honeywell Primus II NV–850 NRM. If Mod L is installed, the letter L will be blacked out. Honeywell Service Bulletin 7510100–34-A0035, dated July 11, 2003, is an acceptable source of service information for the inspection required by this paragraph.

(1) If Mod L is installed, before further flight, do paragraph (h) or (j) of this AD. After the effective date of this AD, only accomplishment of paragraph (j) is acceptable for compliance with this paragraph.

(2) If Mod L is not installed, no further action is required by this paragraph.

Note 2: For the purposes of this AD, a general visual inspection is defined as: ''A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to enhance visual access to all exposed surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.''

Note 3: For more information on the inspection specified in paragraph (g) of this AD, refer to Honeywell Technical Newsletter A23–3850–001, Revision 1, dated January 21, 2003.

Aircraft Flight Manual Revision

(h) Revise the Limitations section of the aircraft flight manual (AFM) to include the following statements (which may be accomplished by inserting a copy of the AD into the AFM):

''FLIGHT LIMITATIONS''

When crossing the Outer Marker on glideslope, the altitude must be verified with the value on the published procedure.

For aircraft with a single operating glideslope receiver, the approach may be flown using normal procedures no lower than Localizer Only Minimum Descent Altitude (MDA).

For aircraft with two operating glideslope receivers, the aircraft may be flown to the published minimums for the approach using normal procedures if both glideslope receivers are tuned to the approach and both crew members are monitoring the approach using independent data and displays.''

Parts Installation

(i) As of March 11, 2003, no person may install a Honeywell Primus II NV–850 NRM on which Mod L has been installed, on the Honeywell Primus II RNZ-850/-851 INU of any aircraft, unless paragraph (h) or (k) of this AD is accomplished. As of the effective date of this AD, only accomplishment of paragraph (k) is acceptable for compliance with this paragraph.

New Requirements of This AD

Inspection To Determine Modification Level of NRM

(j) For aircraft on which Mod L was found to be installed during the inspection required by paragraph (g) of this AD, or for aircraft on which paragraph (h) of this AD was accomplished: Within 24 months after the effective date of this AD, do an inspection of the modification plate on the Honeywell Primus II NV–850 NRM; part number 7510134–811, –831, –901, or –931; which is part of the Honeywell Primus II RNZ–850/–851 INU; to determine if Mod L, N, P, R or T is installed. The modification plate located on the bottom of the Honeywell Primus II RNZ–850/–851 INU is labeled NV–850, and contains the part number and serial number for the Honeywell Primus II NV–850 NRM. If Mod L, N, P, R or T is installed, the corresponding letter on the modification plate will be blacked out. Honeywell Service Bulletin 7510100–34–A0035, dated July 11, 2003, is an acceptable source of service information for this inspection. If Mod T is installed, no further action is required by this paragraph. If Mod L, N, P, or R is installed, before further flight, do all applicable related investigative, corrective, and other specified actions, in accordance with the Accomplishment Instructions of Honeywell Service Bulletin 7510100–34–A0035, dated

July 11, 2003; and Honeywell Service Bulletin 7510100–34–0037, dated July 8, 2004; to ensure that the NRM is at the Mod T configuration. Once the actions in this paragraph are completed, the AFM revision required by paragraph (h) of this AD may be removed from the AFM.

Note 4: Honeywell Service Bulletin 7510100–34–A0035, dated July 11, 2003, refers to Honeywell Service Bulletin 7510100–34–A0034, dated February 28, 2003, as an additional source of service information for inspecting to determine the NRM part number, marking the modification plates of the NRM and INU accordingly, testing the INU for discrepant signals, and replacing the unit with a new or modified INU, as applicable. Honeywell Service Bulletin 7510100–34–A0034 refers to Honeywell Service Bulletin 7510134–34–A0016, currently at Revision 001, dated March 4, 2003, as an additional source of service information for marking the modification plates of the NRM and INU.

Note 5: Honeywell Service Bulletin 7510100–34–0037, dated July 8, 2004, refers to Honeywell Service Bulletin 7510134–34–0018, dated July 8, 2004, as an additional source of service information for modifying the NRM to the Mod T configuration.

(k) If the inspection specified by paragraph (j) of this AD is done within the compliance time specified in paragraph (f) of this AD, paragraph (g) of this AD does not need to be done.

No Reporting Requirement

(l) Where Honeywell Service Bulletin 7510100–34–A0035 (or any of the related service information referenced therein) specifies to submit certain information to the manufacturer, this AD does not include that requirement.

Alternative Methods of Compliance (AMOCs)

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

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

Issued in Renton, Washington, on May 9, 2006.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E6–7559 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF STATE

22 CFR Part 181

[Public Notice: 5402]

RIN 1400–AC21

Publication, Coordination, and Reporting of International Agreements: Amendments

AGENCY: State Department.

ACTION: Proposed rule with request for comments.

SUMMARY: The Department of State is proposing to update the regulations implementing 1 U.S.C. 112a and 112b in order to reflect amendments to the statutes governing publication of U.S. international agreements and their transmittal to the Congress. It is further proposing not to publish certain categories of international agreements in the compilation entitled ''United States Treaties and Other International Agreements'' or in the Treaties and Other International Acts series. These categories of agreements are of a highly technical or specialized nature and are of limited interest to the public. Further, the regulations are proposed to be amended to reflect adjustments to certain internal procedures within the State Department on the reporting of international agreements to Congress. Finally, the Department is adding a new requirement concerning procedures for consultation with the Secretary of State in the negotiation and conclusion of international agreements. Where an international agreement could reasonably require for its implementation the issuance of a significant domestic regulatory action, agencies proposing the agreement are to consult in a timely manner with the Office of Management and Budget (OMB), and the Department of State should confirm that timely consultations were undertaken.

DATES: Submit comments on or before July 17, 2006.

ADDRESSES: You may submit comments, identified by any of the following methods: E-mail: *treatyoffice@state.gov*. You must include the Regulatory Identification Number (RIN) in the subject line of your message.

Mail (paper, disk, or CD–ROM submissions): An original and three copies of comments should be sent to the Assistant Legal Adviser for Treaty Affairs, Office of the Legal Adviser, Room 5420, Department of State, Washington, DC 20520.

Persons with access to the internet may also view this notice and provide comments by going to the regulations.gov Web site at: *http://www.regulations.gov/index.cfm*. You must include the RIN in the subject line of your message.

FOR FURTHER INFORMATION CONTACT: John J. Kim, Assistant Legal Adviser for Treaty Affairs, Office of the Legal Adviser, Department of State, 202–647–1660.

SUPPLEMENTARY INFORMATION:

Background

Two statutes set forth the Secretary's unique role and important responsibilities in the area of publishing, coordinating, and reporting international agreements. Pursuant to 1 U.S.C. 112a, the Secretary of State is required to publish annually a compilation of all treaties and international agreements to which the United States is a party that were signed, proclaimed, or ''with reference to which any other final formality ha[d] been executed'' during the calendar year. The Secretary of State, however, may determine that certain categories of agreements should not be published if certain criteria are met. Any such determination must be published in the **Federal Register**.

Under the second statute, 1 U.S.C. 112b, the Secretary of State is required to transmit to the Congress the text of any international agreement other than a treaty to which the United States is a party as soon as practicable but no later than 60 days after it enters into force. Those agreements that the President determines should be classified are to be transmitted, not to Congress as a whole, but to the House Committee on International Relations (at that time called ''the House Committee on Foreign Affairs'') and to the Senate Foreign Relations Committee under an injunction of secrecy. The statute further recognizes the Secretary of State's special role in the negotiation and conclusion of all U.S. international agreements, providing that ''[n]otwithstanding any other provision of law, an international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State. Such consultation may encompass a class of agreements rather than a particular agreement.''

The Department of State has issued regulations to implement these statutory provisions. These regulations are codified in Part 181 of Chapter 22 of the Code of Federal Regulations (CFR). Congress has amended both 1 U.S.C. 112a and 1 U.S.C. 112b several times, most recently in section 7121 of the Intelligence Reform and Terrorism

Prevention Act of 2004, Public Law 108–458 (Dec. 17, 2004). This proposed rule amends certain sections of 22 CFR part 181 in order to reflect (1) the changes made to 1 U.S.C. 112a and 112b in December 2004; (2) certain changes made to internal Departmental procedures; (3) four additional categories of international agreements that meet the non-publication criteria of 1 U.S.C. 112(a).

In addition, this proposed rule amends the procedures regarding consultation with the Secretary of State with respect to the negotiation and conclusion of international agreements. These procedures are set forth in 22 CFR 181.4 and in the Circular 175 procedure referenced therein. In particular, if a proposed international agreement embodies a commitment that could reasonably be expected to require (for its implementation) the issuance of a ''significant regulatory action'' (as defined in section 3 of Executive Order 12866), the agency proposing the agreement shall consult in a timely manner with the OMB regarding such commitment. This amendment is aimed at ensuring that OMB is apprised of international commitments that may have a significant regulatory impact on domestic entities or persons prior to the negotiation or conclusion of the international agreement containing the commitment.

Discussion

First, Public Law 108–458 made significant changes to certain legal definitions, including a change in the factors to be considered in assessing whether an agreement is a reportable international agreement under 1 U.S.C. 112a and the Case-Zablocki Act. Subsection (e) of 1 U.S.C. 112b was amended to provide in relevant part:

(2)(A) An arrangement shall constitute an international agreement within the meaning of this section * * * irrespective of the duration of activities under the arrangement or the arrangement itself.

(B) Arrangements that constitute an international agreement within the meaning of this section * * * include the following:

(i) A bilateral or multilateral counterterrorism agreement.

(ii) A bilateral agreement with a country that is subject to a determination under section 6(j)(1)(A) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)(1)A), section 620A(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2371(a)), or section 40(d) of the Arms Export Control Act (22 U.S.C. 2780(d)).

We propose to amend the provisions of 22 CFR 181.2 (which describe criteria to be applied in determining whether an undertaking, oral agreement, document or set of documents constitutes an international agreement) to incorporate these statutory amendments.

Second, this proposed rule amends 22 CFR 181.4(e) to provide an additional basis on which agencies must consult with OMB prior to the negotiation or conclusion of an international agreement. Currently, 22 CFR 181.4(e) states that if a proposed international agreement embodies a commitment to furnish funds, goods, or services that are beyond or in addition to those authorized in an approved budget, the agency proposing the agreement shall state what arrangements have been planned or carried out concerning consultation with OMB on such a commitment. The Department of State makes sure that the relevant budget contains funds for the commitment, or that the President has made a determination to seek the funds.

The proposed rule adds a second paragraph to subsection (e) to ensure OMB consultation on proposed international agreements that reasonably may require, for their implementation, significant domestic regulatory action. OMB is responsible for overseeing and coordinating the Administration's legislative initiatives and its domestic regulatory policy. Commitments contained in international agreements may be implemented through domestic regulations. This revision to subsection (e) is designed to ensure that OMB is consulted, in a timely manner, prior to negotiation or conclusion of an international agreement that contains a commitment that reasonably could be expected to require, for its implementation, the issuance of a ''significant regulatory action'' as defined in section 3 of Executive Order 12866.

Third, the proposed rule amends 22 CFR 181.7 to reflect that the State Department has modified its internal procedures so that the Assistant Legal Adviser for Treaty Affairs, instead of the Assistant Secretary of State for Congressional Relations, transmits classified agreements to the Senate Committee on Foreign Relations and to the House Committee on International Relations. Similarly, the Assistant Legal Adviser for Treaty Affairs, instead of the Assistant Secretary for Congressional Relations, transmits to the Congress any agreements between the American Institute in Taiwan (AIT) and the governing authorities in Taiwan, or between AIT and an agency in the U.S. government. In order to enhance accountability and avoid the possibility of classified agreements or agreements involving AIT getting lost or misplaced between the two bureaus, the Department decided to centralize responsibility for all Case Act reporting in the Office of the Legal Adviser.

Fourth, as provided in section 7121(b) of Public Law 108–458, any references in 22 CFR 181.7 to the ''House Committee on Foreign Affairs'' have been replaced with the ''House Committee on International Relations,'' which is the current name of the committee.

Fifth, the Department proposes to amend 22 CFR 181.8(a) to add four additional categories of documents that it believes no longer should be published in ''United States Treaties and Other International Agreements''. As set forth in 1 U.S.C. 112a, the Secretary of State is authorized to—determine that publication of certain categories of agreements is not required if the following criteria are met:

(1) Such agreements are not treaties which have been brought into force for the United States after having received Senate advice and consent pursuant to section 2(2) of Article II of the Constitution of the United States;

(2) The public interest in such agreements is insufficient to justify their publication, because (A) as of the date of enactment of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, the agreements are no longer in force; (B) the agreements do not create private rights or duties, or establish standards intended to govern government action in the treatment of private individuals; (C) in view of the limited or specialized nature of the public interest in such agreements, such interest can adequately be satisfied by an alternative means; or (D) the public disclosure of the text of the agreement would, in the opinion of the President, be prejudicial to the national security of the United States; and

(3) Copies of such agreements (other than those in paragraph (2)(D)), including certified copies where necessary for litigation or similar purposes, will be made available by the Department of State upon request.

This statute requires publication in the **Federal Register** of any such determination that publication of certain categories of agreements is not required.

In selecting the following categories of agreements, the Department has focused on four areas comprising a large volume of agreements that are rather specialized and do not appear to be of general public interest. Routine non-publication of the following categories of

agreements will moderate future publication requirements, thus permitting agreements of greater interest to be published in a more timely manner. Also, these agreements do not appear to create private rights or duties. In any event, copies of these agreements will be provided by the Department upon request. For the above-stated reasons, the Department proposes not to publish routinely the following:

United States Agency for International Development (USAID) Implementing Agreements. Consistent with the Foreign Assistance Act and the Agricultural Trade and Development Act of 1954, USAID negotiates agreements with foreign governments under which specific activities and programs financed with USAID-administered foreign assistance funding are implemented. The Department seeks to exclude all such bilateral ''implementing'' agreements from the routine publication requirement, which is consistent with current practice. There is little, if any, public interest in these agreements.

We note that the Department of State already forgoes the reporting of such agreements to Congress (under 1 U.S.C. 112b) when they involve grants of $25 million or less. The Department will continue to report to Congress those USAID agreements that exceed $25 million.

Letters of Agreement and Memoranda of Understanding for Bilateral Assistance on Counter-Narcotics and Anti-Crime Cooperation. Pursuant to the Foreign Assistance Act and the President's constitutional authority, the United States negotiates bilateral agreements with other countries regarding the control of narcotic drugs and other anti-crime purposes. These agreements are of a limited and specialized nature, and there has been no indication of public interest in their substance.

We note that the Department already forgoes the reporting of such agreements to Congress when they involve grants of less than $25 million. The Department will continue to report to Congress those letters of agreement and memoranda of understanding for bilateral assistance over $25 million.

Educational and Leadership Development Agreements. The U.S. Government enters into a number of agreements that regulate practical or technical arrangements for targeted programs or assignments designed to acquaint U.S. and foreign armed forces, law enforcement, homeland security, or related personnel with limited, specialized aspects of each other's practices or operations. These agreements are of a limited and specialized nature, and there has been no indication of public interest in their substance.

Bilateral Aviation Technical Assistance Agreements. The United States enters into international agreements which provide for managerial, operational, and technical assistance to other countries in developing and modernizing their civil aviation infrastructure for specific aviation projects. These agreements address only identified aviation objectives and can sometimes be highly technical in nature. There has been no indication of public interest in the publication of these agreements.

The Department of State does not intend to publish agreements in the above categories that were signed before publication of this notice and not previously published in the compilation entitled ''United States Treaties and Other International Agreements.'' Agreements in the above categories (except classified agreements) will continue to be listed in the Department of State's annual publication entitled ''Treaties in Force.'' These four additional categories of agreements that meet the non-publication criteria will be reflected in four additional subparagraphs in 22 CFR 181.8(a).

Sixth, we propose to add a new paragraph to 22 CFR 181.8 (''Publication'') to implement a new, additional reporting requirement. In Public Law 108–458, Congress amended 1 U.S.C. 112b to add the following:

(d)(1) The Secretary of State shall annually submit to Congress a report that contains an index of all international agreements, listed by country, date, title, and summary of each such agreement (including a description of the duration of activities under the agreement and the agreement itself), that the United States—

(A) Has signed, proclaimed, or with reference to which any other final formality has been executed, or that has been extended or otherwise modified, during the preceding calendar year; and

(B) Has not been published, or is not proposed to be published, in the compilation entitled ''United States Treaties and Other International Agreements''.

The Department submitted such an index for the past two years and has taken steps to continue to meet this reporting requirement.

Finally, the Department proposes to add a new section 22 CFR 181.9 that implements an Internet publication requirement. Public Law 108–458 specifically added subsection (d) to 1 U.S.C. 112a, establishing that ''[t]he Secretary of State shall make publicly available through the Internet Web site of the Department of State each treaty or international agreement proposed to be published in the compilation entitled 'United States Treaties and Other International Agreements' not later than 180 days after the date on which the treaty or agreement enters into force.'' The Department of State has been meeting this requirement by making available through its Internet FOIA webpage copies of those agreements reported to Congress under 1 U.S.C. 112b.

Regulatory Analysis

Administrative Procedure Act

In accordance with provisions of the Administrative Procedure Act governing rules promulgated by Federal agencies that affect the public (5 U.S.C. 553), the Department is publishing these proposed regulations and inviting public comment.

Regulatory Flexibility Act/Executive Order 13272: Small Business

These proposed changes to the regulations are hereby certified as not expected to have a significant impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act, 5 U.S.C. 601–612, and Executive Order No. 13272, section 3(b).

The Small Business Regulatory Enforcement Fairness Act of 1996

These proposed regulations do not constitute a major rule, as defined by 5 U.S.C. 804, for purposes of congressional review of agency rulemaking under the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121. These regulations would not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign based companies in domestic and export markets.

The Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (UFMA), Public Law 104–4, 109 Stat. 48, 2 U.S.C. 1532, generally requires agencies to prepare a statement before proposing any rule that may result in an annual expenditure of $100 million or more by State, local, or tribal governments, or by the private sector. These proposed regulations would not result in any such expenditure nor would it significantly or uniquely affect small governments.

Executive Orders 12372 and 13132: Federalism

These regulations would 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 would the regulations have federalism implications warranting the application of Executive Order No. 12372 and No. 13132.

Executive Order 12866: Regulatory Review

Because a portion of this proposed rule directly involves the participation of OMB, the Department of State has submitted it to OMB for its review.

Executive Order 12988: Civil Justice Reform

The Department has reviewed the regulations in light of sections 3(a) and 3(b)(2) of Executive Order No. 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

The Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 et seq.), Federal agencies must obtain approval from OMB for each collection of information they conduct, sponsor, or require through regulation. The Department of State has determined that this proposal contains no new collection of information requirements for the purposes of the PRA.

List of Subjects in 22 CFR Part 181

Treaties.

For the reasons set forth above, part 181 is proposed to be amended as follows:

PART 181—COORDINATION, REPORTING AND PUBLICATION OF INTERNATIONAL AGREEMENTS

1. The authority citation for part 181 will continue to read:

Authority: 1 U.S.C. 112a, 112b; and 22 U.S.C. 2651a.

2. 22 CFR 181.2 is amended by:

A. Adding a new sentence after the second sentence of paragraph (a) (2);

B. Removing the third and fourth sentences of paragraph (a) (2); and

C. Adding new paragraph (f).

The additions read as follows:

§ 181.2 Criteria.

(a) * * *

(2) * * * The duration of the activities pursuant to the undertaking or the duration of the undertaking itself shall not be a factor in determining whether it constitutes an international agreement. * * *

* * * * *

(f) Notwithstanding the other provisions of this section, arrangements that constitute international agreements within the meaning of this section include

(1) Bilateral or multilateral counterterrorism agreements and

(2) Bilateral agreements with a country that is subject to a determination under section 6(j)(1)(A) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)(1)(A)), section 620A(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2371(a)), or section 40(d) of the Arms Export Control Act (22 U.S.C. 2780(d)).

3. 22 CFR 181.4 is amended in paragraph (e) as follows:

A. By designating the existing text as paragraph (e)(1); and

B. Adding a new paragraph (e)(2) as follows:

§ 181.4 Consultations with the Secretary of State.

* * * * *

(e) (1) * * *

(2) If a proposed agreement embodies a commitment that could reasonably be expected to require (for its implementation) the issuance of a significant regulatory action (as defined in section 3 of Executive Order 12866), the agency proposing the arrangement shall state what arrangements have been planned or carried out concerning timely consultation with the Office of Management and Budget (OMB) for such commitment. The Department of State should receive confirmation that OMB has been consulted in a timely manner concerning the proposed commitment.

* * * * *

§ 181.7 [Amended]

4. 22 CFR 181.7 is amended as follows:

A. In paragraph (b): By removing ''Assistant Secretary of State for Congressional Relations'' wherever it appears and adding ''Assistant Legal Adviser for Treaty Affairs'' in its place; and removing ''House Committee on Foreign Affairs'' wherever it appears and adding ''House Committee on International Relations'' in its place.

B. In paragraph (c): By removing '', the negotiations, the effect of the agreement,'' in the third sentence; and by removing, in the last sentence the phrase ''Assistant Secretary of State for Congressional Relations'' and adding ''Assistant Legal Adviser for Treaty Affairs'', and removing ''House Committee on Foreign Affairs'' and adding ''House Committee on International Relations'' in its place.

C. In paragraph (d), by removing ''Assistant Secretary of State for Congressional Relations'' wherever it appears and adding ''Assistant Legal Adviser for Treaty Affairs'' in its place.

5. 22 CFR 181.8 is amended as follows:

A. By adding paragraphs (a)(10) through (13);

B. By adding a sentence to the end of paragraph (b); and

C. By adding a new paragraph (d) to read as follows:

§ 181.8 Publication.

(a) * * *

(10) Bilateral agreements with other governments that apply to specific activities and programs financed with foreign assistance funds administered by the United States Agency for International Development pursuant to the Foreign Assistance Act, as amended, and the Agricultural Trade Development and Assistance Act of 1954, as amended;

(11) Letters of agreements and memoranda of understanding with other governments that apply to bilateral assistance for counter-narcotics and other anti-crime purposes furnished pursuant to the Foreign Assistance Act, as amended;

(12) Bilateral agreements that apply to specified education and leadership development programs designed to acquaint U.S. and foreign armed forces, law enforcement, homeland security, or related personnel with limited, specialized aspects of each other's practices or operations; and

(13) Bilateral agreements between aviation agencies governing specified aviation technical assistance projects for the provision of managerial, operational, and technical assistance in developing and modernizing the civil aviation infrastructure;

(b) * * * Agreements on the subjects listed in paragraphs (a)(10) through (13) of this section that had not been published as of [date of publication of final rule in **Federal Register**].

* * * * *

(d) The Assistant Legal Adviser for Treaty Affairs shall annually submit to Congress a report that contains an index of all international agreements, listed by country, date, title, and summary of each such agreement (including a description of the duration of activities under the agreement and the agreement itself), that the United States:

(1) Has signed, proclaimed, or with reference to which any other final formality has been executed, or that has

been extended or otherwise modified, during the preceding calendar year; and

(2) Has not been published, or is not proposed to be published, in the compilation entitled ''United States Treaties and Other International Agreements.''

6. Add new § 181.9 to read as follows:

§ 181.9 Internet Web site publication.

The Office of the Assistant Legal Adviser for Treaty Affairs, with the cooperation of other bureaus in the Department, shall be responsible for making publicly available on the Internet Web site of the Department of State each treaty or international agreement proposed to be published in the compilation entitled ''United States Treaties and Other International Agreements'' not later than 180 days after the date on which the treaty or agreement enters into force.

Dated: May 11, 2006.

John J. Kim,

Assistant Legal Adviser for Treaty Affairs, Department of State.

[FR Doc. E6–7596 Filed 5–17–06; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[COTP Charleston 06–070]

RIN 1625–AA00

Safety Zone; Lowcountry Splash, Charleston Harbor, Charleston, SC

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to create a temporary safety zone in the Wando River, Cooper River, and Charleston Harbor from Hobcaw Yacht Club to Charleston Harbor Marina along the coast of Mount Pleasant, SC, to approximately 150 yards offshore, during the Lowcountry Splash swimming event on June 24, 2006. A safety zone is necessary to prevent commercial or recreational boating traffic from interfering with swimmers on the racecourse. This rule provides for the safety of swimmers and vessels transiting the area.

DATES: Comments and related material must reach the Coast Guard on or before June 19, 2006.

ADDRESSES: You may mail comments and related material to, U.S. Coast Guard Sector Charleston, Waterways Management Division, Charleston, South Carolina 29401. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at U.S. Coast Guard Sector Charleston, Waterways Management Office between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Chief Warrant Officer James J. McHugh, U.S. Coast Guard Sector Charleston, Waterways Management Division, (843) 724–7647.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (COTP Charleston 06–070), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

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

Background and Purpose

The Lowcountry Splash is a 2.4 mile open water swimming event in the Wando River and Charleson Harbor, parallel to Mt. Pleasant, SC This regulation is needed to provide for the safety of life on navigable waters because of the inherent dangers associated with an open-water swimming event in a highly transited body of water. The event sponsor will provide 20–30 kayaks to keep swimmers on course and assist the Coast Guard in patrolling the area. This rule creates a regulated area that will prohibit non-participant vessels from entering the regulated area during the event without the permission of the Coast Guard Patrol Commander.

Discussion of Proposed Rule

This rule allows the Coast Guard Captain of the Port Charleston, South Carolina, to establish a temporary safety zone in order to provide for a safe area for the swimming event. The safety zone will have patrol vessels to enforce the zone and the event sponsor will provide 20 to 30 kayaks in order to assist the swimmers and ensure they are staying within the designated areas. The safety zone is necessary to protect the swimmers from the dangers of commercial and recreational vessel traffic in the vicinity of the race. Sector Charleston will notify the maritime community of periods during which these safety zones will be in effect via a broadcast notice to mariners on VHF Marine Band Radio, Channel 16 (156.8 MHz), or by having on-scene assets inform vessel traffic as necessary.

Regulatory Evaluation

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

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary, because the safety zone will only be in effect for a limited time and for a limited area.

Small Entities

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

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

or anchor in a portion of the Wando River, Cooper River, and Charleston Harbor from 7:00 a.m. to 11 a.m., June 24, 2006.

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

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance; please contact Chief Warrant Officer James J. McHugh, U.S. Coast Guard Sector Charleston, Waterways Management Division, at (843) 724–7647. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have 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 is a temporary safety zone.

A preliminary ''Environmental Analysis Check List'' is available in the docket where indicated under **ADDRESSES**. Comments on this section will be considered before we make the final decision on whether this rule should be categorically excluded from further environmental review.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

2. Add new temporary § 165.T07–70 to read as follows:

§ 165.T07–70 Safety Zone; Charleston, SC.

(a) *Regulated Area.* The waters of the Wando River, Cooper River, and Charleston Harbor from Hobcaw Yacht Club, in approximate position 32°49.324 N 079°53.813 W, South along the coast

of Mt. Pleasant, S.C., to Charleston Harbor Marina, approximate position 32°47.198 N 079°54.639 W and encompasses an area 150 yards offshore between the two points.

(b) *Regulations.* In accordance with the general regulations of § 165.23 of this part, all persons and vessels are prohibited from entering, anchoring, mooring or transiting the Regulated Area unless authorized by the Coast Guard Captain of the Port or Coast Guard Patrol Commander.

(c) *Dates.* This rule is effective from 7 a.m. to 11 a.m. on June 24, 2006.

Dated: April 24, 2006.

J.E. Cameron,

Captain, U.S. Coast Guard, Captain of the Port, Charleston, South Carolina.

[FR Doc. 06–4628 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–15–U

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD05–06–048]

RIN 1625–AA00

Safety Zone: Stars in the Sky Fireworks Celebration, James River, Newport News, VA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes establishing a 1000 foot safety zone in the vicinity of Newport News, VA centered on position 37–58–30N/076–26–19W on July 4, 2006 in support of the Stars in the Sky Fireworks event. This action is intended to restrict vessel traffic on James River as necessary to protect mariners from the hazards associated with fireworks displays.

DATES: Comments and related material must reach the Coast Guard on or before June 15, 2006.

ADDRESSES: You may mail comments and related material to Commander, Sector Hampton Roads, Norfolk Federal Building, 200 Granby St., 7th Floor, Attn: Lieutenant Bill Clark, Norfolk, VA 23510. Sector Hampton Roads maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the Norfolk Federal Building between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Bill Clark, Chief, Waterways Management Division, Sector Hampton Roads at (757) 668–5580.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking CGD05–06–048 and indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

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

Background and Purpose

On July 4, 2006, the Stars in the Sky Fireworks event will be held on the James River in Newport News, VA. Due to the need to protect mariners and spectators from the hazards associated with the fireworks display, vessel traffic will be temporarily restricted within a 1000 foot radius of the display.

Discussion of Proposed Rule

The Coast Guard is establishing a 1000 foot safety zone on specified waters of James River in position 37–58–30N/076–26–19W, in the vicinity of Newport News, VA. This regulated area will be established in the interest of public safety during the Stars in the Sky Fireworks event and will be enforced from 8:45 p.m. to 10 p.m. on July 4, 2006. General navigation in the safety zone will be restricted during the event. Except for participants and vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

Regulatory Evaluation

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

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. Although this regulation restricts access to the regulated area, the effect of this rule will not be significant because: (i) The safety zone will be in effect for a limited duration of time and (ii) the Coast Guard will make notifications via maritime advisories so mariners can adjust their plans accordingly.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities because the zone will only be in place for a limited duration of time and maritime advisories will be issued allowing the mariners to adjust their plans accordingly. However, this rule may affect the following entities, some of which may be small entities: The owners and operators of vessels intending to transit or anchor in that portion of the James River from 8:45 p.m. to 10 p.m. on July 4, 2006.

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

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that

they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Lieutenant Bill Clark, Chief, Waterways Management Division, Sector Hampton Roads at (757) 668–5580.

The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, we believe that this rule should be categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation.

A preliminary ''Environmental Analysis Check List'' is available in the docket where indicated under **ADDRESSES**. Comments on this section will be considered before we make the final decision on whether this rule should be categorically excluded from further environmental review.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

2. Add Temporary § 165.T05–048, to read as follows:

§ 165.T05–048 Safety Zone: Stars in the Sky Fireworks event, James River, Newport News, VA.

(a) *Location.* The following area is a safety zone: All waters within 1000 feet of position 37–58–30N/076–26–19W in the vicinity of the Newport News on the James River within the Captain of the Port, Hampton Roads zone as defined in 33 CFR 3.25–10.

(b) *Definition.* The following definition applies to this section:

Captain of the Port Representative: means any U.S. Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port, Hampton Roads, Virginia to act on his behalf.

(c) *Regulation:* (1) In accordance with the general regulations in § 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port, Hampton Roads or his designated representatives.

(2) The operator of any vessel in the immediate vicinity of this safety zone shall:

(i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant or petty officer on shore or on board a vessel that is displaying a U.S. Coast Guard Ensign.

(ii) Proceed as directed by any commissioned, warrant or petty officer on shore or on board a vessel that is displaying a U.S. Coast Guard Ensign.

(*A*) The Captain of the Port, Hampton Roads and the Sector Duty Officer at Sector Hampton Roads in Portsmouth, Virginia can be contacted at telephone number (757) 668–5555 or (757) 484–8192.

(*B*) The Coast Guard Representatives enforcing the safety zone can be contacted on VHF–FM 13 and 16.

(d) *Effective date:* This regulation is effective from 8:45 p.m. to 10 p.m. on July 4, 2006.

Dated: May 2, 2006.

Patrick B. Trapp,

Captain, U.S. Coast Guard, Captain of the Port, Hampton Roads.

[FR Doc. E6–7531 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD05–06–049]

RIN 1625–AA00

Safety Zone: Mathews County Fireworks Event, East River, Mathews, VA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes establishing a 1200 foot safety zone in the vicinity of Mathews, VA centered on position 37–23–56N/076–20–42W on July 1, 2006 in support of the Mathews County Fireworks Event. This action is intended to restrict vessel traffic on the East River as necessary to protect mariners from the hazards associated with fireworks displays.

DATES: Comments and related material must reach the Coast Guard on or before June 15, 2006.

ADDRESSES: You may mail comments and related material to Commander, Sector Hampton Roads, Norfolk Federal Building, 200 Granby St., 7th Floor, Attn: Lieutenant Bill Clark, Norfolk, VA 23510. Sector Hampton Roads maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the Norfolk Federal Building between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Bill Clark, Chief, Waterways Management Division, Sector Hampton Roads at (757) 668–5580.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking CGD05–06–049 and indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

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

Background and Purpose

On July 1, 2006, the Mathews County Fireworks Event will be held on the East River near Mathews, VA. Due to the need to protect mariners and spectators from the hazards associated with the fireworks display, vessel traffic will be temporarily restricted within a 1200 foot radius of the display.

Discussion of Proposed Rule

The Coast Guard is establishing a 1200 foot safety zone on specified waters of East River in position 37–23–56N/076–20–42W, in the vicinity of the Williams Wharf in Mathews, VA. This regulated area will be established in the interest of public safety during the Mathews County Fireworks Event and will be enforced from 8:45 p.m. to 10 p.m. on July 1, 2006. General navigation in the safety zone will be restricted during the event. Except for participants and vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

Regulatory Evaluation

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

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. Although this regulation restricts access to the regulated area, the effect of this rule will not be significant because: (i) The safety zone will be in effect for a limited duration of time and (ii) the Coast Guard will make notifications via maritime advisories so mariners can adjust their plans accordingly.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities because the zone will only be in place for a limited duration of time and maritime advisories will be issued allowing the mariners to adjust their plans accordingly. However, this rule may affect the following entities, some of which may be small entities: the owners and operators of vessels intending to transit or anchor in that portion of the East River from 8:45 p.m. to 10 p.m. on July 1, 2006.

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

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Lieutenant Bill Clark, Chief, Waterways Management Division, Sector Hampton Roads at (757) 668–5580.

The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

2. Add Temporary § 165.T05–049, to read as follows:

§ 165.T05–049 Safety Zone: Mathews County Fireworks Event, East River, Mathews, VA.

(a) *Location.* The following area is a safety zone: All waters within 1200 feet of position 37–23–56N / 076–20–42W in the vicinity of the Williams Wharf on the East River near Mathews, VA within the Captain of the Port, Hampton Roads zone as defined in 33 CFR 3.25–10.

(b) *Definition.* The following definition applies to this section:

Captain of the Port Representative: means any U.S. Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port, Hampton Roads, Virginia to act on his behalf.

(c) *Regulation:* (1) In accordance with the general regulations in 165.23 of this part, entry into this zone is prohibited

unless authorized by the Captain of the Port, Hampton Roads or his designated representatives.

(2) The operator of any vessel in the immediate vicinity of this safety zone shall:

(i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant or petty officer on shore or on board a vessel that is displaying a U.S. Coast Guard Ensign.

(ii) Proceed as directed by any commissioned, warrant or petty officer on shore or on board a vessel that is displaying a U.S. Coast Guard Ensign.

(*A*) The Captain of the Port, Hampton Roads and the Sector Duty Officer at Sector Hampton Roads in Portsmouth, Virginia can be contacted at telephone Number (757) 668–5555 or (757) 484–8192.

(*B*) The Coast Guard Representatives enforcing the safety zone can be contacted on VHF–FM 13 and 16.

(d) *Effective date:* This regulation is effective from 8:45 p.m. to 10 p.m. on July 1, 2006.

Dated: May 2, 2006.

Patrick B. Trapp,

Captain, U.S. Coast Guard, Captain of the Port, Hampton Roads.

[FR Doc. E6–7532 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[I.D. 051106B]

RIN 0648–AT75

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery Off the Southern Atlantic States; Amendment 13C

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

ACTION: Announcement of availability of an amendment to a fishery management plan; request for comments.

SUMMARY: The South Atlantic Fishery Management Council (Council) has submitted Amendment 13C to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP) for review, approval, and implementation by NMFS. The amendment would end overfishing of snowy grouper, golden tilefish, vermilion snapper, and black sea bass, and increase the catch of red porgy consistent with an updated stock assessment.

DATES: Comments must be received no later than 5 p.m., eastern time, on July 17, 2006.

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

- E-mail: *0648–AT75.NOA@noaa.gov*. Include in the subject line the following document identifier: 0648–AT75.
- Federal e-Rulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Mail: Julie Weeder, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.
- Fax: 727–824–5308; Attention: Julie Weeder.

Copies of Amendment 13C, which includes a Final Environmental Impact Statement, a Regulatory Impact Review, and an Initial Regulatory Flexibility Analysis, are available from the South Atlantic Fishery Management Council, 1 Southpark Circle, Suite 306, Charleston, SC 29407–4699; e-mail: *safmc@safmc.net*.

FOR FURTHER INFORMATION CONTACT: Julie Weeder, 727–551–5753; fax: 727–824–5308; e-mail: *julie.weeder@noaa.gov*.

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery off the southern Atlantic states is managed under the FMP. The FMP was prepared by the Council and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

The Magnuson-Stevens Act requires a regional fishery management council to submit any amendment to a fishery management plan to NMFS for review, approval, disapproval, or partial approval. The Magnuson-Stevens Act also requires that NMFS, upon receiving an amendment, publish a notice in the **Federal Register** stating that the amendment is available for public review and comment.

Background

The Council began developing the actions in Amendment 13C in 2003 to eliminate or phase out overfishing of snowy grouper, golden tilefish, vermilion snapper, and black sea bass, as mandated by the Magnuson-Stevens Act. The amendment will also allow an increase in the catch of red porgy, consistent with an updated stock assessment.

Proposed Actions

Amendment 13C, if implemented, would reduce and phase in the snowy grouper quota and trip limit over 3 years and limit possession to one per person per day within the 5–grouper per person per day aggregate recreational bag limit. For golden tilefish, the annual commercial quota and trip limit would be reduced. The golden tilefish commercial trip limit would be further reduced each year if 75 percent of the quota was taken by September 1, in an attempt to achieve a year-round fishery. For the recreational sector, possession would be limited to one per person per day within the 5–grouper per person per day aggregate bag limit. An annual commercial quota would be established for vermilion snapper, and the recreational minimum size limit would increase from 11 inches (27.9 cm) total length (TL) to 12 inches (30.5 cm) TL. For black sea bass, an annual commercial quota would be established and phased in over 3 years; fishermen would be required to use at least 2–inch (5.1–cm) mesh for the entire back panel of black sea bass pots; the commercial and recreational fishing year would change from the calendar year to June 1 through May 31; and black sea bass pots would be required to be removed from the water once the commercial quota is met. A black sea bass recreational allocation would also be established and would be phased in over 3 years; the recreational size limit would increase from 10 inches (25.4 cm) TL to 12 inches (30.5 cm) TL and be phased in over 2 years; and the recreational bag limit would be reduced from 20 to 15 per person per day. For red porgy, a commercial quota would be established, the commercial trip limit would be increased, and the recreational bag limit would increase from 1 to 3 red porgy per person per day.

The Council believes these actions provide the most biological, social, and economic benefits while allowing for adaptive management. The Magnuson-Stevens Act requires the regional fishery management councils and NMFS to implement measures to end overfishing. Recent stock assessments indicated snowy grouper, golden tilefish, vermilion snapper, and black sea bass are undergoing overfishing, and that red porgy is rebuilding from an overfished status and is not undergoing overfishing. This action proposes measures to reduce harvests and end overfishing of these species. Additional background and rationale for the measures discussed above are contained in Amendment 13C.

Proposed Rule

A proposed rule that would implement the measures in Amendment 13C has been received from the Council. In accordance with the Magnuson-Stevens Act, NMFS is evaluating the

proposed rule to determine whether it is consistent with the FMP, the Magnuson-Stevens Act, and other applicable law. If that determination is affirmative, NMFS will publish the proposed rule in the **Federal Register** for public review and comment.

Consideration of Public Comments

Comments received by the end of the comment period on the notice of availability of the FMP, whether specifically directed to the FMP or the proposed rule, will be considered by NMFS in its decision to approve, disapprove, or partially approve Amendment 13C. Comments received after that date will not be considered by NMFS in this decision. All comments received by NMFS on Amendment 13C or the proposed rule during their respective comment periods will be addressed in the preamble of the final rule.

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

Dated: May 12, 2006.

Alan D. Risenhoover,

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

[FR Doc. E6–7586 Filed 5–17–06; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 622 and 635

[Docket No. 060425111–6111–01; I.D. 041906B]

RIN 0648–AN09

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Amendment 18A

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues this proposed rule to implement Amendment 18A to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (Amendment 18A) prepared by the Gulf of Mexico Fishery Management Council (Council). This proposed rule would prohibit vessels from retaining reef fish caught under the recreational size and bag/possession limits when commercial quantities of Gulf reef fish are on board; adjust the number of persons allowed onboard when a vessel with both commercial and charter vessel/headboat reef fish permits and a Certificate of Inspection (COI) is fishing commercially; prohibit use of Gulf reef fish, except sand perch or dwarf sand perch, as bait in any commercial or recreational fishery in the exclusive economic zone (EEZ) of the Gulf of Mexico, with a limited exception for crustacean trap fisheries; require a NMFS-approved vessel monitoring system (VMS) on board vessels with Federal commercial permits for Gulf reef fish, including charter vessels/headboats with such commercial permits; and require owners and operators of vessels with Federal commercial or charter vessel/headboat permits for Gulf reef fish to comply with sea turtle and smalltooth sawfish release protocols, possess on board specific gear to ensure proper release of such species, and comply with guidelines for proper care and release of incidentally caught sawfish and sea turtles. NMFS is also proposing to require annual permit application rather than application every 2 years (biennial). In addition, Amendment 18A would revise the total allowable catch (TAC) framework procedure to reflect current practices and terminology. The intended effects of this proposed rule are to improve enforceability and monitoring in the reef fish fishery in the Gulf of Mexico and to reduce mortality of incidentally caught sea turtles and smalltooth sawfish.

DATES: Comments must be received no later than 5 p.m., eastern time, on July 3, 2006.

ADDRESSES: You may submit comments on the proposed rule by any of the following methods:

- E-mail: *0648–AN09.Proposed@noaa.gov*. Include in the subject line the following document identifier: 0648–AN09.
- Federal e-Rulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Mail: Peter Hood, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.
- Fax: 727–824–5308; Attention: Peter Hood.

Copies of the Amendment 18A, which includes a Regulatory Impact Review (RIR), an Initial Regulatory Flexibility Analysis (IRFA), and an Environmental Assessment, may be obtained from the Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607; telephone: 813–348–1630; fax: 813–348–1711; e-mail: *gulfcouncil@gulfcouncil.org*. Copies of the amendments may also be downloaded from the Council's Web site at *www.gulfcouncil.org*.

Comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted in writing to Jason Rueter at the Southeast Regional Office address and to David Rostker, Office of Management and Budget (OMB), by e-mail at *David_Rostker@omb.eop.gov*, or by fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Peter Hood, telephone: 727–824–5305; fax: 727–824–5308; e-mail: *Peter.Hood@noaa.gov*.

SUPPLEMENTARY INFORMATION: The fishery for reef fish is managed under the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP) that was prepared by the Council. The FMP was approved by NMFS and implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

Background

This proposed rule is intended to resolve several issues related to monitoring and enforcement of existing regulations and to reduce bycatch mortality of incidentally caught endangered sea turtles and smalltooth sawfish. In addition, Amendment 18A would update the framework procedure for setting TAC to reflect current terminology and stock assessment procedures.

Simultaneous Commercial and Recreational Harvest on a Vessel

This proposed rule would improve enforceability of the prohibition on sale of reef fish caught under the recreational bag limit by prohibiting persons aboard a vessel with a commercial reef fish permit from retaining reef fish species caught under recreational size and possession limits when the vessel has commercial quantities, i.e., fish in excess of applicable bag/possession limits, of any Gulf reef fish species aboard. By prohibiting retention of recreational reef fish catches on a commercial fishing trip, this alternative adds an at-sea component to enforcement of the prohibition on sale of recreationally caught reef fish. This measure also makes consistent across all reef fish the rules regarding retention of recreationally harvested fish on a commercial fishing vessel. Regulations for red grouper, gag, and black grouper specifically prohibit commercial reef fish vessels from possessing those species during the February 15 to March

15 closed season, but possession of recreational bag limits is allowed during a quota closure for those species, and for other reef fish during any commercial closure of that species. This action explicitly prohibits retention of recreational bag limits of Gulf reef fish on board a vessel that possesses commercial quantities of Gulf reef fish.

Maximum Crew Size on a Charter Vessel/Headboat When Fishing Commercially

This proposed rule would resolve the discrepancy between United States Coast Guard (USCG) minimum crew size regulations and NMFS' maximum crew size regulations, and address potential safety issues related to spearfishing under the maximum crew size restrictions of the existing NMFS regulations. The USCG regulations currently require a minimum of four persons (two captains and two crew) when a vessel with a COI is out over 12 hours. NMFS' current fishing regulations limit the maximum number of persons on board to three when a vessel with both a commercial and charter vessel/headboat permit is fishing commercially. Since some charter vessels and headboats must have a COI in order to carry passengers for hire, this creates a discrepancy in the regulations for dual-permitted vessels, and there is a need to resolve this discrepancy. In addition, the Council received a request from the operator of a dual-permitted vessel who spearfishes commercially to allow a crew size of four persons when commercially spearfishing, so that for safety purposes, there could be two persons in the boat while there are two divers in the water.

This proposed rule would address these crew size issues by revising the definitions of ''Charter vessel'' and ''Headboat'' to clarify that a vessel that has a charter vessel/headboat permit for Gulf reef fish, a commercial vessel permit for Gulf reef fish, and a valid COI issued by the USCG to carry passengers for hire will not be considered to be operating as a charter vessel/headboat provided: (1) It is not carrying a passenger who pays a fee; and (2) When underway for more than 12 hours, that vessel meets but does not exceed the minimum manning requirements outlined in its COI for vessels underway over 12 hours; or when underway for not more than 12 hours, that vessel meets the minimum manning requirements outlined in its COI for vessels underway for not more than 12-hours (if any), and does not exceed the minimum manning requirements outlined in its COI for vessels that are underway for more than 12 hours. A vessel with a commercial vessel permit for king mackerel and/or Spanish mackerel and a charter vessel/headboat permit for Gulf coastal migratory pelagic fish would still be subject to the 3–person maximum crew size limit if the vessel has commercial quantities of mackerel onboard, regardless of whether the vessel also has a Gulf reef fish charter vessel/headboat permit, a commercial vessel permit for Gulf reef fish, or commercial quantities of Gulf reef fish onboard.

Use of Reef Fish in or from the EEZ for Bait

It is illegal to cut up reef fish at sea for use as bait. However, it is not illegal to use cut up reef fish that were purchased as bait on shore, nor is it illegal to use a whole reef fish provided it complies with applicable size and bag limits. Allowing cut up reef fish to be used when purchased compromises enforcement of the rules prohibiting the cutting up of reef fish caught at sea because it is difficult to differentiate between the two.

This proposed rule would prohibit using any species in the reef fish management unit or parts thereof, except sand perch and dwarf sand perch, as bait in any commercial or recreational fishery. A limited exception to this prohibition would be provided for reef fish carcasses and offal to be used for bait in trap fisheries for blue crab, stone crab, deep-water crab, and spiny lobster, unless such use was otherwise restricted.

Vessel Monitoring System

The Reef Fish FMP contains several area-specific regulations where fishing is restricted or prohibited to protect habitat or spawning aggregations, or to reduce fishing pressure in areas that are heavily fished. Unlike size, bag, and trip limits, where the catch can be monitored onshore when a vessel returns to port, area restrictions require at-sea enforcement. However, at-sea enforcement of offshore area restrictions is difficult due to the distance from shore and limited number of patrol vessels. There is a need to improve enforceability of area fishing restrictions through electronic methods.

This proposed rule would require permitted commercial reef fish vessels, including charter vessel/headboats with commercial reef fish vessel permits even when under charter, to be equipped with an operating VMS approved by NMFS for the Gulf reef fish fishery. An operating VMS includes an operating mobile transmitting unit on the vessel and a functioning communication link between the unit and NMFS as provided by a NMFS-approved communication service provider. NMFS would publish in the **Federal Register** a list of approved VMS mobile transmitting units and associated communication service providers that meet the minimum standards for the Gulf reef fish fishery. Upon installation of an approved transmitting unit by a qualified marine electrician and activation of the communication services, a vessel owner or operator would be required to submit to NMFS, Office of Enforcement, Southeast Region, 263 13th Avenue South, St. Petersburg, FL 33701, a statement certifying compliance with an installation and activation checklist and a vendor-completed installation certification checklist that would be available from NMFS. The VMS would be required to transmit a signal indicating the vessel's accurate position at least once per hour and must function 7 days a week, 24 hours a day unless exempted by NMFS under the power down exemption of the NOAA Enforcement Draft Vessel Monitoring System Requirements that is included as Appendix E to Amendment 18A. Prior to departure for each trip, a vessel owner or operator would be required to report to NMFS any fishery the vessel would participate in on that trip and the specific type(s) of fishing gear, using NMFS-defined gear codes, that would be on board the vessel. This information could be reported via NMFS' toll-free number, 888–219–9228, or via an attached VMS terminal. The vessel owner would be responsible for the cost of the VMS equipment, installation, maintenance, and month-to-month communications. These VMS requirements would apply throughout the Gulf of Mexico. Compliance with the VMS requirements would be required 120 days after publication of the final rule implementing Amendment 18A.

Vessels fishing exclusively with fish traps would be exempted from the VMS requirement through February 7, 2007, but would remain subject to mandatory trip origination and termination reporting requirements through February 7, 2007. The use of fish traps in the Gulf reef fishery is prohibited after February 7, 2007.

Sea Turtle and Smalltooth Sawfish Bycatch

NMFS concluded in a biological opinion that reasonable and prudent measures should be taken to minimize stress and increase survival rates of any sea turtles and smalltooth sawfish taken in the reef fish fishery. Therefore, measures are needed to comply with the

biological opinion and to enhance the protection of endangered sea turtles and smalltooth sawfish.

This proposed rule would require vessels with commercial or charter vessel/headboat permits for Gulf reef fish to possess a document provided by NMFS titled, ''Careful Release Protocols for Sea Turtle Release With Minimal Injury''; post the sea turtle handling and release guidelines provided by NMFS on the vessel; follow specified release handling measures for any smalltooth sawfish that are caught incidentally; and have sea turtle release gear onboard.

Measure Proposed by NMFS

NMFS is proposing to revise the renewal requirements applicable to all Magnuson-Stevens Act vessel permits, licenses, endorsements, and dealer permits issued by NMFS' Southeast Regional Office, including applicable highly migratory species permits, to require submission of an application every year rather than requiring submission only every two years (i.e., biennial application). NMFS believes that requiring an annual application would: Provide better permit accountability, particularly regarding permit transfers; provide for better verification of permit application data; and simplify permit financial accounting through annual application payments. Fees for annual application would be half of the current biennial fee; therefore, there would be no increased cost to applicants.

Modifications to the TAC Framework Procedure

In addition to the measures contained in this proposed rule as discussed above, Amendment 18A proposes to modify the framework procedure for setting TAC by incorporating the Southeast Data, Assessment, and Review (SEDAR) process and adopting minor wording changes to update the terminology in the framework. The administrative procedures for setting TAC have changed with the development of SEDAR to assess stock status. The framework procedure currently specifies that the Reef Fish Stock Assessment Panel (RFSAP) evaluate stock assessments and recommend acceptable biological catch (ABC) ranges. However, the RFSAP has been discontinued, and stock assessments and ABC recommendations are now conducted through the SEDAR process. In addition, some of the terminology and agency or department names have changed since the last revision of the framework procedure and must be updated accordingly.

Classification

At this time, NMFS has not determined whether Amendment 18A, which this proposed rule would implement, is consistent with the Magnuson-Stevens Act and other applicable laws. NMFS, in making that determination, will take into account the data, views, and comments received during the comment periods on this amendment and on this proposed rule.

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

NMFS prepared an IRFA, as required by section 603 of the Regulatory Flexibility Act. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the SUMMARY section of the preamble. A copy of the full analysis is available from the Council office (see **ADDRESSES**). A summary of the analysis follows.

The Magnuson-Stevens Act provides the statutory basis for the proposed rule. The proposed rule would: (1) Continue allowing vessels to possess both commercial and for-hire vessel permits but disallow retention of reef fish species caught under recreational size and possession limits when the vessel has commercial harvests of any reef fish species aboard; (2) allow a charter vessel/headboat with a USCG COI to increase its crew size but not in excess of its minimum manning requirements outlined in its COI when fishing for reef fish under its commercial fishing license; (3) prohibit the use of any species in the reef fish management unit or parts thereof as bait, with certain exceptions; (4) require the use of VMS systems Gulf-wide for all commercially permitted reef fish vessels, including charter vessels with commercial reef fish permits; and (5) require vessels with commercial and/or charter vessel/headboat reef fish permits to comply with sea turtle and smalltooth sawfish release protocols, possess a set of release gear required by the NMFS' Office of Protected Resources (OPR), and comply with specific guidelines for the proper care of incidentally caught sawfish.

The main objectives of the proposed rule are to resolve certain issues related to monitoring and enforcement of existing regulations and reduce bycatch mortality of incidentally caught endangered sea turtles and smalltooth sawfish.

The proposed rule would impact three types of businesses in the Gulf reef fish fishery, namely, commercial fishing vessels, recreational for-hire vessels, and fish dealers. At present, the commercial reef fish permits are under a license limitation program, and for-hire reef fish permits are under a moratorium, which is proposed to be converted into a license limitation under a separate amendment. Hence, no new commercial or for-hire reef fish permits will be issued when Amendment 18A is implemented. Currently, there are 1,145 commercial and 1,574 for-hire active vessel permits for the Gulf reef fish fishery. Of these permittees, 237 vessels have both commercial and for-hire vessel permits. Reef fish dealers in the Gulf are required to obtain permits to handle reef fish caught in the Gulf. There are currently 227 dealers permitted to buy and sell reef fish caught in the Gulf. The proposed rule is expected to affect these commercial vessels, for-hire vessels, and fish dealers. The direct effects on dealers would mainly come from the restriction of bait use and only to the extent that dealers supply bait to some fishermen. Data are not available to quantify the extent of this impact.

Average annual gross receipts of commercial reef fish vessels in the Gulf range from $24,095 for low-volume vertical line vessels to $116,989 for high-volume longline vessels. The corresponding annual net incomes range from $4,479 for low-volume vertical line vessels to $28,466 for high-volume vertical line vessels. Permit records indicate that the maximum number of commercial reef fish permits owned by any single entity is six, so at the maximum this entity would generate a total of $701,934 in gross receipts. For the for-hire vessels, gross annual receipts range from $76,960 for charter vessels to $404,172 for headboats. The corresponding annual operating profits range from $36,758 for charter vessels to $338,209 for headboats. Permit records indicate a maximum of 12 permits held by any single entity. At a maximum, this entity would generate a total of $4,850,064 in gross receipts. A fishing business is considered a small entity if it is independently owned and operated and not dominant in its field of operation, and if it has annual receipts not in excess of $4.0 million in the case of commercial harvesting entities or $6.5 million in the case of for-hire entities. Relative to these thresholds, both the commercial vessel and for-hire vessel entities affected by the proposed rule are determined to be small business entities.

According to a survey of reef fish processors, employment (both part and full time) by all reef fish processors in

the Southeast totaled 700 individuals. There is no information regarding employment by fish dealers, although it is safe to assume that dealers employ fewer individuals than processors. A seafood processor (fish dealer) is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 500 (100) or fewer persons on a full-time, part-time, temporary, or other basis. Given the employment information, it is very unlikely for any processor that holds a reef fish dealer permit to employ 500 or more persons. Although there are no actual data on employment by fish dealers, between 1997 and 2000, on average, in excess of 100 reef fish dealers operated in the Gulf. It is assumed that all processors must be dealers, yet a dealer need not be a processor. Total dealer employment, therefore, is expected to be slightly more than 700 individuals. Given the number of reef fish dealers and estimates of dealer employment, it is unlikely any dealer employs more than 100 persons.

Based on earnings information, the commercial and recreational fishing business entities affected by the proposed rule are determined to be small business entities. It is also very likely that most, if not all, permitted fish dealers affected by the proposed rule are also small business entities. However, as previously noted, this proposed rule's direct effects on dealers would mainly come from the restriction of bait use and only to the extent that dealers supply bait to some fishermen. Data are not available to quantify the extent of this impact. Allowing vessels to be dually permitted (commercial and for-hire) would enable some 227 vessels to continue their usual operations. Disallowing these vessels to possess recreationally caught reef fish when commercial quantities of reef fish are aboard would improve enforcement without significantly impacting the operations of these dually permitted vessels. Allowing a for-hire vessel to increase its crew size but not in excess of its minimum manning requirements outlined in its COI affords flexibility in operation and helps to assure safety at sea of the crew, particularly for vessels using spearfish gear. This would also eliminate the discrepancy between current fishing rules and USCG requirements with respect to crew size of for-hire vessels. The prohibition on the use of reef fish, except sand perch and dwarf sand perch, as bait reinforces the current ban on cutting up reef fish at sea and regulations on bait. The economic impact of this provision on commercial and for-hire vessels cannot be estimated but is expected to be relatively small. The VMS requirement is expected to improve the efficacy of enforcement efforts and the effectiveness and timeliness of at-sea rescue efforts. One-time and recurring costs would be incurred by all commercial reef fish vessels, including for-hire vessels with commercial reef fish permits. First-year compliance costs range from $2,032 to $3,651 per vessel. These costs could be substantial, particularly relative to the profits of small-time vessel operations. The various requirements addressing the bycatch issue relative to sea turtles and smalltooth sawfish would affect all commercial and for-hire vessels in the reef fish fishery. Out-of-pocket expenses are estimated between $267 and $459 per vessel. These are mainly costs for equipping vessels with the required gear. Because some of the gear would last for some time, costs would in effect be spread over a number of years.

The proposed rule would alter some reporting, record-keeping, and other compliance requirements. The VMS requirement would affect all vessels with commercial and/or for-hire reef fish permits. Including installation by a qualified marine electrician, equipment costs range from $1,600 to $2,900 per vessel. In addition, yearly communication costs range from $432 to $751 per vessel. The proposed rule also contains changes to the application process for renewal of permits. However, the new requirement for yearly application is not expected to alter burden time or costs to respondents. The availability of the permit renewal application as an on-line document, as well as the reduced burden time attributable to the changes of the income qualification affidavit, should offset any increases in burden hours generated by the yearly renewal. Permit applications would cost half of their previous amount, but would be required twice as often, thereby off-setting any changes in overall cost. Compliance with sea turtle and smalltooth sawfish release protocols would also affect all vessels with commercial and/or for-hire reef fish permits. Costs range from $267 to $459 per vessel.

Other than the provision on vessel manning requirements, which removes the conflict between NMFS and USCG regulations, no other Federal rules have been identified that would duplicate, overlap, or conflict with the proposed rule.

The proposed rule is expected to affect a substantial number of small entities. A total of 908 commercial vessels only, 1,337 for-hire vessels only, and 237 commercial/for-hire vessels would be affected. Since practically all entities affected by the proposed rule are small entities, the issue of disproportional effects on small versus large entities does not arise. Mainly because of the VMS requirement, for which compliance costs range from $1,600 to $2,900 per vessel, and the sea turtle and smalltooth sawfish release protocols, for which compliance costs range from $267 to $459 per vessel, the proposed rule would have substantial adverse impacts on the profitability of affected vessels, particularly the smaller and marginal operations.

This amendment considered several alternatives to the proposed rule. For vessels with both commercial and for-hire reef fish permits (dual-permitted vessels), two other alternatives have been considered. Alternative 1 (status quo) continues to allow vessels to be dually permitted, but it does not resolve the problem of identifying whether caught fish are saleable (commercial trip) or not (charter trip). Alternative 3, which would preclude a vessel from being dual-permitted, would adversely affect the fishing operations of dual-permitted vessels by forcing them to divest of either the commercial or for-hire permit. Regarding crew size of for-hire vessels fishing under their commercial permits, four other alternatives have been considered. Alternative 1 (status quo), which limits for-hire vessel crew size to 3 persons, would not be compatible with minimum USCG manning requirements. Alternative 3, which is similar to the proposed rule except for spearfishing vessels, would benefit the spearfishing vessels but at the same time make the crew size for these vessels incompatible with USCG manning requirements. Alternative 4, which allows a maximum crew size of 4 persons, would also be incompatible with USCG manning requirements. Alternative 5, which removes the maximum crew size requirements for dual-permitted vessels, creates the same enforcement problem as the status quo and also allows a potential increase in fishing effort. Regarding use of reef fish as bait, two other alternatives (with various sub-alternatives) have been considered. Alternative 1 (status quo), which allows whole reef fish that meet the specified requirements for bait or cut-up reef fish purchased at shore for bait, complicates the enforcement of the ban on cutting up reef fish at sea and potentially increases the mortality of certain reef fish species. Alternative 3, which effectively requires enforcement officials to identify reef fish species

used as bait before assessing any potential violation, would tend to complicate enforcement. For the VMS requirement, two other alternatives have been considered. Alternative 1 (status quo), which does not require VMS, is the least costly to small entities, but it does not address vital enforcement and rescue-at-sea issues. Similar to the proposed rule, Alternative 3 requires VMS, but vessel owners would shoulder only the yearly communication costs. If government resources are available, this alternative would be better for the industry than the proposed rule. Regarding sea turtle and smalltooth sawfish bycatch, five other alternatives have been considered. Alternative 1 (status quo) is the least costly of all alternatives to small entities, but it would not address the bycatch of sea turtles and smalltooth sawfish in commercial and for-hire reef fish vessels. Alternative 2, which requires commercial vessels to abide by the release protocols in effect in the HMS bottom longline fishery, would impose a compliance cost ranging from $202 to $380. Alternative 3, which requires the commercial reef fish fleet to comply with the more stringent requirement in place in the HMS pelagic longline fishery, would carry a compliance cost of $712 to $1,282 per vessel. Alternative 4 requires for-hire reef fish vessels to comply with either the less stringent release protocol as in Alternative 2 or the more stringent release protocol as in Alternative 3. The corresponding compliance costs per vessel would be similar to those in Alternative 2 or 3. Alternative 5, which requires commercial and for-hire reef fish vessels to comply with the sea turtle release protocols in place for the Atlantic HMS bottom longline vessels, would impose a compliance cost of $202 to $380 per vessel.

This proposed rule contains collection-of-information requirements subject to review and approval by OMB under the Paperwork Reduction Act (PRA)--namely, requirements for: (1) VMS installation; (2) completion and submission of certification of VMS installation and activation; (3) transmission of position reports; (4) fishing activity reports; (5) annual maintenance of VMS; (6) submission of requests for power down exemptions; and (7) annual renewal of all permits. These requirements have been submitted to OMB for approval. The public reporting burdens per response for these collections of information are estimated to average 4 hours, 15 minutes, 24 seconds, 1 minute, 2 hours, 10 minutes, and 15 minutes respectively. These estimates of the public reporting burdens include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collections of information. Public comment is sought regarding: Whether these proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the burden estimates; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collections of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to NMFS and to OMB (see **ADDRESSES**) and by e-mail to *David__Rostker@omb.eop.gov* or fax to 202–395–7285.

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

List of Subjects

50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

50 CFR Part 635

Endangered and threatened species, Fisheries, Fishing, Fishing vessels, Foreign relations, Intergovernmental relations, Penalties, Statistics, Treaties.

Dated: May 12, 2006.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR parts 622 and 635 are proposed to be amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

1. The authority citation for part 622 continues to read as follows:

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

2. In § 622.2, the definitions of ''Charter vessel'' and ''Headboat'' are revised in alphabetical order to read as follows:

§ 622.2 Definitions and acronyms.

* * * * *

Charter vessel means a vessel less than 100 gross tons (90.8 mt) that is subject to the requirements of the USCG to carry six or fewer passengers for hire and that engages in charter fishing at any time during the calendar year. A charter vessel with a commercial permit, as required under § 622.4(a)(2), is considered to be operating as a charter vessel when it carries a passenger who pays a fee or when there are more than three persons aboard, including operator and crew. However, a charter vessel that has a charter vessel permit for Gulf reef fish, a commercial vessel permit for Gulf reef fish, and a valid Certificate of Inspection (COI) issued by the USCG to carry passengers for hire will not be considered to be operating as a charter vessel provided—

(1) It is not carrying a passenger who pays a fee; and

(2) When underway for more than 12 hours, that vessel meets, but does not exceed the minimum manning requirements outlined in its COI for vessels underway over 12 hours; or when underway for not more than 12 hours, that vessel meets the minimum manning requirements outlined in its COI for vessels underway for not more than 12-hours (if any), and does not exceed the minimum manning requirements outlined in its COI for vessels that are underway for more than 12 hours.

* * * * *

Headboat means a vessel that holds a valid Certificate of Inspection (COI) issued by the USCG to carry more than six passengers for hire.

(1) A headboat with a commercial vessel permit, as required under § 622.4(a)(2), is considered to be operating as a headboat when it carries a passenger who pays a fee or—

(i) In the case of persons aboard fishing for or possessing South Atlantic snapper-grouper, when there are more persons aboard than the number of crew specified in the vessel's COI; or

(ii) In the case of persons aboard fishing for or possessing coastal migratory pelagic fish, when there are more than three persons aboard, including operator and crew.

(2)However a vessel that has a headboat permit for Gulf reef fish, a commercial vessel permit for Gulf reef fish, and a valid COI issued by the USCG to carry passengers for hire will not be considered to be operating as a headboat provided—

(i) It is not carrying a passenger who pays a fee; and

(ii) When underway for more than 12 hours, that vessel meets, but does not

exceed the minimum manning requirements outlined in its COI for vessels underway over 12 hours; or when underway for not more than 12 hours, that vessel meets the minimum manning requirements outlined in its COI for vessels underway for not more than 12-hours (if any), and does not exceed the minimum manning requirements outlined in its COI for vessels that are underway for more than 12 hours.

* * * * *

3. In § 622.4, paragraph (h)(1) is revised, and a sentence is added at the end of paragraph (m)(1) to read as follows:

§ 622.4 Permits and fees.

* * * * *

(h) * * *

(1) *Vessel permits, licenses, and endorsements and dealer permits.* A vessel owner or dealer who has been issued a permit, license, or endorsement under this section must renew such permit, license, or endorsement on an annual basis. The RA will mail a vessel owner or dealer whose permit, license, or endorsement is expiring an application for renewal approximately 2 months prior to the expiration date. A vessel owner or dealer who does not receive a renewal application from the RA by 45 days prior to the expiration date of the permit, license, or endorsement must contact the RA and request a renewal application. The applicant must submit a completed renewal application form and all required supporting documents to the RA prior to the applicable deadline for renewal of the permit, license, or endorsement and at least 30 days prior to the date on which the applicant desires to have the permit made effective. If the RA receives an incomplete application, the RA will notify the applicant of the deficiency. If the applicant fails to correct the deficiency within 30 days of the date of the RA's letter of notification, the application will be considered abandoned. A permit, license, or endorsement that is not renewed within the applicable deadline will not be reissued.

* * * * *

(m) * * *

(1) * * * An application for renewal or transfer of a commercial vessel permit for Gulf reef fish will not be considered complete until proof of purchase, installation, activation, and operational status of an approved VMS for the vessel receiving the permit has been verified by NMFS VMS personnel.

* * * * *

4. In § 622.7, paragraph (ff) is added to read as follows:

§ 622.7 Prohibitions.

* * * * *

(ff) Fail to comply with the protected species conservation measures as specified in § 622.10.

5. Section 622.9 is revised to read as follows:

§ 622.9 Vessel monitoring systems (VMSs).

(a) *Requirements for use of a VMS*—(1) *South Atlantic rock shrimp.* An owner or operator of a vessel that has been issued a limited access endorsement for South Atlantic rock shrimp must ensure that such vessel has an operating VMS approved by NMFS for use in the South Atlantic rock shrimp fishery on board when on a trip in the South Atlantic. An operating VMS includes an operating mobile transmitting unit on the vessel and a functioning communication link between the unit and NMFS as provided by a NMFS-approved communication service provider.

(2) *Gulf reef fish.* An owner or operator of a vessel that has been issued a commercial vessel permit for Gulf reef fish, including a charter vessel/headboat issued such a permit even when under charter, must ensure that such vessel has an operating VMS approved by NMFS for use in the Gulf reef fish fishery on board at all times whether or not the vessel is underway, unless exempted by NMFS under the power down exemption of the NOAA Enforcement Draft Vessel Monitoring System Requirements as included in Appendix E to Final Amendment 18A to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico. The NOAA Enforcement Draft Vessel Monitoring System Requirements document is available from NMFS, Office of Enforcement, Southeast Region, 263 13th Avenue South, St. Petersburg, FL 33701; phone: 800–758–4833. An operating VMS includes an operating mobile transmitting unit on the vessel and a functioning communication link between the unit and NMFS as provided by a NMFS-approved communication service provider. Unless exempted under the power down exemption, a VMS must transmit a signal indicating the vessel's accurate position at least once an hour, 24 hours a day every day. Prior to departure for each trip, a vessel owner or operator must report to NMFS any fishery the vessel will participate in on that trip and the specific type(s) of fishing gear, using NMFS-defined gear codes, that will be on board the vessel. This information may be reported to NMFS using the toll-free number, 888–219–9228, or via an attached VMS terminal. The VMS requirements of this paragraph apply throughout the Gulf of Mexico. An owner or operator of a vessel that has been issued a commercial vessel permit for Gulf reef fish with a fish trap endorsement and that fishes exclusively with fish traps is exempt from the VMS requirements of this paragraph through February 7, 2007.

(b) *Installation and activation of a VMS.* Only a VMS that has been approved by NMFS for the applicable fishery may be used, and the VMS must be installed by a qualified marine electrician. When installing and activating the NMFS-approved VMS, or when reinstalling and reactivating such VMS, the vessel owner or operator must—

(1) Follow procedures indicated on a NMFS-approved installation and activation checklist for the applicable fishery, which is available from NMFS, Office of Enforcement, Southeast Region, 263 13th Avenue South, St. Petersburg, FL 33701; phone: 800–758–4833; and

(2) Submit to NMFS, Office of Enforcement, Southeast Region, 263 13th Avenue South, St. Petersburg, FL 33701, a statement certifying compliance with the checklist, as prescribed on the checklist.

(3) Submit to NMFS, Office of Enforcement, Southeast Region, 263 13th Avenue South, St. Petersburg, FL 33701, a vendor-completed installation certification checklist, which is available from NMFS, Office of Enforcement, Southeast Region, 263 13th Avenue South, St. Petersburg, FL 33701; phone: 800–758–4833.

(c) *Interference with the VMS.* No person may interfere with, tamper with, alter, damage, disable, or impede the operation of the VMS, or attempt any of the same.

(d) *Interruption of operation of the VMS.* When a vessel's VMS is not operating properly, the owner or operator must immediately contact NMFS, Office of Enforcement, Southeast Region, 263 13th Avenue South, St. Petersburg, FL 33701, phone: 800–758–4833, and follow instructions from that office. If notified by NMFS that a vessel's VMS is not operating properly, the owner and operator must follow instructions from that office. In either event, such instructions may include, but are not limited to, manually communicating to a location designated

by NMFS the vessel's positions or returning to port until the VMS is operable.

(e) *Access to position data.* As a condition of authorized fishing for or possession of fish in a fishery subject to VMS requirements in this section, a vessel owner or operator subject to the requirements for a VMS in this section must allow NMFS, the USCG, and their authorized officers and designees access to the vessel's position data obtained from the VMS.

6. In subpart A, § 622.10 is added to read as follows:

§ 622.10 Conservation measures for protected resources.

(a) *Atlantic dolphin and wahoo pelagic longliners.* The owner or operator of a vessel for which a commercial permit for Atlantic dolphin and wahoo has been issued, as required under § 622.4(a)(2)(xii), and that has on board a pelagic longline must post inside the wheelhouse the sea turtle handling and release guidelines provided by NMFS. Such owner or operator must also comply with the sea turtle bycatch mitigation measures, including gear requirements and sea turtle handling requirements, as specified in § 635.21(c)(5)(i) and (ii) of this chapter, respectively. For the purpose of this paragraph, a vessel is considered to have pelagic longline gear on board when a power-operated longline hauler, a mainline, floats capable of supporting the mainline, and leaders (gangions) with hooks are on board. Removal of any one of these elements constitutes removal of pelagic longline gear.

(b) *Gulf reef fish commercial vessels and charter vessels/headboats*—(1) *Sea turtle conservation measures.* The owner or operator of a vessel for which a commercial vessel permit for Gulf reef fish or a charter vessel/headboat permit for Gulf reef fish has been issued, as required under §§ 622.4(a)(2)(v) and 622.4(a)(1)(i), respectively, must post inside the wheelhouse, or within a waterproof case if no wheelhouse, a copy of the document provided by NMFS titled, ''Careful Release Protocols for Sea Turtle Release With Minimal Injury,'' and must post inside the wheelhouse, or in an easily viewable area if no wheelhouse, the sea turtle handling and release guidelines provided by NMFS. Those permitted vessels with a freeboard height of 4 ft (1.2 m) or less must have on board a dipnet, short-handled dehooker, long-nose or needle-nose pliers, bolt cutters, monofilament line cutters, and at least two types of mouth openers/mouth gags. This equipment must meet the specifications described in 50 CFR 635.21(c)(5)(i)(E-L) with the following modifications: the dipnet handle can be of variable length, only one NMFS approved short-handled dehooker is required (i.e., CFR 635.21(c)(5)(i)(G or H)); and life rings, seat cushions, life jackets, and life vests may be used as alternatives to tires for cushioned surfaces as specified in 50 CFR 635.21(c)(5)(i)(F). Those permitted vessels with a freeboard height of greater than 4 ft (1.2 m) must have on board a dipnet, long-handled line clipper, a short-handled and a long-handled dehooker, long-nose or needle-nose pliers, bolt cutters, monofilament line cutters, and at least two types of mouth openers/mouth gags. This equipment must meet the specifications described in 50 CFR 635.21(c)(5)(i) (A-L) with the following modifications: only one NMFS approved long-handled dehooker (50 CFR 635.21(c)(5)(i)(B or C)) and one NMFS-approved short-handled dehooker (50 CFR 635.21(c)(5)(i)(G or H)) are required; and life rings, seat cushions, life jackets, and life vests may be used as alternatives to tires for cushioned surfaces as specified in 50 CFR 635.21(c)(5)(i)(F).

(2) *Smalltooth sawfish conservation measures.* The owner or operator of a vessel for which a commercial vessel permit for Gulf reef fish or a charter vessel/headboat permit for Gulf reef fish has been issued, as required under §§ 622.4(a)(2)(v) and 622.4(a)(1)(i), respectively, that incidentally catches a smalltooth sawfish must--

(i) Keep the sawfish in the water at all times;

(ii) If it can be done safely, untangle the line if it is wrapped around the saw;

(iii) Cut the line as close to the hook as possible; and

(iv) Not handle the animal or attempt to remove any hooks on the saw, except for with a long-handled dehooker.

7. In § 622.31, paragraph (n) is added to read as follows:

§ 622.31 Prohibited gear and methods.

* * * * *

(n) Gulf reef fish other than sand perch or dwarf sand perch may not be used as bait in any fishery, except that, when purchased from a fish processor, the filleted carcasses and offal of Gulf reef fish may be used as bait in trap fisheries for blue crab, stone crab, deep-water crab, and spiny lobster.

8. In § 622.34, a sentence is added at the end of paragraph (l) to read as follows:

§ 622.34 Gulf EEZ seasonal and/or area closures.

* * * * *

(l) * * * Also note that if commercial quantities of Gulf reef fish, i.e., Gulf reef fish in excess of applicable bag/possession limits, are on board the vessel, no bag limit of Gulf reef fish may be possessed, as specified in § 622.39(a)(5).

* * * * *

9. In § 622.36, a sentence is added at the end of paragraph (a) to read as follows:

§ 622.36 Seasonal harvest limitations.

(a) * * * Also note that if commercial quantities of Gulf reef fish, i.e., Gulf reef fish in excess of applicable bag/possession limits, are on board the vessel, no bag limit of Gulf reef fish may be possessed, as specified in § 622.39(a)(5).

* * * * *

10. In § 622.37, paragraph (d)(4) is added to read as follows:

§ 622.37 Size limits.

* * * * *

(d) * * *

(4) A person aboard a vessel that has a Federal commercial vessel permit for Gulf reef fish and commercial quantities of Gulf reef fish, i.e., Gulf reef fish in excess of applicable bag/possession limits, may not possess any Gulf reef fish that do not comply with the applicable commercial minimum size limit.

* * * * *

11. In § 622.38, a sentence is added at the end of paragraph (d)(1) introductory text to read as follows:

§ 622.38 Landing fish intact.

* * * * *

(d) * * *

(1) * * * See § 622.31(m) regarding a prohibition on the use of Gulf reef fish as bait.

* * * * *

12. In § 622.39, paragraph (a)(2)(iii) is revised, and paragraph (a)(5) is added to read as follows:

§ 622.39 Bag and possession limits.

(a) * * *

(2) * * *

(iii) For a species/species group when its quota has been reached and closure has been effected, provided that no commercial quantities of Gulf reef fish, i.e., Gulf reef fish in excess of applicable bag/possession limits, are on board as specified in § 622.39(a)(5).

* * * * *

(5) A person aboard a vessel that has a Federal commercial vessel permit for

Gulf reef fish and commercial quantities of Gulf reef fish, i.e., Gulf reef fish in excess of applicable bag/possession limits, may not possess Gulf reef fish caught under a bag limit.

* * * * *

§ 622.41 [Amended]

13. In § 622.41, paragraph (l)(2) is removed and reserved.

14. In § 622.43, paragraph (a)(1)(iii) is removed; the suspension of paragraph (a)(1)(i) is lifted; and paragraph (a)(1)(i) is revised to read as follows:

§ 622.43 Closures.

(a) * * *

(1) * * *

(i) *Commercial quotas.* The application of bag limits described in this paragraph (a)(1)(i) notwithstanding, bag limits of Gulf reef fish may not be possessed on board a vessel with commercial quantities of Gulf reef fish, i.e., Gulf reef fish in excess of applicable bag/possession limits, on board, as specified in § 622.39(a)(5).

(A) If the recreational fishery for the indicated species is open, the bag and possession limits specified in § 622.39(b) apply to all harvest or possession in or from the Gulf EEZ of the indicated species, and the sale or purchase of the indicated species taken from the Gulf EEZ is prohibited. In addition, the bag and possession limits for red snapper, when applicable, apply on board a vessel for which a commercial permit for Gulf reef fish has been issued, as required under § 622.4(a)(2)(v), without regard to where such red snapper were harvested.

(B) If the recreational fishery for the indicated species is closed, all harvest or possession in or from the Gulf EEZ of the indicated species is prohibited.

* * * * *

PART 635—ATLANTIC HIGHLY MIGRATORY SPECIES

15. The authority citation for part 635 continues to read as follows:

Authority: 16 U.S.C. 971 *et seq.*; 16 U.S.C. 1801 *et seq.*

16. In § 635.4, the second sentence of paragraph (m)(1) is revised to read as follows:

§ 635.4 Permits and fees.

* * * * *

(m) * * *

(1) * * * A renewal application must be submitted to NMFS, at an address designated by NMFS, at least 30 days before a permit's expiration to avoid a lapse of permitted status. * * *

* * * * *

[FR Doc. E6–7587 Filed 5–17–06; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register

Vol. 71, No. 96

Thursday, May 18, 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

Forest Service

Little Doe and Low Gulch Timber Sale Project EIS—Six Rivers National Forest

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Forest Service will prepare an environmental impact statement on a proposal to harvest timber from the Little Doe and Low Gulch project area, which is located on National Forest System lands administered by the Six Rivers National Forest in Northern California. If approved, the project would harvest approximately 7.9 million board feet (MMBF) of timber from approximately 923 acres of conifer stands through intermediate and regeneration cutting methods. Logging systems employed would include ground-based skidding, skyline cable yarding, and helicopter logging. Post-harvest treatments within the proposed treatment units include fuel reduction, site preparation, and reforestation treatments. Connected actions associated with the project proposal include landing construction and reconstruction, temporary road construction with subsequent decommissioning, and road maintenance. There is a need to provide timber volume that would contribute to the economic base of the local communities. Within the context of meeting this need, an opportunity exists to maintain oaks as an important component within Douglas-fir/black oak conifer stands and oak woodlands within the project area.

DATES: Comments concerning the scope of the analysis should be received on or before 30 days after publication of this notice in the **Federal Register.** The draft environmental impact statement is expected to be released in November 2006 and the final environmental impact statement is expected to be released in April 2007.

ADDRESSES: Send written comments to William Metz, Acting Forest Supervisor, Six Rivers National Forest, 1330 Bayshore Way, Eureka, CA 95501–3834. Electronic mail may be sent to *comments-pacificsouthwest-six-rivers-mad-river@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Ruben Escatell, EIS Team Leader, (707) 574–6233, Ext. 225.

SUPPLEMENTARY INFORMATION:

Proposed Action

The Forest Service proposes to harvest approximately 7.9 million board feet (MMBF) of timber from approximately 923 acres of conifer stands within the Little Doe and Low Gulch planning areas in the form of 87 harvest units. The planning areas are located on National Forest System lands administered by the Mad River Ranger District of the Six Rivers National Forest in Trinity County, California. The project area is located in all or portions of the following townships: T.26 N., R.11 W.; T.26 N., R.12 W.; T.27 N., R11 W.; and T.27 N., R.12 W.; Mount Diablo Meridian. The project area occurs on lands allocated to Management Areas that support a programmed timber harvest under the Six Rivers Land and Resource Management Plan (LRMP).

Silvicultural treatments prescribed on the proposed harvest units include 709 acres of intermediate harvest treatments (low thinning, thinning/sanitation cutting, and oak release) and 214 acres of regeneration cutting treatments (regeneration with green tree legacy and shelterwood cutting). Of the 923 acres proposed for commercial harvest, approximately 730 acres would be tractor logged, 14 acres would be tractor swung to skyline corridors, 82 acres would be skyline logged, and 97 acres would be helicopter logged. Twenty-five (25) new landings would be constructed, and 127 existing landings would be utilized. Fuel treatments prescribed would include one or a combination of the following treatments: hand or machine piling and subsequent burning of piles, yarding of tops out of the units and piling at existing landings for future disposal, yarding unutilized material out of harvest units, felling of unutilized material less than 8 inches in diameter, and underburning. Reforestation would take place after logging and fuels treatments are completed on 214 acres in harvest units proposed for regeneration cutting. Connected actions include approximately 1,213 feet (0.23 miles) of new temporary road construction and 3,443 feet (0.65 miles) of existing non-system roads used to access landings in harvest units. These roads would be decommissioned upon project completion. Road maintenance would occur as needed on Forest system roads used to haul commercial timber. These activities may include blading, scarification, spot rocking, brushing, ditch cleaning, culvert cleaning, dust abatement, water bars, minor slide and slump repair, and water source deferred maintenance.

Purpose and Need for Action

There is a need for the Six Rivers National Forest to provide timber volume to contribute to the economic base of the local communities. Within the context of meeting this need, vegetation management within the project area also provides an opportunity to maintain oaks as a component within Douglas-fir/black oak conifer stands and oak woodlands. The project area encompasses vegetative communities where oaks are becoming over-topped, shaded out, and encroached upon by conifers. There is an opportunity to remove competing conifers from treatment units exhibiting these characteristics. This opportunity serves to maintain oaks and the specialized habitats they provide over the long term.

Responsible Official

William Metz, Acting Forest Supervisor, Six Rivers National Forest, 1330 Bayshore Way, Eureka, CA 95501–3834, is the Responsible Official for making any decisions relative to this proposal. He will document his decisions and rationale in a Record of Decision.

Decisions To Be Made

The Forest Supervisor of the Six Rivers National Forest will decide on whether the proposed action will proceed as proposed, or as modified by an alternative. If it proceeds he will also decide on what project design features and monitoring requirements will be applied to the project.

Estimated Dates for Filing

The draft EIS is expected to be filed with the Environmental Protection Agency (EPA) and to be available for public review by November 2006. At that time EPA will publish a Notice of Availability of the draft EIS in the **Federal Register.** The comment period on the draft EIS will be 45 days from the date the EPA publishes the Notice of Availability in the **Federal Register.** It is very important that those interested in the management of this area participate at that time.

The final EIS is scheduled to be completed by April 2007. In the final EIS, the Forest Service is required to respond to comments and responses received during the comment period that pertain to the environmental consequences discussed in the draft EIS and applicable laws, regulations, and policies considered in making a decision regarding the proposal.

Comment Requested

This notice of intent continues the scoping process which guides the development of the environmental impact statement. The Forest Service will be seeking information, comments and assistance from Federal, State and local agencies and other individuals or organization that may be interested in, or affected by, the proposed action. While public participation in this analysis is welcome at any time, comments received within 30 days of the publication of this notice will be especially useful in the preparation of the EIS.

Electronic Access and Filing Addresses

Comments may be sent by electronic mail (e-mail) to *comments-pacificsouthwest-six-rivers-mad-river@fs.fed.us.* Please reference the Little Doe and Low Gulch Timber Sale Project on the subject line. Also, include your name and mailing address with your comments so documents pertaining to this project may be mailed to you.

Early Notice of Importance of Public Participation in Subsequent Environmental Review

A draft environmental impact statement will be prepared for comment. The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register.**

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel,* 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

(Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21)

Dated: May 12, 2006.

William Metz,

Acting Forest Supervisor, Six Rivers National Forest.

[FR Doc. E6–7556 Filed 5–17–06; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Ravalli County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Ravalli County Resource Advisory Committee will be meeting to discuss 2006 projects, several guest speakers, and hold a short public forum (question and answer session). The meeting is being held 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 meeting is open to the public.

DATES: The meeting will be held on May 23, 2006, 6:30 p.m.

ADDRESSES: The meeting will be held at the Bitterroot National Forest Supervisor Office, Conference Room, 1801 North First Street, Hamilton, Montana. Send written comments to Dan Ritter, District Ranger, Stevensville Ranger District, 88 Main Street, Stevensville, MT 59870, by facsimile (406) 777–7423, or electronically to *dritter@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Daniel G. Ritter, Stevensville District Ranger and Designated Federal Officer, Phone: (406) 777–5461.

Dated: May 11, 2006.

David T. Bull,

Forest Supervisor.

[FR Doc. 06–4645 Filed 5–17–06; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–846]

Certain Hot–Rolled Flat–Rolled Carbon–Quality Steel Products from Japan: Notice of Amended Final Determination Pursuant to Court Decision.

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On February 22, 2006, the United States Court of International Trade (CIT) issued an order affirming the Department of Commerce's (Department) Final Results of Redetermination Pursuant to Court Remand filed by the Department of Commerce on December 2, 2003 (Redetermination). *See Nippon Steel*

Corporation v. United States, SLIP OP. 06–23 (CIT 2006). The remand redetermination arose out of the final determination of sales at less than fair value in the antidumping duty investigation of hot–rolled flat–rolled carbon–quality steel products from Japan. Because all litigation in this matter has now concluded, the Department is issuing its amended final determination in accordance with the CIT's decision.

EFFECTIVE DATE: May 18, 2006.

FOR FURTHER INFORMATION CONTACT: Kimberley Hunt, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington DC 20230; telephone: (202) 482–1272.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On May 6, 1999, the Department published a *Notice of Final Determination of Sales at Less Than Fair Value: Hot–Rolled Flat–Rolled Carbon–Quality Steel Products from Japan*, 64 FR 24329 (*May 6, 1999*) (Final Determination) covering the period of investigation (POI) July 1, 1997 through June 30, 1998. On June 29, 1999, the antidumping duty order was published. *See Notice of the Antidumping Duty Order: Certain Hot–Rolled Flat–Rolled Carbon–Quality Steel Products From Japan*, 64 FR 34778 (June 29, 1999). Both Bethlehem Steel Corporation, U.S. Steel Group, Ispat Inland, Inc., and LTV Steel Company, Inc. (collectively, Petitioners), and Nippon Steel Corporation (Nippon), a respondent, contested various aspects of the *Final Determination*.

On October 26, 2000, the CIT issued its opinion and remanded to the Department an issue in the *Final Determination* for reconsideration: specifically, the CIT asked the Department to assess its rejection of Nippon's untimely submitted weight conversion factor and its assignment of a margin to the affected sales based upon adverse facts available and instructed the Department to determine whether Nippon acted to the best of its ability according to 19 U.S.C. § 1677e(b) in submitting the requested weight conversion factor the Department. The court also instructed the Department to issue a policy statement on *ex parte* memoranda. Additionally, the CIT upheld the Department on several issues. Only one is pertinent here; namely, that the CIT affirmed the Department's methodology for determining the starting U.S. price from Nippon's invoices, which converted yen paid from the buyer to Nippon into U.S. dollars and used the converted amount from the invoice as the U.S. starting price, as opposed to using the U.S. dollar amount Nippon had submitted in its response, which had been negotiated between the parties and was an agreed upon U.S. dollar amount. *See Nippon Steel Corporation v. United States*, 118 F. Supp. 2d 1366 (CIT 2000) (*Nippon I*).

Pursuant to the CIT's decision, the Department issued its remand redetermination concluding that Nippon ''failed to cooperate by not acting to the best of its ability'' and again assigned a margin to the affected sales based upon facts available, as opposed to using the actual, untimely reported weight conversion factor submitted by Nippon. *See Final Results of Redetermination Pursuant to Court Remand: Nippon Steel Corporation v. United States*, Consol. Ct. No. 99–08–00466 (December 8, 2000) (*First Remand Redetermination*) (available at *http://ia.ita.doc.gov*).

Nippon contested various aspects of the Department's *First Remand Redetermination*. On April 20, 2001, the CIT issued its opinion regarding the Department's *First Remand Redetermination* and remanded, in part, the Department's results. The CIT found that the *ex parte* policy statement conformed to the requirements of the court's injunction regarding the placement on the record of memoranda detailing *ex parte* communications between parties and Department officials. However, the court remanded the case to the Department, specifically stating that it was not remanding the case for further examination of the adverse inference issue. Rather, the court stated that the Department's conclusion that Nippon ''failed to cooperate by not acting to the best of its ability'' was unsupported by substantial evidence and instructed the Department to re–calculate Nippon's dumping margin without using adverse facts available. *See Nippon Steel Corporation v. United States*, 146 F. Supp. 2d 835 (CIT 2001) (*Nippon II*).

Pursuant to the CIT's decision, the Department changed its analysis of Nippon's weight conversion factor and selected weighted–average margins for theoretical weight sales as non–adverse facts available. *See Final Results of Redetermination Pursuant to Court Remand: Nippon Steel Corporation v. United States*, Consol. Ct. No. 99–08–00466 (June 19, 2001) (*Second Remand Redetermination*) (available as part of the CIT court record). Nippon contested the Department's *Second Remand Redetermination*. On October 12, 2001, the CIT issued its opinion regarding the Department's Second Remand Redetermination, remanding the case to the Department to devise a new approach to the determination of neutral facts available with respect to Nippon's weight conversion factor, stating that the Department unreasonably selected weighted–average margins for theoretical weight sales as non–adverse facts available, where the margins reflected a weight conversion factor that was implausible. *See Nippon Steel Corporation v. United States*, SLIP OP. 01–122 (CIT October 12, 2001) (*Nippon III*).

Pursuant to the CIT's decision, the Department issued its third redetermination and modified its approach by substituting a margin based on a weighted average of all reported U.S. actual–weight sales. *See Final Results of Redetermination Pursuant to Court Remand: Nippon Steel Corporation v. United States*, Consol. Ct. No. 99–08–00466 (November 13, 2001) (*Third Remand Redetermination*) (available as part of the CIT court record). Nippon contested the Department's *Third Remand Redetermination*, stating that the Department did not meaningfully change its methodology, as ordered by the CIT in *Nippon III*. On December 27, 2001, the CIT issued its opinion regarding the Department's *Third Remand Redetermination*, stating that it ''refuse{d} to further extend litigation by reopening the issue'' and ordering the Department to use Nippon's untimely reported weight conversion factor. *See Nippon Steel Corporation v. United States*, SLIP OP. 01–152 (CIT December 27, 2001) (*Nippon IV*).

Both the U.S. Government and certain petitioners, Bethlehem Steel and U.S. Steel Group (collectively Bethlehem), appealed the decision to the United States Court of Appeals for the Federal Circuit (CAFC). Specifically, both appellants argued that the CIT erred in rejecting the Department's original determination to apply partial adverse facts available with respect to Nippon's weight conversion factor because the Department's determination was supported by substantial evidence. Bethlehem separately argued that the CIT erred by holding that the Department's determination of a yen–based U.S. starting price to be used for Nippon's U.S. sales was supported by substantial evidence.

The CAFC held that the Department's application of partial adverse facts available was supported by substantial evidence and otherwise in accordance with the law but that the Department's methodology of calculating the U.S.

starting price was not in accordance with law. *Nippon Steel Corporation v. United States*, 337 F.3d 1373, 1385 (Fed. Cir. 2003). The CAFC reversed the CIT's decision to the extent that it held the opposite on any of these issues. The Department filed its fourth remand redetermination on December 2, 2003 and changed its methodology according to the CAFC's reversal of the CIT's decision on U.S. starting price and the use of partial adverse facts available for Nippon's weight conversion factor. *See Final Results of Redetermination Pursuant to Court Remand Nippon Steel Corporation v. United States 99–08–00466* (December 2, 2003) (*Fourth Remand Redetermination*). On February 22, 2006, the CIT sustained the Department's *Fourth Remand Redetermination*. *See Nippon Steel Corporation v. United States*, SLIP OP. 06–23 (CIT February 22, 2006).

In addition to the court decisions discussed above, the Government of Japan (GOJ) appealed, among other issues, the Department's application of adverse facts available for Nippon's weight conversion factor to the World Trade Organization (WTO). The GOJ did not appeal the U.S. starting price issue to the WTO. In its report, the WTO Appellate Body ruled that the Department acted inconsistently with the Antidumping Agreement in applying ''facts available'' to Nippon with regard to the reported weight conversion factor and found that the Department should have used Nippon's untimely submitted, actual weight conversion factor. The Department implemented the WTO Appellate Body's findings in a Section 129 Determination. *See Notice of Determination Under Section 129 of the Uruguay Round Agreement Act: Antidumping Measures on Certain Hot–Rolled, Flat–Rolled Carbon Quality Steel Products from Japan*, 67 FR 71936, 71939 (December 3, 2002) (*129 Determination*). The effective date of the *129 Determination* is November 22, 2002.

Because the effective date of the *129 Determination* predates the *Fourth Remand Redetermination*, the *Fourth Remand Redetermination* includes an analysis of the effect of the 129 Determination on the antidumping duty margin. *See Fourth Remand Redetermination* at 2. Accordingly, the Department calculated two margins for Nippon in the *Fourth Remand Redetermination*. The first margin, 21.12 percent, reflects the use of the same adverse inference made in the original investigation with respect to the margins for Nippon's theoretical weight sales, but changes the starting price for U.S. sales from converted yen to reported U.S. dollars. This margin applies to Nippon's unreviewed entries made prior to November 22, 2002, the effective date of the *129 Determination*. The second margin, 19.95 percent, reflects the various changes made to the original investigation margin as a result of the *129 Determination* and includes the use of Nippon's actual reported weight conversion factor, but also reflects the use of the reported U.S. dollar as the U.S. starting price. This margin applies to Nippon's unreviewed entries made on or after the effective date of the *129 Determination*, November 22, 2002.

AMENDED FINAL DETERMINATION

Because no party appealed the CIT's February 22, 2006 decision, there is now a final and conclusive decision in the court proceeding and we are thus amending the *Final Determination* to reflect the results of the *Fourth Remand Redetermination*, which addresses the CAFC's ruling as well as the changes to the margin pursuant to the *129 Determination*. The recalculated margins are as follows:

Manufacturer/exporter	Weighted-average margin (percent)
From February 19, 1999 through November 21, 2002.	
Nippon Steel Corporation	**21.12%**
On or after November 22, 2002.	
Nippon Steel Corporation	**19.95%**

Accordingly, pursuant to 19 U.S.C. 1516a(e) and effective as of the publication of this notice, the Department will instruct U.S. Customs and Border Protection (CBP) to terminate the suspension of liquidation and proceed with liquidation of all appropriate entries entered, or withdrawn from warehouse, for consumption, on or after February 19, 1999, and before November 22, 2002 (the effective date of the *129 Determination*) at the rate of 21.12 percent, and all entries entered, or withdrawn from warehouse, for consumption on or after November 22, 2002 (the effective date of the *129 Determination*) at the rate of 19.95 percent.

CASH DEPOSIT REQUIREMENTS

The Department will direct CBP to require, on or after the date of publication of this notice in the **Federal Register**, a cash deposit rate of 19.95 percent for the subject merchandise. This cash deposit requirement, 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: May 12, 2006.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E6–7603 Filed 5–17–06; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–856]

Synthetic Indigo from the People's Republic of China: Revocation of Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On May 2, 2005, the Department of Commerce (''the Department'') initiated and the International Trade Commission (''ITC'') instituted the sunset review of the antidumping duty (''AD'') order on synthetic indigo from the People's Republic of China (''the PRC'') pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''). *See Notice of Initiation of Five-year (''Sunset'') Reviews*, 70 FR 22632 (May 2, 2005) and *Institution of a Five-year Review concerning the Antidumping Duty Order on Synthetic Indigo from China*, 70 FR 22701 (May 2, 2005). Pursuant to section 751(c) of the Act, the ITC determined that revocation of this AD order would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See Synthetic Indigo from China*, 71 FR 26109 (May 3, 2006). Therefore, pursuant to section 751(d)(2) of the Act and 19 CFR 351.222(i)(1)(iii), the Department is revoking the AD order on synthetic indigo from the PRC.

EFFECTIVE DATE: June 19, 2005.

FOR FURTHER INFORMATION CONTACT: Hilary E. Sadler, Esq., Office 8 of AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4340.

SUPPLEMENTARY INFORMATION:

Scope of the Order

The products subject to this order are the deep blue synthetic vat dye known

as synthetic indigo and those of its derivatives designated commercially as ''Vat Blue 1.'' Included are Vat Blue 1 (synthetic indigo), Color Index No. 73000, and its derivatives, pre–reduced indigo or indigo white (Color Index No. 73001) and solubilized indigo (Color Index No. 73002). The subject merchandise may be sold in any form (*e.g.*, powder, granular, paste, liquid, or solution) and in any strength. Synthetic indigo and its derivatives subject to this order are currently classifiable under subheadings 3204.15.10.00, 3204.15.40.00 or 3204.15.80.00 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under the order is dispositive.

Background

On June 19, 2000, the Department issued an AD order on synthetic indigo from the PRC. *See Notice of Amendment of Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Synthetic Indigo from the People's Republic of China, 65 FR 37961, amended by Notice of Amendment of Antidumping Duty Order: Synthetic Indigo from the People's Republic of China*, 65 FR 39128 (June 23, 2000). Pursuant to section 751(c) of the Act and 19 CFR 351.218, the Department initiated and the ITC instituted the sunset review of this order by publishing the notice of the initiation in the **Federal Register** (70 FR 22632 (May 2, 2005) and 70 FR 22701 (May 2, 2005)). As a result of its review, the Department found that revocation of the AD order would likely lead to continuation or recurrence of dumping and notified the ITC of the magnitude of the margin likely to prevail were the order to be revoked. *See Synthetic Indigo: Notice of Final Results of Expedited Sunset Review of Antidumping Duty Order*, 70 FR 53165 (September 7, 2005). On March 23, 2006, the ITC determined that revocation of the AD order on synthetic indigo from the PRC would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time, pursuant to section 751(c) of the Act. *See Synthetic Indigo from China*, 71 FR 26109 (May 3, 2006) and USITC Publication 3846 (April 2006), Investigation No. 731–TA–851 (Review).

Determination to Revoke

As a result of the determination by the ITC that revocation of this AD order is not likely to lead to continuation or recurrence of material injury to an industry in the United States, the Department is revoking the AD order on synthetic indigo from the PRC, pursuant to section 751(d) of the Act. Pursuant to section 751(d)(2) of the Act and 19 CFR 351.222(i)(2)(i), the effective date of revocation is June 19, 2005 (*i.e.*, the fifth anniversary of the date of publication in the **Federal Register** of the notice of the AD order). The Department will notify U.S. Customs and Border Protection to discontinue suspension of liquidation and collection of cash deposits on entries of the subject merchandise entered or withdrawn from warehouse on or after June 19, 2005, the effective date of revocation of the AD order. The Department will complete any pending administrative reviews of these findings or order and will conduct administrative reviews of subject merchandise entered prior to the effective date of revocation in response to appropriately filed requests for review.

This five-year sunset review and notice are in accordance with section 751(d)(2) and published pursuant to section 777(i)(1) of the Act.

Dated: May 11, 2006.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E6–7602 Filed 5–17–06; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

North American Free-Trade Agreement, Article 1904; NAFTA Panel Reviews; Notice of Suspension of Extraordinary Challenge Committee

AGENCY: NAFTA Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Notice of suspension of Extraordinary Challenge Committee to review the binational NAFTA Panel decisions of August 13, 2003; June 7, 2004; Second Remand of December 1, 2004; Third Remand of May 23, 2005; Fourth Remand of October 5, 2005; Fifth Remand of March 17, 2006; and Notice of Final Panel Action of March 28, 2006 in the matter of Certain Softwood Lumber Products from Canada, Final Affirmative Countervailing Duty Determination, Secretariat File No. USA/CDA–2002–1904–03.

SUMMARY: On April 27, 2006, the Office of the United States Trade Representative filed a Request for an Extraordinary Challenge Committee to review decisions as stated above with the United States Section of the NAFTA Secretariat pursuant to Article 1904 of the North American Free Trade Agreement. Committee review was requested of the final affirmative countervailing duty determination made by the International Trade Administration, respecting Certain Softwood Lumber Products From Canada. These determinations were published in the **Federal Register**. An agreement to suspend the proceedings was filed with the NAFTA Secretariat on May 11, 2006 on behalf of the United States and Canadian Governments. The NAFTA Secretariat Case Number ECC–2006–1904–01USA was assigned to this request.

FOR FURTHER INFORMATION CONTACT: Caratina L. Alston, United States Secretary, NAFTA Secretariat, Suite 2061, 14th and Constitution Avenue, Washington, DC 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: Chapter 19 of the North American Free-Trade Agreement (''Agreement'') establishes a mechanism to replace domestic judicial review of final determinations in antidumping and countervailing duty cases involving imports from a NAFTA country with review by independent binational panels. When a Request for Panel Review is filed, a panel is established to act in place of national courts to review expeditiously the final determination to determine whether it conforms with the antidumping or countervailing duty law of the country that made the determination.

Under Article 1904 of the Agreement, which came into force on January 1, 1994, the Government of the United States, the Government of Canada and the Government of Mexico established *Rules of Procedure for Article 1904 Binational Panel Reviews* (''Rules''). These Rules were published in the **Federal Register** on February 23, 1994 (59 FR 8686).

A Request for an Extraordinary Challenge Committee was filed with the United States Section of the NAFTA Secretariat, pursuant to Article 1904 of the Agreement, on April 27, 2006, requesting panel review of the final affirmative countervailing duty determination as described above. An agreement to suspend the requested ECC was filed on May 11, 2006 on behalf of the United States and Canadian Governments.

Dated: May 12, 2006.

Caratina L. Alston,

U.S. Secretary, NAFTA Secretariat.

[FR Doc. E6–7537 Filed 5–17–06; 8:45 am]

BILLING CODE 3510–GT–P

DEPARTMENT OF COMMERCE

International Trade Administration

North American Free-Trade Agreement, Article 1904; NAFTA Panel Reviews; Notice of Request for an Extraordinary Challenge Committee

AGENCY: NAFTA Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Notice of request for an Extraordinary Challenge Committee to review the binational NAFTA Panel decisions of August 13, 2003; June 7, 2004; Second Remand of December 1, 2004; Third Remand of May 23, 2005; Fourth Remand of October 5, 2005; Fifth Remand of March 17, 2006; and Notice of Final Panel Action of March 28, 2006 in the matter of Certain Softwood Lumber Products from Canada, Final Affirmative Countervailing Duty Determination, Secretariat File No. USA/CDA–2002–1904–03.

SUMMARY: On April 27, 2006, the Office of the United States Trade Representative filed a Request for an Extraordinary Challenge Committee to review decisions as stated above with the United States Section of the NAFTA Secretariat pursuant to Article 1904 of the North American Free Trade Agreement. Committee review was requested of the final affirmative countervailing duty determination made by the International Trade Administration, respecting Certain Softwood Lumber Products From Canada. These determinations were published in the **Federal Register**. The NAFTA Secretariat has assigned Case Number ECC–2006–1904–01USA to this request.

FOR FURTHER INFORMATION CONTACT: Caratina L. Alston, United States Secretary, NAFTA Secretariat, Suite 2061, 14th and Constitution Avenue, Washington, DC 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: Chapter 19 of the North American Free-Trade Agreement (''Agreement'') establishes a mechanism to replace domestic judicial review of final determinations in antidumping and countervailing duty cases involving imports from a NAFTA country with review by independent binational panels. When a Request for Panel Review is filed, a panel is established to act in place of national courts to review expeditiously the final determination to determine whether it conforms with the antidumping or countervailing duty law of the country that made the determination.

Under Article 1904 of the Agreement, which came into force on January 1, 1994, the Government of the United States, the Government of Canada and the Government of Mexico established *Rules of Procedure for Article 1904 Binational Panel Reviews* (''Rules''). These Rules were published in the **Federal Register** on February 23, 1994 (59 FR 8686).

A Request for an Extraordinary Challenge Committee was filed with the United States Section of the NAFTA Secretariat, pursuant to Article 1904 of the Agreement, on April 27, 2006, requesting panel review of the final affirmative countervailing duty determination as described above.

The Rules provide that:

(a) A Party or participant in the panel review who proposes to participate in the extraordinary challenge proceeding shall file with the responsible Secretariat a Notice of Appearance within 10 days after the filing of the first Request for Extraordinary Challenge Committee (the deadline for filing a Notice of Appearance is May 8, 2006); and

(b) Complainants briefs shall be filed within 21 days after the Request for Extraordinary Challenge Committee (the deadline for filing briefs is May 18, 2006);

(c) Respondents briefs shall be filed within 21 days after the Complainants briefs (the deadline for filing brief is June 8, 2006).

Dated: April 28, 2006.

Caratina L. Alston,

United States Secretary, NAFTA Secretariat.

[FR Doc. E6–7538 Filed 5–17–06; 8:45 am]

BILLING CODE 3510–GT–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Sunshine Act Notice

The Board of Directors of the Corporation for National and Community Service gives notice of the following meeting:

DATE AND TIME: Wednesday, May 24, 2006, 9:30 a.m.—11:30 a.m.

PLACE: Corporation for National and Community Service; 8th Floor Conference Room; 1201 New York Avenue, NW.; Washington, DC 20525.

STATUS: Open.

MATTERS TO BE CONSIDERED:

I. Chair's Opening Remarks.
II. Consideration of Prior Meeting's Minutes.
III. Committee Reports.
IV. CEO Report.
V. Public Comment.

ACCOMMODATIONS: Anyone who needs an interpreter or other accommodation should notify the Corporation's contact person by 5 p.m. Monday, May 22, 2006.

FOR FURTHER INFORMATION CONTACT: David Premo, Public Affairs Associate, Public Affairs, Corporation for National and Community Service, 10th Floor, Room 10302E, 1201 New York Avenue NW., Washington, DC 20525. Phone (202) 606–6717. Fax (202) 606–3460. TDD: (202) 606–3472. E-mail: *dpremo@cns.gov*.

Dated: May 15, 2006.

Frank R. Trinity,

General Counsel.

[FR Doc. 06–4690 Filed 5–16–06; 12:01 pm]

BILLING CODE 6050–$$–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0047]

Federal Acquisition Regulation; Information Collection; Place of Performance

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for an extension to an existing OMB clearance (9000–0047).

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning place of performance. The clearance currently expires on October 31, 2006.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; and ways to enhance the quality, utility, and clarity of the information to be

collected. When the On-Line Representation and Certifications Application (ORCA) becomes available, contractors will be able to complete the provision electronically; however, because the data being collected could change for a specific solicitation, contractor's will still be required to submit place of performance information on an exception basis; that is, whenever the place of performance for a specific solicitation is different from the place of performance shown in ORCA.

DATES: Submit comments on or before July 17, 2006.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of the collection of information, including suggestions for reducing this burden to the General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Jackson, Contract Policy Division, GSA, (202) 208–4949.

SUPPLEMENTARY INFORMATION:

A. Purpose

The information relative to the place of performance and owner of plant or facility, if other than the prospective contractor, is a basic requirement when contracting for supplies or services (including construction). This information is instrumental in determining bidder responsibility, responsiveness, and price reasonableness. A prospective contractor must affirmatively demonstrate its responsibility. Hence, the Government must be apprised of this information prior to award. The contracting officer must know the place of performance and the owner of the plant or facility to (1) determine bidder responsibility; (2) determine price reasonableness; (3) conduct plant or source inspections; and (4) determine whether the prospective contractor is a manufacturer or a regular dealer. The information is used to determine the firm's eligibility for awards and to assure proper preparation of the contract.

B. Annual Reporting Burden

Respondents: 79,397.
Responses Per Respondent: 14.
Total Responses: 1,111,558.
Hours Per Response: .07.
Total Burden Hours: 77,810.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VIR), Room 4035, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0047, Place of Performance, in all correspondence.

Dated: May 12, 2006

Ralph Destefano,

Director, Contract Policy Division.

[FR Doc. 06–4647 Filed 5–17–06; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0048]

Federal Acquisition Regulation; Information Collection; Authorized Negotiators

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for comments regarding a renewal to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the General Services Administration will be submitting to the Office of Management and Budget (OMB) a request to review and approve a renewal of a currently approved information collection requirement regarding authorized negotiators. The clearance currently expires on October 31, 2006.

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate and based on valid assumptions and methodology; and ways to enhance the quality, utility, and clarity of the information to be collected.

DATES: Submit comments on or before: July 17, 2006.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Jackson, Contract Policy Division, GSA, (202) 208–4949.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Regulatory Secretariat (VIR), General Services Administration, Room 4035, 1800 F Street, NW., Washington, DC 20405. Please cite OMB Control No. 9000–0048, Authorized Negotiators, in all correspondence.

SUPPLEMENTARY INFORMATION:

A. Purpose

Firms offering supplies or services to the Government under negotiated solicitations must provide the names, titles, and telephone numbers of authorized negotiators to assure that discussions are held with authorized individuals. The information collected is referred to before contract negotiations and it becomes part of the official contract file.

B. Annual Reporting Burden

Respondents: 65,660.
Responses Per Respondent: 8.
Total Responses: 525,280.
Hours Per Response: .017.
Total Burden Hours: 8,930.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW., Room 4035, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0048, Authorized Negotiator, in all correspondence.

Ralph Destefano,

Director, Contract Policy Division.

[FR Doc. 06–4648 Filed 5–17–06; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Availability of Government-Owned Inventions; Available for Licensing

AGENCY: Department of the Navy, DOD.

ACTION: Notice.

SUMMARY: The Department of the Navy hereby gives notice of the availability of exclusive or partially exclusive license to practice worldwide under the following pending patents. Any license granted shall comply with 35 U.S.C. 209 and 37 CFR part 404. Applications will be evaluated utilizing the following criteria: Ability to manufacture and market the technology; manufacturing and marketing ability; time required to bring technology to market and production rate; royalties; technical capabilities; and small business status.

U.S. Patent application Serial Number 11/208,120 entitled ''Fiber pigtails and method for fabricating same'' filed on August 16, 2005. This application teaches a method of pre-alignment of birefringent fiber in a handle so the

assembly would snap-in to a prefabricated receptacle on a polymer integrated optic chip.

U.S. Patent application Serial Number 11/208,119 entitled ''Polymer integrated optical transceiver'' filed on August 16, 2005. This application teaches the assembly of a polymer integrated optic transceiver module that outputs polarized light intended for use in fiber optic gyros.

U.S. Patent application Serial Number 11/288,066 entitled ''Polymer Phase Modulator'' filed on November 23, 2005. This application teaches a hybrid polarizing/non-polarizing beam splitter/phase modulator for use in a fiber optic gyro.

U.S. Patent application Serial Number 11/288,065 entitled ''Polymer Phase Modulator'' filed on November 23, 2005. This application teaches a non-polarizing beam splitter/phase modulator for use in a fiber optic gyro.

U.S. Patent application Serial Number 11/288,050 entitled ''Polymer Phase Modulator'' filed on November 23, 2005. This application teaches a polarizing beam splitter/phase modulator for use in a fiber optic gyro.

U.S. Patent application Serial Number 11/288,051 entitled ''Polymer Phase Modulator'' filed on November 23, 2005. This application teaches a hybrid polarizing/non-polarizing phase modulator.

U.S. Patent application Serial Number 10/816,578 entitled ''Apparatus and Method for Image Based Coordinate Determination'' filed on March 25, 2004. This application teaches a method for providing mensurated geospatial coordinates complete with error terms on any windows based platform from stereo pair satellite imagery.

DATES: Applications for an exclusive or partially exclusive license may be submitted at any time from the date of this notice.

ADDRESSES: Requests for copies of the patents cited should be directed to: Naval Air Warfare Center Weapons Division, Code 498400D, 1900 N. Knox Road Stop 6312, China Lake, CA 93555–6106, and must include the patent number.

FOR FURTHER INFORMATION CONTACT: Michael D. Seltzer, Ph.D., Head, Technology Transfer Office, Naval Air Warfare Center Weapons Division, Code 498400D, 1900 N. Knox Road Stop 6312, China Lake, CA 93555–6106, telephone 760–939–1074 or E-Mail at: *michael.seltzer@navy.mil*.

(Authority: 35 U.S.C. 207, 37 CFR part 404.)

Dated: May 10, 2006.

Saundra K. Melancon,

Paralegal Specialist, Alternate Federal Register Liaison Officer.

[FR Doc. E6–7561 Filed 5–17–06; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Availability of Government-Owned Inventions; Available for Licensing

AGENCY: Department of the Navy, DOD.

ACTION: Notice.

SUMMARY: The inventions listed below are assigned to the U.S. Government as represented by the Secretary of the Navy and are available for licensing by the Department of the Navy.

U.S. Patent No. 6,338,457: Precision Parachute Recovery System

U.S. Patent No. 6,416,019: Precision Parachute Recovery System

U.S. Patent No. 5,321,503: Closed Loop Depolarized IFOG With Self-Adjusting Serrodyne Phase Nulling

U.S. Patent No. 5,365,338: Wavelength Sensor for Fiber Optic Gyroscope

U.S. Patent No. 6,507,660: Method for Enhancing Air-to-Ground Target Detection, Acquisition, and Terminal Guidance and an Image Correlation System

U.S. Patent No. 6,259,803: Simplified Image Correlation Method Using Off-the-Shelf Signal Processors to Extract Edge Information Using Only Spatial Data

U.S. Patent No. 6,988,049: Apparatus and Method for Providing True Geodetic Coordinates

DATES: Applications for an exclusive or partially exclusive license may be submitted at any time from the date of this notice.

ADDRESSES: Requests for copies of the patents cited should be directed to: Naval Air Warfare Center Weapons Division, Code 498400D, 1900 N. Knox Road Stop 6312, China Lake, CA 93555–6106, and must include the patent number.

FOR FURTHER INFORMATION CONTACT: Michael D. Seltzer, Ph.D., Head, Technology Transfer Office, Naval Air Warfare Center Weapons Division, Code 498400D, 1900 N. Knox Road Stop 6312, China Lake, CA 93555–6106, telephone 760–939–1074 or e-mail *michael.seltzer@navy.mil*

(Authority: 35 U.S.C. 207, 37 CFR Part 404.)

Dated: May 11, 2006.

Saundra K. Melancon,

Paralegal Specialist, Alternate Federal Register Liaison Officer.

[FR Doc. E6–7564 Filed 5–17–06; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–426–002]

Destin Pipeline Company, L.L.C.; Notice of Request for Extension of Time

May 11, 2006.

Take notice that on May 1, 2006, Destin Pipeline Company, L.L.C. (Destin) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, Second Revised Sheet No. 136.01, to be effective June 1, 2006.

Destin states that purpose of its filing is to request additional time in order to comply with the Commission's Letter Order issued August 30, 2005, in Docket No. RP05–426–000.

Destin states that copies of this filing are being served on all parties to the proceedings, affected shippers, and applicable state regulatory agencies.

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.

Protest Date: 5 p.m. Eastern Time on May 18, 2006.

Magalie R. Salas,

Secretary.

[FR Doc. E6–7549 Filed 5–17–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC02–51–001]

Enron Corp.; Enron North America Corp; Enron Power Marketing, Inc.; Enron Net Works LLC; UBS AG; Notice of Filing

May 11, 2006.

Take notice that on April 4, 2006, Florida Gas Transmission Company and Transwestern Pipeline Company LLC, tendered for filing a pleading requesting relief from the Commission's Order issued on April 22, 2002 in Docket No. EC02–51–000.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 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 May 26, 2006.

Magalie R. Salas,

Secretary.

[FR Doc. E6–7546 Filed 5–17–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–518–089]

Gas Transmission Northwest Corporation; Notice of Negotiated Rate

May 11, 2006.

Take notice that on May 8, 2006, Gas Transmission Northwest Corporation (GTN) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1–A, Ninth Revised Sheet No. 24 and Fourth Revised Sheet No. 27, to become effective May 9, 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 protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E6–7545 Filed 5–17–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM06–16–000]

Mandatory Reliability Standards for the Bulk-Power System; Notice of Comment Period

May 11, 2006.

On April 4, 2006, the North American Electric Reliability Council, on behalf of its wholly-owned subsidiary, the North American Electric Reliability Corporation (NERC), filed 102 proposed Reliability Standards for Commission approval, subject to its application for certification as the Electric Reliability Organization (ERO) pursuant to section 215 of the Federal Power Act (FPA).

Concurrent with this notice, the Commission today released a staff preliminary assessment of the proposed Reliability Standards. This assessment is a preliminary technical analysis by staff and does not offer legal conclusions or recommend any particular action to be taken by the Commission. The Commission will issue a Notice of Proposed Rulemaking (NOPR) with its proposals on each Reliability Standard after receiving comments on the staff preliminary assessment. Interested persons will also have an opportunity to file comments on the NOPR.

NERC should respond to this preliminary assessment by June 26, 2006. We also invite other interested persons to file comments on the staff preliminary assessment by the comment date. Comments should respond to individual Reliability Standards in the format used in the preliminary assessment.

The Commission encourages electronic submission of comments using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of their comments to the Secretary of the Commission, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The staff preliminary assessment 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 June 26, 2006.

Magalie R. Salas,

Secretary.

[FR Doc. E6–7548 Filed 5–17–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–339–001]

Northern Natural Gas Company; Notice of Tariff Filing

May 11, 2006.

Take notice that on May 8, 2006, Northern Natural Gas Company (Northern), tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, Substitute First Revised Sheet No. 66D, with an effective date of June 1, 2006.

Northern states that it is filing the above-referenced tariff sheet to correct the date filed information for certain previously filed non-conforming contracts.

Northern further 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 in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E6–7551 Filed 5–17–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–353–000]

Northern Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff

May 11, 2006.

Take notice that on May 8, 2006, Northern Natural Gas Company (Northern), tendered for filing in its FERC Gas Tariff, Fifth Revised Volume No. 1, the following tariff sheets, with an effective date of June 8, 2006:

39 Revised Sheet No. 66
32 Revised Sheet No. 66A
Second Revised Sheet No. 66D

Northern states that it is filing the above-referenced tariff sheets to submit a Rate Schedule PDD service agreement for Commission acceptance as a non-conforming and negotiated rate agreement.

Northern further states that copies of the filing have been mailed to each of its customers and interested State Commissions.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E6–7552 Filed 5–17–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP06–167–000]

Questar Overthrust Pipeline Company; Notice of Application

May 11, 2006.

Take notice that on May 1, 2006, Questar Overthrust Pipeline Company (Overthrust), 180 East 100 South, Salt Lake City, Utah 84111, filed an application under section 7 of the Natural Gas Act seeking authority to expand its interstate natural-gas transmission system by constructing and operating 27.1 miles of 36-inch diameter pipeline and related facilities in Uinta and Lincoln Counties, Wyoming to transport up to 550,000 Dth/day, all as more fully set forth in the application which is on file with the Commission and open for public inspection. These filings are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at

http://www.ferc.gov using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Any questions regarding this application should be directed to Lenard G. Wright, Manager, Federal Regulatory Affairs, Questar Pipeline Company, 180 East 100 South, P.O. Box 45360, Salt Lake City, Utah 84145–0360 at (801) 324–2459, or by fax at (801) 324–5834.

On December 15, 2005, the Commission staff granted Overthrust's request to utilize the National Environmental Policy Act (NEPA) Pre-Filing Process and assigned Docket No. PF06–9–000 to staff activities involving the Overthrust's expansion project. Now, as of the filing of Overthrust's application on May 1, 2006, the NEPA Pre-Filing Process for this project has ended. From this time forward, Overthust's proceeding will be conducted in Docket No. CP06–167–000, as noted in the caption of this Notice.

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 below listed comment date, 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.

Motions to intervene, protests and 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. The Commission strongly encourages electronic filings.

Comment Date: June 1, 2006.

Magalie R. Salas,

Secretary.

[FR Doc. E6–7553 Filed 5–17–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–192–001]

Southern Natural Gas Company; Notice of Compliance Filing

May 11, 2006.

Take notice that on March 31, 2006, Southern Natural Gas Company (Southern) tendered for filing with the Commission detailed descriptions for the maintenance capital surcharge expenditures in excess of $50,000 that was included in their January 31, 2006 filing.

Southern states that the filing is being made in compliance with the March 2, 2006 order in Docket No. RP06–192–000.

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 May 18, 2006.

Magalie R. Salas,

Secretary.

[FR Doc. E6–7550 Filed 5–17–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepting for Filing and Soliciting Motions To Intervene; Protests and Comments

May 11, 2006.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 12628–000.

c. *Date Filed:* December 2, 2005.

d. *Applicant:* City of Nashua.

e. *Name of Project:* Cedar Lake Dam Project.

f. *Location:* On Cedar River, in Nashua, Chickasaw County, Iowa. The

existing dam is owned by the City of Nashua.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. David H. Skilton, City of Nashua, 402 Main Street, Nashua, Iowa 50658, (641) 435–4156.

i. *FERC Contact:* Etta Foster, (202) 502–8769.

j. *Deadline for Filing Comments, Protests, and Motions To Intervene:* 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please include the project number (P–12628–000) on any comments, protests, or motions filed.

k. *Description of Project:* The proposed project would consist of: (1) The existing City of Nashua's 18-foot-high, 258-foot-long Cedar River Dam; (2) a 2,000-foot wide, 700-acre impoundment with a storage capacity of approximately 3,500 acre feet, and a normal surface elevation of 960 feet above sea level; (3) an existing concrete and brick powerhouse which will contain four proposed generating units with a total installed capacity of 850 kW; (4) a proposed 60-foot-long, 13.8-k V transmission line; (5) a tailrace; and (6) appurtenant facilities.

The project would have an estimated annual generation of approximately 3285 MWh (Mega-Watt hours). The applicant plans to sell the generated energy.

l. *Location of Application:* A copy of the application is available for inspection and reproduction at the Commission in the Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h. above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Competing Preliminary Permit:* Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

o. *Competing Development Application:* Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

p. *Notice of Intent:* A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

q. *Proposed Scope of Studies Under Permit:* A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

r. *Comments, Protests, or Motions To Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

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 ''e-filing'' link. The Commission strongly encourages electronic filing.

s. *Filing and Service of Responsive Documents:* Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', ''MOTION TO INTERVENE'', ''NOTICE OF INTENT'', or ''COMPETING APPLICATION'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

t. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Magalie R. Salas,

Secretary.

[FR Doc. E6–7547 Filed 5–17–06; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8171–7]

Availability of FY 05 Grantee Performance Evaluation Reports for the Eight States of EPA Region 4 and Selected Local Agencies

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability of Clean Air Act, section 105 grantee performance evaluation reports.

SUMMARY: EPA's grant regulations (40 CFR 35.115) require the Agency to evaluate the performance of agencies

which receive grants. EPA's regulations for regional consistency (40 CFR 56.7) require that the Agency notify the public of the availability of the reports of such evaluations. EPA performed end-of-year evaluations of eight state air pollution control programs (Alabama Department of Environmental Management; Florida Department of Environmental Protection; Georgia Department of Natural Resources; Kentucky Environmental & Public Protection Cabinet; Mississippi Department of Environmental Quality; North Carolina Department of Environment and Natural Resources; South Carolina Department of Health and Environmental Control; and Tennessee Department of Environment and Conservation) and 12 local programs (City of Huntsville Division of Natural Resources, AL; Jefferson County Department of Health, AL; City of Jacksonville Environmental Quality Division, FL; Hillsborough County Environmental Protection Commission, FL; Miami-Dade County Air Quality Management Division, FL; Palm Beach County Health Department Division of Environmental Health, FL; Forsyth County Environmental Affairs Department, NC; Mecklenburg County Land Use and Environmental Services Agency, NC; Western North Carolina Regional Air Quality Agency, NC; Memphis-Shelby County Health Department, TN; Knox County Department of Air Quality Management, TN; and Nashville-Davidson County Metropolitan Public Health Department, TN). The 20 evaluations were conducted to assess the agencies' performance under the grants awarded by EPA under authority of section 105 of the Clean Air Act. EPA Region 4 has prepared reports for each agency identified above and these reports are now available for public inspection. The evaluations for the remainder of the local governments will be published at a later date.

ADDRESSES: The reports may be examined at the EPA's Region 4 office, 61 Forsyth Street, SW., Atlanta, Georgia 30303, in the Air, Pesticides and Toxics Management Division.

FOR FURTHER INFORMATION CONTACT: Marie Persinger (404) 562–9048 for information concerning the state agencies of Alabama and South Carolina; Miya Smith (404) 562–9091 for the state and local agencies of Florida and for the local agencies of Tennessee; Russandra Brown (404) 562–9064 for the state agencies of Mississippi and Kentucky; Mary Echols (404) 562–9053 for the state agencies of Georgia and Tennessee, and for the state and local agencies of North Carolina. They may be contacted at the above Region 4 address.

Dated: May 4, 2006.

A. Stanley Meiburg,

Deputy Regional Administrator, Region 4.

[FR Doc. E6–7574 Filed 5–17–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8171–6]

Proposed CERCLA Administrative Cost Recovery Settlement: Dayton X-Ray Company Superfund Site

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (''CERCLA''), 42 U.S.C. 9622(i), notice is hereby given of a proposed administrative Agreement for Recovery of Past Response Costs (''Agreement''), issued pursuant to section 122(h)(1) of CERCLA, concerning the Dayton X-Ray Site in Dayton, Ohio, between the United States Environmental Protection Agency (''U.S. EPA'' or ''the Agency'') and the following Settling Party: Joan Ruth Sammons.

The proposed Agreement contains a settlement between U.S. EPA and Joan Ruth Sammons for the payment of a portion of U.S. EPA's costs incurred in connection with the Dayton X-Ray Superfund Site. The Agreement requires the Settling Party to pay a total of $20,955.62 plus interest in the amount of $178.90 into the U.S. EPA Hazardous Substance Superfund. The Agreement also includes U.S. EPA's covenant not to sue the Settling Party pursuant to section 107(a) of CERCLA, 42 U.S.C. 9607(a), if Settling Party fulfills her obligations under the proposed Agreement.

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 which indicate that the Agreement is inappropriate, improper, or inadequate. The Agency's response to any comments received will be available for public inspection at the following location: Records Center, U.S. EPA, Region 5, 7th Floor, 77 W. Jackson Blvd., Chicago, IL 60604.

DATES: Comments must be submitted on or before June 19, 2006.

Background: The Dayton X-Ray Site is located at 1150 West Second Street, Dayton, Ohio. Dayton X-Ray Company operated from 1939 to 1992, as a family-owned business with its principal office and laboratory at this location. A title search revealed that Mrs. Joan Ruth Sammons owned the facility since 1970. Mrs. Sammons is the sole remaining Potentially Responsible Party and is the Settling Respondent in this proposed Agreement.

The Dayton X-Ray Company filed for bankruptcy and ceased operations in 1992. The Site was abandoned with at least several dozen 55 gallon drums and containers, which contained hazardous substances, remaining on site. Approximately 20 of these drums were outside of a building near a sidwalk, and exposed to the elements, which would lead to deterioration of the drums and release of their hazardous contents. Mrs. Sammons performed the cleanup of hazardous substances from the Site pursuant to U.S. EPA Agreement Docket No. V–W–C–637, and has already paid U.S. EPA past costs in the amount of $12,000.

Under the terms of the proposed settlement, Mrs. Joan Sammons will pay the U.S. EPA Superfund $20,955.62 in U.S. EPA's costs in overseeing a clean-up of the Site by Mrs. Joan Sammons, plus interest in the amount of $178.90, for a total payment to the Superfund of $21,134.52. In consideration of the work performed, past costs already paid, and monies to be paid the Superfund pursuant to this proposed Agreement, U.S. EPA will forgive those Past Response Costs not collected pursuant to this Agreement. This settlement between U.S. EPA and Mrs. Sammons will resolve all outstanding costs of U.S. EPA incurred in connection with the Dayton X-Ray Site.

Comments should reference the Dayton X-Ray Company Superfund Site, Dayton, Ohio and U.S. EPA Docket No. V–W–060C–846, and should be addressed to: Jerome Kujawa, Associate Regional Counsel, 77 West Jackson Blvd., Mail Code C–14J, Chicago, Illinois 60604. Copies of the proposed Agreement may be obtained from Jerome Kujawa at (312) 886–6731 or e-mail at *kujawa.jerome@epa.gov.*

FOR FURTHER INFORMATION CONTACT: Jerome Kujawa, Associate Regional Counsel, 77 West Jackson Blvd., Mail Code C–14J, Chicago, Illinois 60604, (312) 886–6731 or e-mail Mr. Kujawa at *kujawa.jerome@epa.gov.*

Dated: May 4, 2006.

Eric J. Cohen,

Acting Regional Counsel.

[FR Doc. E6–7575 Filed 5–17–06; 8:45 am]

BILLING CODE 6560–50–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Equal Employment Opportunity Commission.

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 71 FR 27250, Wednesday, May 10, 2006.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: Wednesday, May 17, 2006, 10 a.m. (Eastern Time).

CHANGE IN THE MEETING: The meeting has been cancelled.

FOR FURTHER INFORMATION CONTACT: Stephen Llewellyn, Acting Executive Officer on (202) 663–4070.

This notice issued May 16, 2006.

Stephen Llewellyn,

Acting Executive Officer, Executive Secretariat.

[FR Doc. 06–4697 Filed 5–16–06; 2:10 pm]

BILLING CODE 6570–06–M

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget

May 9, 2006.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a current valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before June 19, 2006. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., Washington, DC 20554 or an e-mail to *PRA@fcc.gov.* If you would like to obtain or view a copy of this information collection, you may do so by visiting the FCC PRA Web page at: *http://www.fcc.gov/omd/pra.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0910.

Title: Third Report and Order in CC Docket No. 94–102 To Ensure Compatibility with Enhanced 911 Emergency Calling Systems.

Form No.: N/A.

Type of Review: Revision of a currently approved collection.

Repondents: Business or other for-profit, not-for-profit institutions, and State, local or tribal government.

Number of Respondents: 4,000.

Estimated Time per Response: 1 hour.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 4,000 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Needs and Uses: The Commission is submitting this information collection to OMB as a revision in order to obtain the full three-year clearance from them. The previous PRA submission to OMB were based on two filings—an initial report of each carrier's plan for E911 Phase II and any subsequent report of change in that plan. Each report was expected to take one hour to complete. The initial reports were filed in 2000, so that the only remaining reporting requirement under this OMB control number is updates or changes in the plans filed by carriers. The information submitted to the Commission will provide public service answering points (PSAPs), providers of location technology, investors, manufacturers, local exchange carriers, and the Commission with valuable information necessary for preparing for full Phase II E911 implementation. These reports will provide helpful, if not essential information, for coordinating carrier plans with those of manufacturers and PSAPs. Also, they will assist the Commission's efforts to monitor Phase II developments and to take necessary actions to maintain the Phase II developments and to take necessary actions to maintain the Phase II implementation schedule.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 06–4663 Filed 5–17–06; 8:45 am]

BILLING CODE 6712–01–M

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget

May 5, 2006.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before June 19, 2006. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of

time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., DC 20554 or an e-mail to *PRA@fcc.gov.* If you would like to obtain or view a copy of this information collection, you may do so by visiting the FCC PRA Web page at: *http://www.fcc.gov/omd/pra.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0690.

Title: Section 101.17, Performance Requirements for the 38.6–40.0 GHz Frequency Band.

Form No.: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions, Federal government, and state, local or tribal government.

Number of Respondents: 195.

Estimated Time Per Response: 2 hours.

Frequency of Response: Every 10 year reporting requirement.

Total Annual Burden: 390 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Needs and Uses: The Commission is submitting this information collection to OMB as a revision in order to obtain the full three-year clearance from them. The Commission revised this collection by eliminating FCC Forms 415/415T. Those reporting requirements have been incorporated into FCC Form 601 under OMB Control Number 3060–0798. The Commission also removed Section 101.103 because it is approved under a separate OMB Control Number 3060–1023. The only remaining rule section in this information collection is Section 101.17.

Section 101.17 requires all 38.6–40.0 GHz band licensees must demonstrate substantial service at the time of license renewal. A licensee's substantial service showing should include, but not be limited to, the following information for each channel for which they hold a license, in each EA or portion of EA covered by their license, in order to qualify for renewal of that license. The information provided will be judged by the Commission to determine whether the licensee is providing service which rises to the level of ''substantial''. (1) A description of the 38.6–40.0 GHz band licensee's current service in terms of geographic coverage; (2) a description of the 38.6–40.0 GHz band licensee's current service in terms of population served, as well as any additional service provided during the license term; and (3) a description of the 38.6–40.0 GHz band licensee's investments in its system(s) (type of facilities constructed and their operational status is required). Any 38.6–40.0 GHz band licensees adjudged not to be providing substantial service will not have their licenses renewed.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E6–7588 Filed 5–17–06; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than June 2, 2006.

A. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480-0291:

1. The John S. Braun Revocable Trust; Priciscilla W. Braun Revocable Trust (collectively, Trusts); John Stephen Braun and Priscilla White Braun as trustees of the Trusts, all of Deephaven, Minnesota; Stephen John Braun, Minnetonka, Minnesota; Philip McAllister Braun, Richardson, Texas; and Elizabeth Braun Fransen, Wayzata, Minnesota, as a group acting in concert; and Dean Alvin Holasek, Eden Prairie, Minnesota, as an individual, to acquire voting shares of Community Bank Group, Inc., Eden Prairie, Minnesota, and thereby indirectly acquire Community Bank Minnesota Valley, Wayzata, Minnesota and Community Bank Winsted, Winsted, Minnesota.

Board of Governors of the Federal Reserve System, May 15, 2006.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E6–7576 Filed 5–17–06; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center Web site at *http://www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than June 12, 2006.

A. Federal Reserve Bank of Chicago (Patrick M. Wilder, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. Capitol Bancorp, Ltd.,, Lansing, Michigan, and Capitol Development Bancorp, Limited V, Lansing, Michigan; to acquire 51 percent of the voting shares of Bank of Everett (in organization), Everett, Washington.

In connection with this application, Capitol Development Bancorp Limited

V, has applied to become a bank holding company.

B. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. First National Bank Group, Inc.,, Edinberg, Texas; to acquire 9.90 percent of Southside Bancshares, Inc., Tyler, Texas, and indirectly acquire Southside Delaware Financial Corporation, Dover, Delaware, and Southside Bank, Tyler, Texas.

C. Federal Reserve Bank of San Francisco (Tracy Basinger, Director, Regional and Community Bank Group) 101 Market Street, San Francisco, California 94105-1579:

1. Silver State Bancorp, Henderson, Nevada; to acquire 100 percent of the voting shares of Choice Bank, Scottsdale, Arizona.

Board of Governors of the Federal Reserve System, May 12, 2006.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E6–7499 Filed 5–17–06; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center Web site at *http://www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than June 12, 2006.

A. Federal Reserve Bank of Boston (Richard Walker, Community Affairs Officer) P.O. Box 55882, Boston, Massachusetts 02106-2204:

1. Coastal Affiliates, MHC, , Yarmouth Port, Massachusetts; to become a bank holding company by acquiring Cape Cod Co-operative Bank, Yarmouth Port, Massachusetts.

B. Federal Reserve Bank of Chicago (Patrick M. Wilder, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. Kujawa Family Holdings, Inc., Berlin, Wisconsin; to become a bank holding company by acquiring 100 percent of the voting shares of Farmers & Merchants Bank, Berlin, Wisconsin.

2. RAC Inc., Kohler, Wisconsin; to become a bank holding company by acquiring 100 percent of the voting shares of Ridgestone Financial Services, Inc., Brookfield, Wisconsin, and thereby indirectly acquire Ridgestone Bank, Brookfield, Wisconsin.

C. Federal Reserve Bank of St. Louis (Glenda Wilson, Community Affairs Officer) 411 Locust Street, St. Louis, Missouri 63166-2034:

1. F &M Bancshares, Inc., Trezevant, Tennessee; to acquire 100 percent of the voting shares of Citizens City & County Bank, Trenton, Tennessee.

D. Federal Reserve Bank of Kansas City (Donna J. Ward, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198-0001:

1. Emprise Financial Corporation, Wichita, Kansas; to acquire 100 percent of the voting shares of Prairie Capital, Inc., and thereby indirectly acquire Prairie State Bank, both in Augusta, Kansas.

Board of Governors of the Federal Reserve System, May 15, 2006.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E6–7577 Filed 5–17–06; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

[Docket No. 9318]

Basic Research LLC, *et al.*; Analysis of Agreement Containing Consent Order To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of Federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before June 12, 2006.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to ''Basic Research LLC, Docket No. 9318,'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room 135–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments containing confidential material must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with Commission Rule 4.9(c). 16 CFR 4.9(c) (2005).[1] The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments that do not contain any nonpublic information may instead be filed in electronic form as part of or as an attachment to e-mail messages directed to the following e-mail box: *consentagreement@ftc.gov.*

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov.* As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

FOR FURTHER INFORMATION CONTACT: Laureen Kapin (202–326–3237), Bureau of Consumer Protection, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 3.25(f) of the Commission Rules of Practice, 16 CFR 3.25(f), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for May 11, 2006), on the World Wide Web, at *http://www.ftc.gov/os/2006/05/index.htm.* A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before the date specified in the **DATES** section.

Analysis of Agreement Containing Consent Order To Aid Public Comment

The Federal Trade Commission (''Commission '') has accepted an agreement containing a consent order, subject to final approval, with Basic Research L.L.C. (''Basic Research'') and five other limited liability companies (''Corporate Respondents''), as well as with Dennis Gay, Daniel Mowrey, and Mitchell Friedlander (''Individual Respondents''), all of whom were named as Respondents in the Complaint issued by the Commission on June 15, 2004.

The agreement and consent order settle charges that the Corporate Respondents and the Individual Respondents (together ''Respondents'') violated sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. 45 and 52, by advertising and selling dietary supplements and drugs with unsubstantiated claims for fat loss and/or weight loss, falsely representing that some of these products were clinically proven to be effective, and falsely representing that Respondent Mowrey was a medical doctor. On February 27, 2006, the case was withdrawn from adjudication, so that the Commission could consider the proposed consent order.

The proposed consent order has been placed on the public record for thirty (30) days to receive comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the agreement and any comments received, and decide whether to withdraw from the agreement or to make final the proposed order.

The purpose of this analysis is to facilitate comment on the proposed consent order. This analysis does not constitute an official interpretation of the agreement and proposed order and does not modify their terms in any way.

The Complaint Allegations

According to the Commission's Complaint, Individual Respondents Dennis Gay, Daniel Mowrey (also doing business as American Phytotheraphy Research Laboratory), and Mitchell K. Friedlander all worked from the same Salt Lake City, Utah facility as Corporate Respondents Basic Research, L.L.C., A.G. Waterhouse, L.L.C., Klein-Becker usa, L.L.C., Nutrasport, L.L.C., Sovage Dermalogic Laboratories, L.L.C., and BAN, L.L.C., who have operated as a common enterprise to advertise and sell a broad line of topical gels and dietary supplements.

The Commission's Complaint alleges that these Respondents engaged in deceptive practices in advertising and selling topical fat-loss gels (Dermalin-APg, Cutting Gel, and Tummy Flattening Gel), weight-loss and fat-loss dietary supplements for ''significantly overweight'' adults containing ephedrine, caffeine and aspirin (Anorex and Leptoprin), and a weight-loss dietary supplement for children containing glucomannan (PediaLean). Specifically, the Commission's Complaint challenges the following claims as unsubstantiated:

- That Dermalin-APg, Cutting Gel, and Tummy Flattening Gel cause rapid and visibly obvious fat loss in areas of the body to which they are applied;
- That Leptoprin and Anorex cause weight loss of more than 20 pounds in significantly overweight users and that those products cause loss of substantial, excess fat in significantly overweight users; and
- That PediaLean causes substantial weight loss in overweight or obese children. Additionally, the Complaint challenges the following claims as false:
- That published, clinical testing proves that Cutting Gel and Tummy Flattening Gel cause rapid and visibly obvious fat loss in areas of the body to which they are applied;
- That clinical testing proves that Leptoprin causes weight loss of more than 20 pounds, including as much as 50, 60, or 147 pounds, in significantly overweight users; and that clinical testing proves that Leptoprin causes loss of substantial, excess fat in significantly overweight users;
- That clinical testing proves that PediaLean causes substantial weight loss in overweight or obese children; and
- That Respondent Mowrey is a medical doctor.

The Proposed Consent Order

The proposed consent order contains provisions designed to prevent Respondents from continuing the illegal conduct alleged in the Complaint, and from engaging in future practices similar to those previously alleged. The proposed order's specific provisions are as follows:

The core prohibitions appear in Paragraphs I through IV. Paragraph I prohibits Respondents from making any unsubstantiated representations that Dermalin-APg, Cutting Gel, Tummy Flattening Gel, Anorex, Leptoprin, PediaLean, or any substantially similar product, cause weight loss or fat loss. At the time that any Respondents make weight loss or fat loss claims for any of those products, Respondents must possess and rely upon a reasonable basis for such claims, which shall consist of competent and reliable scientific evidence.

Paragraph II of the proposed order prohibits Respondents from making any unsubstantiated representations that any food, drug, or dietary supplement has an effect on any disease, on the structure or function of the human body, or other health benefits or weight loss benefits. At the time that any Respondents make any such claims, Respondents must possess and rely upon a reasonable basis for those claims, which shall consist of competent and reliable scientific evidence.

The proposed consent order also prohibits the Respondents from making misrepresentations concerning any test, study, or research (Paragraph III of the proposed order), or concerning the profession, expertise, training, education, experience or qualifications of Respondent Mowrey or any other endorser (Paragraph IV of the proposed order).

As defined in the proposed order, ''competent and reliable scientific evidence'' means tests, analyses, research, studies, or other evidence, based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results. A ''substantially similar product'' means any product that is substantially similar in ingredients, composition, and properties to any of the six products challenged in the Complaint.

Paragraph V provides that Basic Research will pay the sum of three million dollars ($3,000,000), on behalf of all Respondents, to the Commission. In the discretion of the Commission, these funds may be used to provide redress to purchasers of any of the products challenged in the Complaint and to pay the attendant administrative costs. If the Commission determines, in its sole discretion, that redress to product purchasers is wholly or partially impracticable or is otherwise unwarranted, any funds not used will be paid to the U.S. Treasury.

The proposed order allows Respondents to engage in various forms of legitimate conduct. The order does not prohibit Respondents from making any claim for any drug that is permitted in labeling for that drug under any tentative final or final standard established by the Food and Drug Administration (''FDA''), or under any new drug application approved by the FDA (Paragraph VI of the proposed order). The order also does not prohibit Respondents from making any claim for any product that is specifically permitted in labeling for that product under FDA regulations made under the Nutrition Labeling and Education Act of 1990 (Paragraph VII of the proposed order).

Additionally, Paragraphs VIII, IX, X, and XI provide for various compliance reports and notifications by the Respondents. Paragraph XII obligates the Respondents to cooperate in certain ways with any Commission inquiry into their compliance with the order. The proposed order will expire in 20 years.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. E6–7533 Filed 5–17–06; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–06–06BG]

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 404–639–5960 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

Longitudinal Follow-up of Youth with Attention-Deficit/Hyperactivity Disorder (ADHD) Identified in Community Settings: Examining Health Status, Correlates, and Effects Associated with Treatment for ADHD—New—National Center on Birth Defects and Developmental Disabilities (NCBDDD), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

This project will collect data from proxy respondents and youths with and without Attention-Deficit/Hyperactivity Disorder (ADHD). This program addresses the Healthy People 2010 focus area of Mental Health and Mental Disorders, and describes the prevalence, incidence, long-term outcomes, treatment(s), select co-morbid conditions, secondary conditions, and health risk behavior of youth with ADHD relative to youth without ADHD.

In FY 2002–FY 2005 two cooperative agreements (transitioned to extramural research) were awarded to conduct community-based epidemiological research on ADHD among elementary-aged youth, known as the Project to Learn about ADHD in Youth (PLAY Study Collaborative, OMB# 0920–0584, expired on March 31, 2006). These studies provided community-based prevalence, rates of co-morbidity, and rates of health risk behaviors among elementary-age youth with and without ADHD as determined by a rigorous case definition developed by the principal investigators in collaboration with CDC scientists.

The purpose of this program is to study the long-term outcomes and health status for children with ADHD identified and treated in community settings through a systematic follow-up of the subjects who participated in the PLAY Study Collaborative. There is considerable interest in the long-term outcomes of youth with ADHD as well as the effects of treatment, lack of treatment, and quality of care in average U.S. communities, emphasizing the public health importance of longitudinal research in this area. There are no costs to the respondents other than their time.

Estimated Annualized Burden Hours

Respondents	No. of respondents	No. of responses per respondent	Average burden per response (in hrs.)	Total burden hours
Health Risk Behavior Survey (Parent Report)	980	1	10/60	163
Health Risk Behavior Survey (Youth Report)	980	1	10/60	163
Demographics and Family History Survey (Parent)	980	1	15/60	245
Treatment and Services Survey	980	1	10/60	163

Respondents	No. of respondents	No. of responses per respondent	Average burden per response (in hrs.)	Total burden hours
Total				734

Dated: May 11, 2006.

Joan F. Karr,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E6–7562 Filed 5–17–06; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day-06–0199]

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 404–639–5960 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

Importation of Etiologic Agents, Hosts, and Vectors of Human Disease (42 CFR 71.54)—(OMB Control No. 0920–0199)—Revision—Office of the Director (OD), Centers for Disease Control (CDC).

Background and Brief Description

The Foreign Quarantine Regulations (42 CFR part 71) set forth provisions to prevent the introduction, transmission, and spread of communicable disease from foreign countries into the United States. Subpart F—Importations—contains provisions for importation of etiologic agents, hosts, and vectors (42 CFR 71.54), requiring persons that import or distribute after importing these materials to obtain a permit issued by the CDC. This request is for the information collection requirements contained in 42 CFR 71.54 for issuance of permits by CDC to importers or distributors after importation of etiologic agents, hosts, or vectors of human disease.

CDC is requesting continued OMB approval to collect this information through the use of two separate forms. These forms are: (1) Application for Permit to Import or Transport Etiologic Agents, Hosts, or Vectors of Human Disease and (2) Application for Permit to Import or Transport Live Bats.

The Application for Permit to Import or Transport Etiologic Agents, Hosts, or Vectors of Human Disease will be used by laboratory facilities, such as those operated by government agencies, universities, research institutions, and zoologic exhibitions, and also by importers of nonhuman primate trophy materials, such as hunters or taxidermists, to request permits for the importation and subsequent distribution after importation of etiologic agents, hosts, or vectors of human disease. The Application for Permit to Import or Transport Etiologic Agents, Hosts, or Vectors of Human Disease requests applicant and sender contact information; description of material for importation; facility isolation and containment information; and personnel qualifications.

The Application for Permit to Import or Transport Live Bats will be used by laboratory facilities such as those operated by government agencies, universities, research institutions, and zoologic exhibitions entities to request importation and subsequent distribution after importation of live bats. The Application for Permit to Import or Transport Live Bats requests applicant and sender contact information; a description and intended use of bats to be imported; facility isolation and containment information; and personnel qualifications. Estimated average time to complete this form is 20 minutes. There are no costs to respondents other than their time.

Estimated Annualized Burden Hours

CFR section	Number of respondents	Responses per respondent	Avg. burden response (in hours)	Total burden hours
71.54 Application for Permit	2,300	1	20/60	767

Dated: May 11, 2006.

Joan F. Karr,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E6–7563 Filed 5–17–06; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: The Office of Community Services (OCS) Evaluation Initiative.

OMB No.: New Collection.

Description: This questionnaire is part of a contract that addresses evaluation strategies for three programs administered by OCS: Community Economic Development (CED), Rural Community Facilities (RF), and Job Opportunities for Low-Income Individuals (JOLI). The legislative requirement for two of these programs, *i.e.,* the RF and CED programs, is in Title IV of the Community Opportunities, Accountability, and Training and Educational Services Act (COATS Human Services Reauthorization Act) of Oct. 27, 1998, Public Law 105–285, sec. 680(b) as amended. This legislative directive states that ''The Secretary shall require all activities receiving assistance under this section to be evaluated for their effectiveness. Funding for such evaluations shall be provided as a stated percentage of the assistance or through a separate grant awarded by the Secretary specifically for the purpose of evaluation of a particular activity or group of activities.''

Under Title V, section 505, of the Family Support Act of 1988, Public Law 100–485, sec. 505(f), JOLI was initially a demonstration program that required local evaluations of each project. When JOLI was reauthorized in 1996 (Public Law 104–193—August 22, 1996), it no longer had demonstration status and evaluation requirements. As a result, a formal evaluation for the JOLI program has not been conducted since the 1996 Public Law reauthorization. At this time, OCS is interested in a formal evaluation to assess the JOLI program.

OCS has chosen to evaluate all three of these programs through a separate contract awarded by the Secretary using the Office of Management and Budget's (OMB) Performance Assessment Rating Tool (PART) in order to critically review the overall design and effectiveness of each program in its totality. The evaluation initiative contract provides the central office with the mechanism to ensure that all programs evaluated will have consistent data that is in agreement with the direction of OMB and provides the Secretary with information on program efficiency and effectiveness.

The evaluation survey's primary purpose is to document and systematically evaluate the program performance of three OCS discretionary grant programs in qualitative and quantitative terms. Thus it will assess each of the three OCS discretionary grant programs—CED, RF, and JOLI—using qualitative and quantitative evaluation methods that capture key information about program and grantee-level performance in four general areas: (1) Program purpose and design; (2) strategic planning; (3) program management; and (4) program results. The evaluation activities will build on the initial year's findings and methods, with the goal of expanding data collection and analysis to improve the validity and generalizability of findings.

The questionnaire will be administered online.

Respondents: Active CED and JOLI grantees with grants awarded from 2001 through 2004.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Questionnaire for OCS–CED and JOLI Grantees in the U.S.	172	1	1.5	258
Estimated Total Annual Burden Hours				258

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *infocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Attn: Desk Officer for ACF, E-mail address: *Katherine_T._Astrich@omb.eop.gov.*

Dated: May 11, 2006.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 06–4632 Filed 5–17–06; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: Multi-site Evaluation of Foster Youth Programs.

OMB No. 0970–0253.

Description: The Administration for Children and Families (ACF) within the Department of Health and Human Services (HHS) is requesting comments on plans to continue data collection for the Evaluation of Independent Living Programs funded under the Chafee Foster Care Independence Program. The Foster Care Independence Act of 1999 (Pub. L. 106–169) mandates evaluations of promising independent living programs administered by State and local child welfare agencies. ACF is conducting an evaluation of four independent living programs using a randomized experimental design. Youth aged 14–21 receiving independent living program services are interviewed at three points during the evaluation period. Program administrators, staff, and youth participate in interviews, observations, and focus groups conducted during program site visits.

In addition, ACF is requesting comments on plans to begin data collection and conduct an evaluation of a fifth independent living program using a randomized experimental design. Youth aged 18–21 will be interviewed at three points during the evaluation period. Program administrators, staff, and youth will participate in interviews, observations, and focus groups conducted during the program site visits.

Respondents: Youth, caseworkers, program administrators, and staff.

ANNUAL BURDEN ESTIMATE

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Ongoing Study Sites				
Baseline:				
Youth interview	98	1	1.5	147
Caseworker survey	4	19	.5	38
First Follow Up:				
Your interview	177	1	1.5	266
Caseworker survey	4	36	.5	72
Program Site visit	50	1	1.5	75
Second Follow Up:				
Youth interview	370	1	1.5	555
New (5th) Study Site				
Baseline:				
Youth interview	250	1	1.5	375
Program site visit	80	1	1.5	120
First Follow Up:				
Youth interview	213	1	1.5	320
Program site visit	50	1	1.5	75
Second Follow Up:				
Youth interview	200	1	1.5	300

Estimated Total Burden Hours: 2,343.

Estimated Annual Burden Hours (average over three years): 781.

In compliance with the requirements of seciton 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above.

Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *infocollection@acf.hhs.gov*. All requests should be identified by the title of the information collection.

The Department specifically requests comments 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) 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. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: May 11, 2006.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 06–4633 Filed 5–17–06; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Title: Needs Assessment for Promoting Cultural Competence and Diversity in Youth Mentoring Programs Toolkit.

OMB No. New Collection.

Description: The Department of Health and Human Services' (HHS) Mentoring Children of Prisoners (MCP) program, administered under the Family Youth Services Bureau (FYSB) within the Administration for Children and Families (ACF), was authorized by the Promoting Safe and Stable Families Act of 2001 (SSFA, Pub. L. 107–133). The MCP program is designed to nurture children who have one or both parents incarcerated. The Secretary of HHS is mandated to appropriate funds for the MCP grant program, specifically for evaluation, research, training, and technical assistance. In FY 2004, grantees began submitting progress reports to HHS.

FYSB will conduct an assessment of the mentoring community to identify and assess needs for the purpose of building a toolkit of practical information and tools to assist mentoring programs in promoting cultural competence and diversity in their programs. The toolkit modules address recruiting minority mentors, assessing and matching mentors and mentees, training, educating program staff and participants, and promoting ethnic identity development.

Respondents: Mentoring Children of Prisoners grantees and National Mentoring Partnership (MENTOR) affiliated mentoring organizations.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Mentoring ToolKit Web-based Needs Assessment Questionnaire	442	1	.75	332
Mentoring ToolKit Web-based focus group	40	1	1	40
Mentoring ToolKit Web-based Feedback Questionnaire	100	1	.25	25
Estimated Total Annual Burden Hours				397

In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *infocollection@ach.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (1) 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) 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. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: May 12, 2006.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 06–4634 Filed 5–17–06; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: National Child Abuse and Neglect Data System.

OMB No.: 0980–0229.

Description: The Child Abuse and Neglect Treatment Act (42 U.S.C. 5101 *et seq.*) as amended requires States ''to annually work with the Secretary to provide to the maximum extent practical, a report'' that includes 12 data items listed in the statute. The National Child Abuse and Neglect Data System (NCANDS), administered by the Children's Bureau, meets this reporting requirement. In addition, the amendments of 1988 require that the data system ''shall be universal and case specific and integrated with other case-based foster care and adoption data collected by the Secretary.'' There are two data components, the Detailed Case Data Component (DCDC), which includes the case-level data submitted through the Child File and some aggregated data submitted through the Agency File, and the Summary Data component (SC), which is used by States that cannot submit case-level data. No changes are being requested. The Summary Data Component will be phased out over the next few years as the number of States that can complete the Child File increases.

Respondents: State Child Welfare Agencies.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
DCDC (includes the Child File and the Agency File)	49	1	108.6	5,321
Summary Data Component	3	1	32	96
Estimated Total Annual Burden Hours				5,417

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *infocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Attn: Desk Officer for ACF, E-mail address: *Katherine_T._Astrich@omb.eop.gov.*

Dated: May 11, 2006.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 06–4635 Filed 5–17–06; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: The Office of Community Services (OCS) Evaluation Initiative.

OMB No.: New Collection.

Description: This questionnaire is part of a contract that addresses evaluation strategies for three programs administered by OCS: Community Economic Development (CED), Rural Community Facilities (RF), and Job Opportunities for Low-Income Individuals (JOLI). The legislative requirement for two of these programs, *i.e.,* the RF and CED programs, is in Title IV of the Community Opportunities, Accountability, and Training and Educational Services Act (COATS Human Services Reauthorization Act) of Oct. 27, 1998, Pub. L. 105–285, sec. 680(b) as amended. This legislative directive states that ''The Secretary shall require all activities receiving assistance under this section to be evaluated for their effectiveness. Funding for such evaluations shall be provided as a stated percentage of the assistance or through a separate grant awarded by the Secretary specifically for the purposes of evaluation of a particular activity or group of activities.''

Under Title V, Section 505, of the Family Support Act of 1988, Public Law 100–485, sec. 505(f), JOLI was initially a demonstration program that required local evaluations of each project. When JOLI was reauthorized in 1996 (Pub. L. 104–193—Aug. 22, 1996), it no longer had demonstration status and evaluation requirements. As a result, a formal evaluation for the JOLI program has not been conducted since the 1996 Public Law reauthorization. At this time, OCS is interested in a formal evaluation to assess the JOLI program.

OCS has chosen to evaluate all three of these programs through a separate contract awarded by the Secretary using the Office of Management and Budget's (OMB) Performance Assessment Rating Tool (PART) in order to critically review the overall design and effectiveness of each program in its totality. The evaluation initiative contract provides the central office with the mechanism to ensure that all programs evaluated will have consistent data that is in agreement with the direction of OMB and provides the Secretary with information on program efficiency and effectiveness.

The evaluation survey's primary purpose is to document and systematically evaluate the program performance of these OCS discretionary grants programs in qualitative and quantitative terms. Thus it will assess each of the three OCS discretionary grants programs—CED, RF and JOLI—using qualitative and quantitative evaluation methods that capture key information about program and grantee-level performance in four general areas: (1) Program purpose and design; (2) strategic planning; (3) program management; and (4) program results. The evaluation activities will build on the initial year's findings and methods, with the goal of expanding data collection and analysis to improve the validity and generalizability of findings.

The questions will be administered online.

Respondents: Active CED and JOLI grantees with grants awarded from 2001 through 2004.

ANNUAL BURDEN ESTIMATES

Instruments	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Questionnaire from OCS–CED and JOLI Grantees in the U.S.	172	1	1.5	258
Estimated Total Annual Burden Hours				258

Additional Information: Copies of the proposed collection may be obtained from writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *infocollection@acf.hhs.gov.*

OMB is required to make a decison concerning the collection of information between 30 and 760 days after pubication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30-days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Attn: Desk Officer for ACF, *E-mail address: Katherine_T._Astrich@omb.eop.gov.*

Dated: May 12, 2006.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 06–4636 Filed 5–17–06; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003D–0379] (formerly Docket No. 03D–0379)

Guidance for Industry: Preparing a Claim of Categorical Exclusion or an Environmental Assessment for Submission to the Center for Food Safety and Applied Nutrition; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance document entitled ''Guidance for Industry: Preparing a Claim of Categorical Exclusion or an Environmental Assessment for Submission to the Center for Food Safety and Applied Nutrition'' (the guidance). This guidance provides information to industry on how to prepare a claim of categorical exclusion or an environmental assessment (EA) for submission to the Center for Food Safety and Applied Nutrition (CFSAN) in notifications for food contact substances, food additive petitions, color additive petitions, requests for exemption from regulation as a food additive, generally recognized as safe (GRAS) petitions, and petitions for certain food labeling regulations.

DATES: This guidance document is final upon the date of publication. Submit written or electronic comments concerning this guidance document at any time.

ADDRESSES: Submit written requests for single copies of the guidance document to the Office of Food Additive Safety (HFS–265), Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740. Include a self-addressed adhesive label to assist that office in processing your request. 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*. To ensure a timelier processing of comments, FDA is no longer accepting comments submitted to the agency by e-mail. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Layla I. Batarseh, Center for Food Safety and Applied Nutrition (HFS–246), 5100 Paint Branch Pkwy., College Park, MD, 20740–3835, 301–436–1296, FAX 301–436–2973, or e-mail: *layla.batarseh@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

As an integral part of its decision-making process, FDA is obligated under the National Environmental Policy Act of 1969 (NEPA) to consider the environmental impact of its actions, including allowing notifications for food contact substances to become effective and approving food additive petitions, color additive petitions, GRAS affirmation petitions, requests for exemption from regulation as a food additive, and actions on certain food labeling citizen petitions, nutrient content claims petitions, and health claims petitions. In 1997, FDA amended its regulations in 21 CFR part 25 to provide for categorical exclusions for additional classes of actions that do not individually or cumulatively have a significant effect on the human environment (62 FR 40570, July 29, 1997). As a result of that rulemaking, FDA no longer routinely requires submission of information about the manufacturing and production of FDA-regulated articles. FDA also has eliminated the previously required EA and abbreviated EA formats from the amended regulations. Instead, FDA is providing this guidance that contains sample formats to help industry submit a claim of categorical exclusion or an EA to CFSAN. This guidance document identifies, interprets, and clarifies existing requirements imposed by statute and regulation, consistent with the Council on Environmental Quality regulations (40 CFR 1507.3). It consists of recommendations that do not themselves create requirements; rather, they are explanatory guidance for FDA's own procedures in order to ensure full compliance with the purposes and provisions of NEPA.

This guidance provides information to assist in the preparation of claims of categorical exclusion and EAs for submission to CFSAN. The following topics are covered in this guidance: (1) What types of industry-initiated actions are subject to a claim of categorical exclusion, (2) What must a claim of categorical exclusion include by regulation, (3) What is an EA, (4) When is an EA required by regulation and what format should be used, (5) What are extraordinary circumstances, and (6) What suggestions does CFSAN have for preparing an EA? Although CFSAN encourages industry to use the EA formats described in this guidance because standardized documentation submitted by industry increases the efficiency of the review process, alternative approaches may be used if these approaches satisfy the requirements of the applicable statutes and regulations.

In the **Federal Register** of September 17, 2003 (68 FR 54462), FDA announced the availability of a draft guidance document entitled ''Guidance for Industry: Preparing a Claim of Categorical Exclusion or an Environmental Assessment for Submission to the Center for Food Safety and Applied Nutrition.'' The agency solicited public comments on the draft guidance document. FDA did not receive any comments and is finalizing the draft guidance without revision, except for those revisions necessary to update certain contact information.

FDA is issuing this guidance document as a level 1 guidance consistent with FDA's good guidance practices regulation (21 CFR 10.115). This guidance document represents FDA's current thinking on the preparation of a claim of categorical exclusion or an EA for submission to CFSAN. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. You may use an alternative approach if such approach satisfies the requirements of the applicable statutes and regulations. If you want to discuss an alternative approach, contact the FDA staff responsible for implementing this guidance (see **FOR FURTHER INFORMATION CONTACT**).

II. Paperwork Reduction Act of 1995

This guidance contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collection of information in this guidance was approved under OMB control number 0910–0541.

III. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this guidance at any time. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The guidance document and received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

IV. Electronic Access

Persons with access to the Internet may obtain the guidance document at *http://www.cfsan.fda.gov/guidance.html*.

Dated: May 10, 2006.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. E6–7528 Filed 5–17–06; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG-2006-24700]

Chemical Transportation Advisory Committee; Vacancies

AGENCY: Coast Guard, DHS.

ACTION: Request for applications.

SUMMARY: The Coast Guard is seeking applications for appointment to membership on the Chemical Transportation Advisory Committee (CTAC). CTAC provides advice and makes recommendations to the Coast Guard on matters relating to the safe and secure transportation and handling of hazardous materials in bulk on U.S.-flag vessels in U.S. ports and waterways.

DATES: Application forms should reach the Coast Guard on or before September 29, 2006.

ADDRESSES: You may request an application form by writing to

Commandant (G-PSO-3), U.S. Coast Guard, 2100 Second Street SW., Washington, DC 20593-0001; by calling (202) 372-1425/1422; or by faxing (202) 372-1926. Submit application forms to the same address. This notice and the application form are available on the Internet at http://dms.dot.gov. The application form is also available at http://www.uscg.mil/hq/g-m/advisory/ctac/ctac.htm.

FOR FURTHER INFORMATION CONTACT: Commander Robert J. Hennessy, Executive Director of CTAC, or Ms. Sara S. Ju, Assistant to the Executive Director, telephone (202) 372-1425/1422, fax (202) 372-1926.

SUPPLEMENTARY INFORMATION: The Chemical Transportation Advisory Committee (CTAC) is an advisory committee constituted under the Federal Advisory Committee Act, 5 U.S.C. App. 2. It provides advice and makes recommendations to the Commandant through the Assistant Commandant for Prevention on matters relating to the safe and secure transportation and handling of hazardous materials in bulk on U.S.-flag vessels in U.S. ports and waterways. The advice and recommendations of CTAC also assist the U.S. Coast Guard in formulating the position of the United States on hazardous material transportation issues prior to meetings of the International Maritime Organization.

CTAC meets at least once a year, usually twice a year, at Coast Guard Headquarters in Washington, DC, or in another location. CTAC's subcommittees and working groups may meet to perform specific assignments as required.

The Coast Guard will consider applications for seven positions that expire on December 31, 2006. To be eligible, applicants should have the following experience associated with marine chemical transportation: Chemical manufacturing, vessel design and construction, safety and security, marine environmental protection, or marine handling or transportation of chemicals. Each member serves for a term of 3 years. Some members may serve consecutive terms. All members serve at their own expense, and receive no salary, reimbursement of travel expenses, or other compensation from the Federal Government.

In support of the policy of the Department of Homeland Security on gender and ethnic diversity, the Coast Guard encourages applications from qualified women and members of minority groups.

Dated: May 4, 2006.

Howard L. Hime,

Acting Director of Standards, Assistant Commandant for Prevention.

[FR Doc. E6–7518 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Agency Information Collection Activities: Lien Notice

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Proposed collection; comments requested.

SUMMARY: The Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995: Lien Notice. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with a change to the burden hours. This document is published to obtain comments form the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (71 FR 12388) on March 10, 2006, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before June 19, 2006.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget Desk Officer at *Nathan.Lesser@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: The Bureau of Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the Proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of The proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections 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, e.g., permitting electronic submission of responses.

Title: Lien Notice.

OMB Number: 1651–0012.

Form Number: Form 3485.

Abstract: The Lien Notice, CBP Form–3485, enable the carriers, cartmen, and similar businesses to notify CBP that a lien exists against an individual/business for non-payment of freight charges, etc., so that CBP will not permit delivery of the merchandise from public stores or a bonded warehouse until the lien is satisfied or discharged.

Current Actions: This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Businesses, Institutions.

Estimated Number of Respondents: 112,000.

Estimated Time Per Respondent: 5 minutes.

Estimated Total Annual Burden Hours: 9,296.

Estimated Total Annualized Cost on the Public: N/A.

If additional information is required contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Room 3.2.C, Washington, DC 20229, at 202–344–1429.

Dated: May 11, 2006.

Tracey Denning,

Agency Clearance Officer, Information Services Branch.

[FR Doc. E6–7590 Filed 5–17–06; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Agency Information Collection Activities: Application and Approval To Manipulate, Examine, Sample or Transfer Goods

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Proposed collection; comments requested.

SUMMARY: The Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995: Application and Approval to Manipulate, Examine, Sample or Transfer Goods. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with a change to the burden hours. This document is published to obtain comments form the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (71 FR 12382–12383) on March 10, 2006, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before June 19, 2006.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget Desk Officer at *Nathan.Lesser@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: The Bureau of Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the Proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of The proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections 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, e.g., permitting electronic submission of responses.

Title: Application & Approval to Manipulate, Examine, Sample, or Transfer Goods.

OMB Number: 1651–0006.

Form Number: Form–3499.

Abstract: CBP Form–3499 is prepared by importers or consignees as an application to request examination, sampling, or transfer of merchandise under CBP supervision. This form is also an application for the manipulation of merchandise in a bonded warehouse and abandonment or destruction of merchandise.

Current Actions: This submission is being submitted to extend the expiration date, with a change to the expiration date.

Type of Review: Extension (without change).

Estimated Number of Respondents: 151,140.

Estimated Time Per Respondent: 6 minutes.

Estimated Total Annual Burden Hours: 15,114.

Estimated Total Annualized Cost on the Public: N/A.

If additional information is required contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Room 3.2.C, Washington, DC 20229, at 202–344–1429.

Dated: May 11, 2006.

Tracey Denning,

Agency Clearance Officer, Information Services Branch.

[FR Doc. E6–7593 Filed 5–17–06; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Agency Information Collection Activities: General Declaration

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Proposed collection; comments requested.

SUMMARY: The Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995: General Declaration. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with a change to the burden hours. This document is published to obtain comments form the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (71 FR 12383) on March 10, 2006, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before June 19, 2006.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time should be directed to the Office of Management and Budget Desk Officer at *Nathan.Lesser@omb.eop.gov*.

SUPPLEMENTARY INFORMATION: The Bureau of Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act of 1995 (Pub. L.104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the Proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of The proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections 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, e.g., permitting electronic submission of responses.

Title: General Declaration (Outward/Inward).

OMB Number: 1651–0002.

Form Number: CBP Form 7507.

Abstract: CBP Form 7507 allows the agent or pilot to make entry or exit of the aircraft, as required by statute. The form is used to document clearance by the arriving aircraft at the required inspectional facilities and inspections by appropriate regulatory agency staffs.

Current Actions: This submission is being submitted to extend the expiration date with a change in the burden hours.

Type of Review: Extension (without change).

Affected Public: Business or other for-profit institutions.

Estimated Number of Respondents: 500.

Estimated Time Per Respondent: 166 minutes.

Estimated Total Annual Burden Hours: 83,333.

Estimated Total Annualized Cost on the Public: N/A.

If additional information is required contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue NW., Room 3.2.C, Washington, DC 20229, at 202–344–1429.

Dated: May 11, 2006.

Tracey Denning,

Agency Clearance Officer, Information Services Branch.

[FR Doc. E6–7594 Filed 5–17–06; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Proposed Collection; Comment Request; Cargo Container and Road Vehicle Certification for Transport Under Customs Seal

AGENCY: Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Cargo Container and Road Vehicle Certification For Transport Under Customs Seal. This proposed information collection was previously published in the **Federal Register** (71 FR 12387) on March 10, 2006, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments should be received on or before June 19, 2006, to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget Desk Officer at *Nathan.Lesser@omb.eop.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Customs and Border Protection, Attn.: Tracey Denning, 1300 Pennsylvania Avenue NW., Room 3.2C, Washington, DC 20229, Tel. (202) 344–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Cargo Container and Road Vehicle Certification for Transport Under Customs Seal.

OMB Number: 1651–0124.

Form Number: N/A.

Abstract: This information collection is used in a voluntary program to receive internationally-recognized CBP certification that intermodel container/road vehicles meet construction requirements of international Customs conventions. Such certification facilitates International trade by reducing intermediate international controls.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Business or other for-profit institutions.

Estimated Number of Respondents: 3,000.

Estimated Time Per Respondent: 3.5 hours.

Estimated Total Annual Burden Hours: 10,600.

Estimated Annualized Cost to the Public: N/A.

If additional information is required contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue NW., Room 3.2.C, Washington, DC 20229, at 202–344–1429.

Dated: May 10, 2006.

Tracey Denning,

Agency Clearance Officer, Information Services Group.

[FR Doc. E6–7595 Filed 5–17–06; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Proposed Collection; Comment Request; Application To Use the Automated Commercial Environment (ACE)

AGENCY: Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Application to Use the Automated Commercial Environment (ACE). This proposed information collection was previously published in the **Federal Register** (71 FR 12380) on March 10, 2006, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 19, 2006, to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget Desk Officer at *Nathan.Lesser@omb.eop.gov*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Application to Use ACE.

OMB Number: 1651–0105.

Form Number: None.

Abstract: CBP collects basic information from companies participating in ACE pilots in order to establish account structures for each company.

Current Actions: This document is being submitted to extend the expiration date.

Type of Review: Extension (with change).

Affected Public: Businesses.

Estimated Number of Respondents: 21,000.

Estimated Time Per Response: 20 minutes.

Estimated Total Annual Burden Hours: 6,930.

Estimated Total Annualized Cost on the Public: N/A.

If additional information is required contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue NW., Room 3.2.C, Washington, DC 20229, at 202–344–1429.

Dated: May 11, 2006.

Tracey Denning,

Agency Clearance Officer, Information Services Branch.

[FR Doc. E6–7597 Filed 5–17–06; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Proposed Collection; Comment Request; Application for Exemption From Special Landing Requirements (Overflight)

AGENCY: Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Application for Exemption from Special Landing Requirements (Overflight). This proposed information collection was previously published in the **Federal Register** (71 FR 12386–12387) on March 10, 2006, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 19, 2006, to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget Desk Officer at *Nathan.Lesser@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Application for Exemption from Special Landing Requirements (Overflight).

OMB Number: 1651–0087.

Form Number: CBP Forms 442 and 442A.

Abstract: CBP Forms 442 and 442A are used by private flyers to obtain a waiver for landing requirements and normal CBP processing at designated airports along the southern border.

Current Actions: There are no changes to the information collection. This document is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Individuals.

Estimated Number of Respondents: 760,655.

Estimated Time Per Response: 3 minutes.

Estimated Total Annual Burden Hours: 13,266.

Estimated Total Annualized Cost on the Public: N/A.

If additional information is required contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue NW., Room 3.2.C, Washington, DC 20229, at 202–344–1429.

Dated: May 11, 2006.

Tracey Denning,

Agency Clearance Officer, Information Services Branch.

[FR Doc. E6–7598 Filed 5–17–06; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Agency Information Collection Activities: Declaration for Free Entry of Returned American Products

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Proposed collection; comments requested.

SUMMARY: The Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995: Declaration for Free Entry of Returned American Products. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended without a change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (71 FR 12388) on March 10, 2006, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before June 19, 2006.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget Desk Officer at *Nathan.Lesser@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: The Bureau of Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act of 1995 (Pub. L.104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the Proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of The proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections 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, *e.g.*, permitting electronic submission of responses.

Title: Declaration of Free Entry of Returned American Products.

OMB Number: 1651–0011.

Form Number: Form-3311.

Abstract: This collection of information is used as a supporting documents which substantiates the claim for duty free status for returning.

Current Actions: This submission is to extend the expiration date without a change to the burden hours.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 12,000.

Estimated Time Per Respondent: 210 minutes.

Estimated Total Annual Burden Hours: 51,000.

Estimated Total Annualized Cost on the Public: N/A.

If additional information is required contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue NW., Room 3.2.C, Washington, DC 20229, at 202–344–1429.

Dated: May 15, 2006.

Tracey Denning,

Agency Clearance Officer, Information Services Branch.

[FR Doc. E6–7599 Filed 5–17–06; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Agency Information Collection Activities: Certificate of Registration

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Proposed collection; comments requested.

SUMMARY: The Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995: Certificate of Registration. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended without a change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (71 FR 12389) on March 10, 2006, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before June 19, 2006.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget Desk Officer at *Nathan.Lesser@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: The Bureau of Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act of 1995 (Pub. L.104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the Proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of The proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections 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, e.g., permitting electronic submission of responses.

Title: Certificate of Registration.

OMB Number: 1651–0010.

Form Number: Forms 4455 and 4457.

Abstract: The Certificate of Registration is used to expedite free entry or entry at a reduced rate on

foreign made personal articles that are taken abroad. The articles are dutiable each time they are brought into the United States unless there is acceptable proof of prior possession.

Current Actions: This submission is to extend the expiration date without a change to the burden hours.

Type of Review: Extension (without change).

Affected Public: Individuals, travelers.

Estimated Number of Respondents: 200,000.

Estimated Time Per Respondent: 3 minutes.

Estimated Total Annual Burden Hours: 10,000.

Estimated Total Annualized Cost on the Public: N/A.

If additional information is required contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue NW., Room 3.2.C, Washington, DC 20229, at 202–344–1429.

Dated: May 11, 2006.

Tracey Denning,

Agency Clearance Officer, Information Services Branch.

[FR Doc. E6–7600 Filed 5–17–06; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Agency Information Collection Activities: Exportation of Used Self-Propelled Vehicles

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Proposed collection; comments requested.

SUMMARY: The Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995: Exportation of Used Self-Propelled Vehicles. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with a change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (71 FR 12390) on March 10, 2006, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before June 19, 2006.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget Desk Officer at *Nathan.Lesser@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: The Bureau of Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency's/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's/component's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections 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, e.g., permitting electronic submission of responses.

Title: Exportation of Used-Propelled Vehicles.

OMB Number: 1651–0054.

Form Number: None.

Abstract: The Exportation of Used-Propelled Vehicles requires the submission of documents verifying vehicle ownership of exporters for exportation of vehicles in the United States.

Current Actions: This submission is being submitted to extend the expiration date with a change to the burden hours.

Type of Review: Extension (without change).

Estimated Number of Respondents: 750,000.

Estimated Time Per Respondent: 10 minutes.

Estimated Total Annual Burden Hours: 125,000.

Estimated Total Annualized Cost on the Public: N/A.

If additional information is required, contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue NW., Room 3.2.C, Washington, DC 20229, at 202–344–1429.

Dated: May 11, 2006.

Tracey Denning,

Agency Clearance Officer, Information Services Branch.

[FR Doc. E6–7604 Filed 5–17–06; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Agency Information Collection Activities: Conditionally Free Under Conditions of Emergency

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Proposed collection; comments requested.

SUMMARY: The Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995: Conditionally Free Under Conditions of Emergency. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended without a change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (71 FR 12381) on March 10, 2006, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before June 19, 2006.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to Office of Management and Budget Desk Officer at *Nathan.Lesser@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: The Bureau of Customs and Border Protection (CBP) encourages the general

public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency's/component', including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's/component's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections 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, e.g., permitting electronic submission of responses.

Title: Free Admittance Under Conditions of Emergency.

OMB Number: 1651–0044.

Form Number: N/A.

Abstract: This collection of information will be used in the event of emergency or catastrophic event to monitor goods temporarily admitted for the purpose of rescue or relief.

Current Actions: This submission is to extend the expiration date without a change to the burden hours.

Type of Review: Extension (without change).

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 1.

Estimated Time Per Respondent: 1 minute.

Estimated Total Annual Burden Hours: 1.

Estimated Total Annualized Cost on the Public: N/A.

If additional information is required, contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue NW., Room 3.2.C, Washington, DC 20229, at 202–344–1429.

Dated: May 11, 2006.

Tracey Denning,

Agency Clearance Officer, Information Services Branch.

[FR Doc. E6–7605 Filed 5–17–06; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Agency Information Collection Activities: Foreign Assembler's Declaration

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Proposed collection; comments requested.

SUMMARY: The Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995: Foreign Assembler's Declaration. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended without a change to the burden hours. This document is published to obtain comments form the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (71 FR 12382) on March 10, 2006, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before June 19, 2006.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget Desk Officer at *Nathan.Lesser@omb.eop.gov*.

SUPPLEMENTARY INFORMATION: The Bureau of Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency's/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's/component's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections 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, e.g., permitting electronic submission of responses.

Title: Foreign Assembler's Declaration (with Endorsement by Importer).

OMB Number: 1651–0031.

Form Number: N/A.

Abstract: The Foreign Assembler's Declaration with Importer's Endorsement is used by CBP to substantiate a claim for duty free treatment of U.S. fabricated components sent abroad for assembly and subsequently returned to the United States.

Current Actions: This submission is to extend the expiration date without a change to the burden hours.

Type of Review: Extension (without change).

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 2,730.

Estimated Time Per Respondent: 50 minutes.

Estimated Total Annual Burden Hours: 302,402.

Estimated Total Annualized Cost on the Public: N/A.

If additional information is required, contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue NW., Room 3.2.C, Washington, DC 20229, at 202–344–1429.

Dated: May 11, 2006.

Tracey Denning,

Agency Clearance Officer, Information Services Branch.

[FR Doc. E6–7606 Filed 5–17–06; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Information Collection Submitted to the Office of Management and Budget (OMB) for Approval Under the Paperwork Reduction Act; Research To Support Outdoor Recreation Management at Lake Umbagog National Wildlife Refuge

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (Fish and Wildlife Service) have requested that OMB approve our information collection associated with research to support outdoor recreation management at Lake Umbagog National Wildlife Refuge, Errol, New Hampshire. We have requested that OMB approve this information collection for a 1-year term.

DATES: You must submit comments on or before June 19, 2006.

ADDRESSES: Send your comments and suggestions on this information collection to the Desk Officer for the Department of the Interior at OMB-OIRA at (202) 395–6566 (fax) or *OIRA_DOCKET@OMB.eop.gov* (e-mail). Please provide a copy of your comments to Hope Grey, Information Collection Clearance Officer, Fish and Wildlife Service, MS 222–ARLSQ, 4401 North Fairfax Drive, Arlington, VA 22203 (mail); (703) 358–2269 (fax); or *hope_grey@fws.gov* (e-mail).

FOR FURTHER INFORMATION CONTACT: To request a copy of the information collection requirements, explanatory information, or related form, contact Hope Grey, Information Collection Clearance Officer, at the above addresses or by telephone at (703) 358–2482.

SUPPLEMENTARY INFORMATION: OMB regulations at 5 CFR part 1320, which implement the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). Federal agencies may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

On January 27, 2006, we published in the **Federal Register** (71 FR 4607) a notice of our intent to request information collection authority from OMB. In that notice, we solicited public comments for 60 days, ending March 28, 2006. We received comments from one individual who objected to the use of Lake Umbagog National Wildlife Refuge for hunting, trapping, and related recreational uses. The commenter did not address the necessity, clarity, or accuracy of the information collection, but suggested that we seek input from the public outside the local area of the refuge. The proposed survey will include a representative sample of all visitors to the refuge, both local and non-local. We did not make any changes to our information collection based on this comment.

The National Wildlife Refuge Improvement Act of 1997, which amended the National Wildlife Refuge System Administration Act (16 U.S.C. 668dd–668ee), guides planning and management of the National Wildlife Refuge System. The law identifies six priority wildlife-dependent recreational uses and provides a process for ensuring that these and other activities do not conflict with the management purpose and goals of each refuge.

The Act also requires that we develop a comprehensive conservation plan (CCP) for every refuge by the year 2012. A refuge CCP outlines goals, objectives, and management strategies for the refuge. It provides a vision and describes desired future conditions for the refuge. Development of a CCP for Lake Umbagog National Wildlife Refuge is ongoing and requires baseline information on recreation use and use patterns at the refuge. Since recreation use is dispersed at this refuge, the only feasible way to collect information on recreation use is through an onsite visitor survey. We will ask questions about visitor experience, wildlife disturbance, crowding, fishing, and camping. This type of information is especially important at Lake Umbagog National Wildlife Refuge because of increasing concern over growing recreational use and its potential impacts on sensitive wildlife populations.

Title of Collection: Research to Support Outdoor Recreation Management at Lake Umbagog National Wildlife Refuge.

OMB Control Number: None; this is a new collection.

Form Number: FWS Form 3–2330.

Frequency of Responses: On occasion.

Description of Respondents: Visitors to Lake Umbagog National Wildlife Refuge.

Number of Respondents: 500.

Number of Responses: 500.

Estimated Total Annual Burden Hours: 125 hours. We estimate that the reporting burden will average 15 minutes per respondent.

We invite your comments concerning this information collection on: (1) Whether or not the collection of information is necessary to properly manage visitor carrying capacity, including whether or not the information will have practical utility; (2) the accuracy of the agency's estimate of burden; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond.

Dated: April 14, 2006.

Hope Grey,

Information Collection Clearance Officer, Fish and Wildlife Service.

[FR Doc. E6–7608 Filed 5–17–06; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: The public is invited to comment on the following applications to conduct certain activities with endangered species and/or marine mammals.

DATES: Written data, comments or requests must be received by June 19, 2006.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203; fax 703/358–2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone 703/358–2104.

SUPPLEMENTARY INFORMATION:

Endangered Species

The public is invited to comment on the following applications for a permit to conduct certain activities with endangered species. This notice is provided pursuant to section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). Written data, comments, or requests for copies of these complete applications should be submitted to the Director (address above).

Applicant: Yerkes National Primate Research Center, Atlanta, GA, PRT–837068.

The applicant requests amendment of a permit to include lethal take of up to twenty captive born white-collared mangabeys (*Cercocebus torquatus*) per year, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a five-year period.

Applicant: Richard T. Frey, Chattahoochee, FL, PRT–121015.

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Kirk E. Windward, Salt Lake City, UT, PRT–122242.

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Robert V. Underwood, Pleasant Grove, UT, PRT–122447.

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Marine Mammals

The public is invited to comment on the following applications for a permit to conduct certain activities with marine mammals. The applications were submitted to satisfy requirements of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the regulations governing marine mammals (50 CFR part 18). Written data, comments, or requests for copies of the complete applications or requests for a public hearing on these applications should be submitted to the Director (address above). Anyone requesting a hearing should give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Director.

Applicant: Kevin Moloney, Las Vegas, NV, PRT–122050.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport hunted from the Northern Beaufort Sea polar bear population in Canada for personal, noncommercial use.

Applicant: Michael J. Wilmet, Long Grove, IL, PRT–121219.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport hunted from the Western Hudson Bay polar bear population in Canada for personal, noncommercial use.

Dated: April 28, 2006.

Michael S. Moore,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. E6–7607 Filed 5–17–06; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO930–06–9260NQ–COQB]

Notice of Availability of the Alamosa River Watershed Restoration Master Plan and Environmental Assessment

AGENCIES: Bureau of Land Management, Department of the Interior, lead agency; Fish and Wildlife Service, Department of the Interior, cooperating agency; Forest Service, Department of Agriculture, cooperating agency.

ACTION: Notice of availability.

SUMMARY: This notice advises the public and other agencies of the availability of the Alamosa River Watershed Restoration Master Plan and Environmental Assessment (''Plan'') prepared under the direction of Federal and state natural resource trustees, pursuant to subpart G of the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR 300.600 and 300.610) and Executive Order 12580. The Department of the Interior (represented by the Bureau of Land Management and the Fish and Wildlife Service), Department of Agriculture (represented by the Forest Service), and the State of Colorado (represented by the Departments of Law, Natural Resources, and Public Health and the Environment) are Trustees for natural resources considered in this Plan. The Alamosa River is located in the San Luis Valley of south-central Colorado. The Plan describes the Alamosa River environment and the impacts to watershed resources and land uses, and briefly describes proposed restoration projects.

DATES: On November 10, 2005, the Authorized Official (Colorado State Director of the Bureau of Land Management) of the Department of the Interior issued a Decision Record, which approved the preferred alternative in the Plan and Environmental Assessment. The Decision Record also referred to an attached Finding of No Significant Impact to the human environment, which concluded that an Environmental Impact Statement is not required. The Regional Director of the Fish and Wildlife Service concurred with release of the Plan. The Regional Forester of the Forest Service concurred with the Decision Record for the Plan and the Finding of No Significant Impact for the Environmental Assessment.

Addresses and Further Information: The Plan is available at the following Internet address: *http://mountain-prairie.fws.gov/nrda/SummitvilleColo/Summitville.htm.* Copies of the document are available for on-site review in the Del Norte Public Library, 190 Grand Avenue, Del Norte, CO 81131 or Department of Agriculture, Conejos County Natural Resources Conservation Service, 15 Spruce, La Jara, CO 81140. The Decision Record and further information is available from Robert Robinson, Bureau of Land Management, 2850 Youngfield Street, Lakewood, CO 80215, telephone 303–239–3642, or via e-mail at *rob_robinson@blm.gov.*

SUPPLEMENTARY INFORMATION: The Plan comprehensively addresses all watershed restoration needs, including those resulting from injuries pursuant to the federal Natural Resource Damage Assessment and Restoration (NRDAR) regulations in Title 43 Code of Federal Regulations part 11, as well as restoration needs arising from other impacts. The Plan also outlines several sets of projects based on competing needs and limited funding, and identifies a preferred restoration alternative, consisting of a project set that best addresses the various resource impacts. The Decision Record approves the preferred alternative, which includes projects for greater in-stream flow, cleaner surface water, river bank stabilization, restored riparian areas, abandoned mine reclamation, and increased public access to the river corridor. The Plan envisions funds from the NRDAR settlement, along with matching funds, grants, and other funding sources, to support the preferred alternative. The restoration actions ultimately undertaken will result from proposals for specific actions that respond to the needs and projects identified in the preferred restoration alternative. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, more commonly known as the Federal ''Superfund'' law) [42 U.S.C. 9601 *et seq.*] and the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA) [33 U.S.C. 1251 *et seq.*] authorize States, federally recognized Tribes, and certain Federal agencies, which have the authority to manage or control natural resources, to act as ''trustees'' on behalf of the public, to restore, rehabilitate, replace, and/or acquire natural resources equivalent to those harmed by hazardous substance releases.

The objective of the NRDAR process in the Alamosa River watershed is to compensate the public, through restoration actions, for losses to natural resources and services that have been caused by releases of toxic metals into the watershed. Restoration activities will be funded in part by natural resource damages recovered in settlement from the party responsible for recent contamination emanating from the Summitville mine in the upper watershed. The damages received must be used to restore, rehabilitate, replace and/or acquire the equivalent of those natural resources that have been injured.

The Trustees have a Memorandum of Agreement which establishes a Trustee Council to develop and implement a restoration plan for ecological restorations in the Alamosa River watershed. The Trustees followed the NRDAR regulations found at Title 43 Code of Federal Regulations part 11 for development of the Plan. The Trustees have worked together, in a cooperative process with the public, to determine appropriate restoration activities to address natural resource injuries caused by Summitville releases of hazardous substances, as well as other watershed impacts identified during planning. The Plan addresses the Trustees' overall approach to restore, rehabilitate, replace, or acquire the equivalent of natural resources injured by the release of toxic metals into the Alamosa River watershed environment. The public was invited to review and comment on the draft Plan during a 30-day period, and to attend a meeting near the site during which important elements of the draft Plan were presented. Approximately 29 comments were received, to which responses have been prepared and included, along with the comments, in the final Plan. Some comments prompted minor text changes, but no comments required significant changes to the document, or to the restoration approach that the Trustees and public have selected.

Authority: 42 U.S.C. 4321–4347.

Dated: April 4, 2006.

Robert H. Robinson,

Summitville Trustee Council Representative, Division of Energy, Lands and Minerals, Colorado State Office, Bureau of Land Management.

[FR Doc. E6–7529 Filed 5–17–06; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AK–910–06–1739–NSSI]

Notice of Public Meeting, North Slope Science Initiative, Science Technical Group

AGENCY: Bureau of Land Management, Alaska State Office, North Slope Science Initiative, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, North Slope Science Initiative (NSSI) Science Technical Group (STG) will meet as indicated below.

DATES: The meeting will be held June 26–28, 2006, at the Bureau of Land Management, 1150 University Avenue, Fairbanks, Alaska, in the second floor Arctic/Steese Conference Room. On June 26 the meeting will begin at 10 a.m.; on June 27 and 28, the meeting will begin at 8:30 a.m. at the same location. The public comment period will be from 3 p.m. to 5 p.m. June 26.

FOR FURTHER INFORMATION CONTACT: Ken Taylor, Executive Director, North Slope Science Initiative, Bureau of Land Management, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513; phone (907) 271–3131 or e-mail *kenton_taylor@ak.blm.gov*.

SUPPLEMENTARY INFORMATION: The North Slope Science Initiative, Science Technical Group provides advice and recommendations to the North Slope Science Oversight Group (OG) regarding priority needs for management decisions across the North Slope of Alaska. These priority needs may include recommendations on inventory, monitoring, and research activities that lead to informed land management decisions. This will be an organizational meeting, and topics will include: roles and responsibilities of the STG, expectations of the OG for the STG, and other topics the OG or STG may raise.

All meetings are open to the public. The public may present written comments to the STG. Each formal meeting will also have time allotted for hearing public comments. Depending on the number of persons wishing to comment and 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, transportation, or other reasonable accommodations, should contact the North Slope Science Initiative staff.

Dated: May 11, 2006.

John Sroufe,

Acting Alaska State Director.

[FR Doc. E6–7592 Filed 5–17–06; 8:45 am]

BILLING CODE 4310–AG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–056–7122–EU–F–686; N–79047]

Notice of Realty Action; Non-Competitive Sale in the Las Vegas Valley

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: The Bureau of Land Management (BLM) proposes to sell a 1.556 acre triangular parcel of public land in the northwest portion of the Las Vegas Valley, Nevada, to the owner of lands adjoining two sides of the parcel. The third side is bounded by a street right-of-way. The adjoining private owner has requested that the parcel be sold to him by direct sale at not less than the appraised market value of the land.

DATES: On or before July 3, 2006, interested parties may submit comments concerning the proposed sale to the BLM Field Manager, Las Vegas Field Office, at the address stated below.

ADDRESSES: Las Vegas Field Office, Bureau of Land Management, 4701 N. Torrey Pines Drive, Las Vegas, NV 89130.

FOR FURTHER INFORMATION CONTACT: Shawna Woods, Realty Specialist at (702) 515–5099.

SUPPLEMENTARY INFORMATION: Pursuant to a request of Mr. Randy Black Jr., the BLM proposes to sell a parcel of public land located in the northwest portion of the Las Vegas Metropolitan Area and further described below. The subject parcel contains 1.556-gross acres in the form of an isolated triangle, resulting from the recent realignment of Durango Drive, which is now a major arterial with a median and three lanes of traffic in each direction. The subject site is surrounded by land controlled by Mr. Black. Due to the development size, shape, and access issues, the real estate appraisal report prepared for BLM concluded that the highest and best use of the site would be for assemblage with the adjacent property controlled by Mr. Black. As part of a larger parcel, the subject site has greater development

potential and fewer limits on possible use due to size, shape and access. The subject parcel would be sold at not less than the fair market value of $546,900.00. The following described land in Clark County, Nevada, has been examined and found suitable for direct sale pursuant to section 203 of the Federal Land Policy and Management Act of 1976 ((FLPMA) Public Law 94–579, as amended , 43 U.S.C. 1713) and the Southern Nevada Public Land Management Act (SNPLMA, Pub. L. 105–263) and 43 CFR 2711.3–3.

Mount Diablo Meridian, Nevada

T. 19 S., R 60 E.,
Section 29, portions of the following aliquot parts: NE¼NE¼NW¼SE¼NE¼, NWA¼NE¼NW¼SE¼NE¼, NE¼SW¼NE¼NW¼SE¼NE¼, N½SE¼NE¼NW¼SE¼NE¼, NE¼NE¼NW¼NW¼SE¼NE¼, NW¼NE¼NW¼NW¼SE¼NE¼, NE¼SW¼NE¼NW¼NW¼SE¼NE¼, N½SE¼NE¼NW¼NW¼SE¼NE¼, N½NE¼NW¼NW¼NW¼SE¼NE¼, NE¼NW¼NW¼NW¼NW¼SE¼NE¼.
(Approximately 1.556 acres)

This proposed action is in conformance with the Las Vegas Resource Management Plan, approved on October 5, 1998. The plan has been reviewed and it is determined the proposed action conforms with land use plan decision LD–1 established in accordance with section 202 of FLPMA, as amended (43 U.S.C. 1713). A direct sale to Mr. Randy Black, Jr. is being proposed, and is considered appropriate, in this case, as the transfer of the Federal non-mineral interest to any other entity would not protect existing equities of the surrounding private land owned by Mr. Black. A direct sale may be utilized when the tract identified is an integral part of a project and speculative bidding would jeopardize a timely completion and economic viability of the project, there is a need to recognize an authorized use such as an existing business which could suffer a substantial economic loss if the tract were purchased by other than the authorized user and the adjoining ownership pattern and access indicate a direct sale is appropriate. The land is not required for any Federal purpose. The sale will be made subject to the applicable provisions of FLPMA and the regulations of the Secretary of the Interior. When patented, title to the land will continue to be subject to the following:

1. A reservation of a right-of-way thereon for ditches or canals constructed by the authority of the United States, Act of August 30, 1890 (26 Stat. 391, 43 U.S.C. 945).

2. A reservation to the United States of oil and gas, sodium and potassium and salable minerals together with the right to prospect for, mine and remove such deposits from the same under applicable law and such regulations as the Secretary of the Interior may prescribe.

3. Valid existing rights of record, including, but not limited to those documented on the BLM public land records at the time of sale.

4. Rights for a roadway granted to the City of Las Vegas, its successors and assigns, by BLM right-of-way No. N–74262, pursuant to section 501 of FLPMA (43 U.S.C. 1761).

The patentee, by accepting a patent, covenants and agrees to indemnify, defend, and hold the United States harmless from any costs, damages, claims, causes of action, penalties, fines, liabilities, and judgments of any kind or nature arising from the past, present, and future acts or omissions of the patentees or their employees, agents, contractors, or lessees, or any third-party, arising out of or in connection with the patentees' use, occupancy, or operations on the patented real property. This indemnification and hold harmless agreement includes, but is not limited to, acts and omissions of the patentees and their employees, agents, contractors, or lessees, or any third party, arising out of or in connection with the use and/or occupancy of the patented real property which has already resulted or does hereafter result in: (1) Violations of Federal, State, and local laws and regulations that are now or may in the future become, applicable to the real property; (2) Judgments, claims, or demands of any kind assessed against the United States; (3) Costs, expenses, or damages of any kind incurred by the United States; (4) Releases or threatened releases of solid or hazardous waste(s) and/or hazardous substances(s), as defined by Federal or State environmental laws, off, on, into or under land, property and other interests of the United States; (5) Activities by which solids or hazardous substances or wastes, as defined by Federal and State environmental laws are generated, released, stored, used or otherwise disposed of on the patented real property, and any cleanup response, remedial action or other actions related in any manner to said solid or hazardous substances or wastes; or (6) Natural resource damages as defined by Federal and State law. Patentee shall stipulate that it will be solely responsible for compliance with all applicable Federal, state and local environmental and regulatory provisions, throughout the life of the facility, including any closure and/or post-closure requirements that may be imposed with respect to any physical plant and/or facility upon the real property under any Federal, state or local environmental laws or regulatory provisions. This covenant shall be construed as running with the above described parcel of land patented or otherwise conveyed by the United States, and may be enforced by the United States in a court of competent jurisdiction.

No warranty of any kind, express or implied is given or will be given by the United States as to the title, physical condition or potential uses of the land proposed for sale. However, to the extent required by law, such land is subject to the requirements of section 120(h) of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), as amended (42 U.S. C. 9620(h)).

Publication of this notice in the **Federal Register** temporarily segregates the above described land from appropriation under the public land laws, including the mining laws. The segregative effect of this notice will terminate in the future as specified in 43 CFR 2711.1–3(c)). The above described land was previously segregated from mineral entry under BLM case file number N–66364, with record notation as of October 19, 1998. This previous segregation will terminate upon publication of this notice in the **Federal Register**.

Detailed information concerning the proposed sale, including an environmental assessment and the approved appraisal report is available for review at the BLM Las Vegas Field Office at the address above. The Field Manager, BLM, Las Vegas Field Office, will review the comments of all interested parties concerning the sale. To be considered, comments must be received at the BLM Las Vegas Field Office on or before the date stated above in this notice for that purpose. Any adverse comments will be reviewed by the BLM, Nevada State Director.

In the absence of any adverse comments, the decision will become effective on July 17, 2006. The lands will not be offered for sale until after the decision becomes effective.

(Authority: 43 CFR 2711.1–2(a)).

Dated: February 16, 2006.

Sharon DiPinto,

Assistant Field Manager, Division of Lands, Las Vegas, NV.

[FR Doc. E6–7544 Filed 5–17–06; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–936–5870–HN; HAG–06–0098]

Call for Public Nominations of Inholding Properties for Potential Purchase by the Federal Government in the States of Oregon and Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Federal Land Transaction Facilitation Act of 2000 (43 U.S.C. 2303) (FLTFA), this notice provides the public the opportunity to nominate inholding properties within the States of Oregon and Washington for possible acquisition by the Federal agencies identified below.

DATES: Nominations may be submitted at any time following the publication of this notice.

ADDRESSES: Nominations should be mailed to the attention of the FLTFA Program Manager for the agency listed below having jurisdiction over the adjacent Federal designated area: Bureau of Land Management, P.O. Box 2965, Portland, OR 97208, USDA Forest Service, P.O. Box 3623, Portland, OR 97208–3623; National Park Service, 1111 Jackson Street, Suite 700, Oakland, CA 94607–4807; and U.S. Fish and Wildlife Service, Pacific Region, 911 NE 11th Ave., Portland, OR 97232.

FOR FURTHER INFORMATION CONTACT: Pam Chappel, FLTFA Program Manager, BLM Oregon State Office, 503–808–6170; or e-mail *pam_chappel@blm.gov.*

SUPPLEMENTARY INFORMATION: In accordance with the FLTFA, the four Federal agencies noted above are offering to the public an opportunity to nominate lands in the States of Oregon and Washington for possible Federal acquisition. Under the provisions of FLTFA, only the following non-Federal lands are eligible for nomination: (1) Inholdings within a federally-designated area; or (2) Inholdings adjacent to federally-designated areas that contain exceptional resources.

An inholding is any right, title, or interest held by a non-Federal entity, in or to a tract of land that lies within the boundary of a federally-designated area.

A federally-designated area is an area, in existence on July 25, 2000, set aside for special management, including units of the national park system managed by the National Park Service, national wildlife refuge system managed by the U.S. Fish and Wildlife Service, or national forest system managed by the USDA Forest Service, and national monuments, national conservation areas, national riparian conservation areas, national recreation areas, national scenic areas, research natural areas, national outstanding natural areas, national landmarks, and areas of critical environmental concern managed by the Bureau of Land Management, wilderness or wilderness study areas, and units of the wild and scenic rivers system or national trails system. If you are uncertain if a particular area meets the statutory definition in FLTFA of a federally-designated area, you should consult the statute or the BLM as provided above.

Exceptional resource refers to a resource of scientific, natural, historic, cultural or recreational value which has been documented by a Federal, state, or local government authority, and for which there is a compelling need for conservation and protection under the jurisdiction of a Federal agency in order to maintain the resource for the benefit of the public.

Nominations meeting the above criteria may be submitted by any individual, group or governmental body. If submitted by a party other than the landowner, the landowner must also sign the nomination to confirm their willingness to sell. Nominations will only be considered eligible by the agencies if: (1) The nomination package is complete; (2) acquisition of the nominated land or interest in land would be consistent with an agency approved land use plan; (3) the land does not contain a hazardous substance or is not otherwise contaminated and would not be difficult or uneconomical to manage as Federal lands; and (4) acceptable title can be conveyed in accordance with Federal title standards. Priority will be placed on nominations for inholdings in areas where there is no local or tribal government objection to Federal acquisition. Nominations may be made at any time following publication of this notice and will continue to be accepted for consideration during the life of the FLTFA, which ends on July 24, 2010, unless extended by Act of Congress.

Nominations may be made on forms available from Pam Chappel at the address stated above. Requests for the forms may be made by phone, e-mail, or U.S. Postal Service mail.

The agencies will assess the nominations for public benefits and rank the nominations in accordance with a jointly prepared State level Interagency Implementation Agreement for FLTFA and a national level Interagency Memorandum of Understanding among the agencies. The nomination and identification of an inholding does not obligate the landowner to convey the property nor does it obligate the United States to acquire the property.

All Federal land acquisitions must be made at fair market value established by applicable provisions of the Uniform Appraisal Standards for Federal Land Acquisitions.

Further information and details of the Statewide Interagency Implementation Agreement, may be obtained by contacting Pam Chappel at the address noted above. The BLM will be developing a world wide Web site linked to the BLM Oregon site at *http://www.or.blm.gov.*

Elaine M. Brong,

State Director Oregon/Washington, USDI Bureau of Land Management.

[FR Doc. E6–7523 Filed 5–17–06; 8:45 am]

BILLING CODE 4310–33–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–555]

In the Matter of Certain Devices for Determining Organ Positions and Certain Subassemblies Thereof; Notice of Commission Determination Not To Review an Initial Determination Terminating the Investigation on the Basis of a Settlement Agreement

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (''ID'') (Order No. 12) issued by the presiding administrative law judge (''ALJ'') terminating the above-captioned investigation in its entirety on the basis of a settlement agreement.

FOR FURTHER INFORMATION CONTACT: Clara Kuehn, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–3012. Copies of the public version of the ALJ's ID and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 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 this investigation may be viewed on the Commission's electronic docket (EDIS–ON–LINE) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on December 2, 2005, based on a complaint filed by SAS Praxim (''SAS'') of La Tronche, France, and Varian Medical Systems, Inc. (''Varian'') of Palo Alto, California. The complaint, as supplemented, alleged violations of section 337 by Resonant Medical, Inc. (''Resonant'') of Montreal, Canada, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain devices for determining organ positions and certain subassemblies thereof by reason of infringement of claims 1, 2, 5, and 10 of U.S. Patent No. 5,447,154. 70 FR 72314 (2005).

On February 16, 2006, the ALJ issued an ID (Order No. 5) granting a motion to intervene as a complainant filed by non-party Université Joseph Fourier (Grenoble) (''UJF'') of Grenoble, France. That ID was not reviewed by the Commission.

On April 10, 2006, the three complainants and sole respondent Resonant jointly moved to terminate the investigation in its entirety on the basis of a settlement agreement. On April 20, 2006, the Commission investigative attorney filed a response supporting the joint motion. On April 25, 2006, the ALJ issued an ID (Order No. 12) granting the joint motion to terminate.

No petitions for review of the ID were filed.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42).

By order of the Commission.

Issued: May 15, 2006.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E6–7582 Filed 5–17–06; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–06–033]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: June 1, 2006 at 11 a.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436. Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meetings: none.
2. Minutes.
3. Ratification List.
4. Inv. Nos. 731–TA–624 and 625 (Second Review) (Helical Spring Lock Washers from China and Taiwan)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before June 12, 2006.)
5. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: May 12, 2006.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 06–4698 Filed 5–16–06; 2:35 pm]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to the Clean Water Act

In accordance with 28 CFR 50.7, 38 FR 19029, notice is hereby given that on May 11, 2006, a Consent Decree was lodged with the United States District Court for the District of Connecticut in *United States* v. *Metropolitan District of Hartford, Connecticut*, Civil Action No. 3:06–cv–00728–PCD. A complaint was also filed simultaneously with the lodging of the Consent Decree. In the complaint the United States, on behalf of the U.S. Environmental Protection Agency (EPA), alleges that the defendant Metropolitan District of Connecticut (''the MDC'') violated the Clean Water Act, 33 U.S.C. 1251, *et seq.*, (''CWA'') in connection with the MDC's operation of its publicly-owned treatment works. The compliant alleges that the MDC discharged untreated wastewater to navigable waters through point sources other than those authorized by the MDC's permit. The consent decree requires the MDC to pay a civil penalty of $850,000–$425,000 to the co-plaintiff State of Connecticut and $425,000 to the United States—and to perform injunctive relief to achieve compliance with the Clean Water Act.

The Department of Justice will receive comments relating to the proposed Consent Decree for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, P.O. Box 7611, Washington, DC 20044, and should refer to *United States* v. *Metropolitan District Commission*, D.J. Ref. 90–5–1–1–084404.

The proposed consent decree may be examined at the office of the United States Attorney, 157 Church St., New Haven, Connecticut, 06510, and at the Region I office of the Environmental Protection Agency, One Congress Street, Suite 1100, Boston, Massachusetts 02114. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/open.html.* A copy of the proposed consent decree may also be obtained by mail from the Department of Justice Consent Decree Library, P.O. Box 7611, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy, please enclose a check (there is a 25 cent per reproduction cost) in the amount of $43.25 payable to the ''U.S. Treasury.''

Ronald G. Gluck,

Assistant Chief, Environmental Enforcement Section, Environment & Natural Resources Division.

[FR Doc. 06–4661 Filed 5–17–06; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. NRTL2–98]

NSF International; Application for Expansion of Recognition

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

ACTION: Notice.

SUMMARY: This notice announces the application of NSF International for expansion of its recognition to use

additional test standards, and presents the Agency's preliminary finding to grant this request for expansion. This preliminary finding does not constitute an interim or temporary approval of this application.

DATES: You must submit information or comments, or any request for extension of the time to comment, by the following dates:

- Hard copy: postmarked or sent by June 2, 2006.
- Electronic transmission or facsimile: sent by June 2, 2006.

ADDRESSES: You may submit information or comments to this notice—identified by docket number NRTL2–98—by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- OSHA Web site: *http://ecomments.osha.gov.* Follow the instructions for submitting comments on OSHA's Web page.
- Fax: If your written comments are 10 pages or fewer, you may fax them to the OSHA Docket Office at (202) 693–1648.
- Regular mail, express delivery, hand delivery and courier service: Submit three copies to the OSHA Docket Office, Docket No. NRTL2–98, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–2625, Washington, DC 20210; telephone (202) 693–2350. (OSHA's TTY number is (877) 889–5627.) OSHA Docket Office hours of operation are 8:15 a.m. to 4:45 p.m., EST.

Instructions: All comments received will be posted without change to *http://dockets.osha.gov,* including any personal information provided. OSHA cautions you about submitting personal information such as social security numbers and birth dates.

Docket: For access to the docket to read background documents or comments received, go to *http://dockets.osha.gov.* Contact the OSHA Docket Office for information about materials not available through the OSHA Web page and for assistance in using the Web page to locate docket submissions.

Extension of Comment Period: Submit requests for extensions concerning this notice to the Office of Technical Programs and Coordination Activities, NRTL Program, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3655, 200 Constitution Avenue, NW., Washington, DC 20210. Or, fax to (202) 693–1644.

FOR FURTHER INFORMATION CONTACT: Office of Technical Programs and Coordination Activities, NRTL Program, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–3653, Washington, DC 20210, or phone (202) 693–2110.

SUPPLEMENTARY INFORMATION:

Notice of Application

The Occupational Safety and Health Administration (OSHA) hereby gives notice that NSF International has applied for expansion of its current recognition as a Nationally Recognized Testing Laboratory (NRTL). NSF's expansion request covers the use of additional test standards. OSHA's current scope of recognition for NSF may be found in the following informational Web page: *http://www.osha.gov/dts/otpca/nrtl/nsf.html.*

OSHA recognition of an NRTL signifies that the organization has met the legal requirements in section 1910.7 of Title 29, Code of Federal Regulations (29 CFR 1910.7). Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within its scope of recognition and is not a delegation or grant of government authority. As a result of recognition, employers may use products ''properly certified'' [1] by the NRTL to meet OSHA standards that require testing and certification.

The Agency processes applications by an NRTL for initial recognition or for expansion or renewal of this recognition following requirements in Appendix A to 29 CFR 1910.7. This appendix requires that the Agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides its preliminary finding and, in the second notice, the Agency provides its final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. We maintain an informational Web page for each NRTL, which details its scope of recognition. These pages can be accessed from our Web site at *http://www.osha.gov/dts/otpca/nrtl/index.html.*

The most recent notice published by OSHA specifically related to NSF's recognition granted a renewal of its NRTL status, which became effective on August 30, 2005 (70 FR 51371).

[1] Properly certified means, in part, that the product is labeled or marked with the NRTL's ''registered'' certification mark (*i.e.*, the mark the NRTL uses for its NRTL work) and that the product certification falls within the scope of recognition of the NRTL.

The current address of the NSF facility already recognized by OSHA is: NSF International, 789 Dixboro Road, Ann Arbor, MI 48105.

General Background on the Application

NSF has submitted an application, dated May 10, 2005 (see Exhibit 16–1), to expand its recognition to include 19 additional test standards. The NRTL then amended the original application to request two additional test standards (see Exhibit 16–2). The NRTL Program staff has determined that each of these standards is an ''appropriate test standard'' within the meaning of 29 CFR 1910.7(c). However, one standard was already included in NSF's scope. Therefore, OSHA would approve twenty test standards for the expansion.

NSF seeks recognition for testing and certification of products for demonstration of conformance to the following test standards:

UL 48	Electric Signs.
UL 65	Wired Cabinets.
UL 174	Household Electric Storage-Tank Water Heaters.
UL 250	Household Refrigerators and Freezers.
UL 412	Refrigeration Unit Coolers.
UL 430	Waste Disposers.
UL 499	Electric Heating Appliances.
UL 778	Motor-Operated Water Pumps.
UL 858	Household Electric Ranges.
UL 873	Temperature-Indicating and -Regulating Equipment.
UL 979	Water Treatment Appliances.
UL 1026	Electric Household Cooking and Food Serving Appliances.
UL 1082	Household Electric Coffee Makers and Brewing-Type Appliances.
UL 1083	Household Electric Skillets and Frying-Type Appliances.
UL 1261	Electric Water Heaters for Pools and Tubs.
UL 1598	Luminaries.
UL 1889	Commercial Filters for Cooking Oil.
UL 1951	Electric Plumbing Accessories.
UL 2157	Electric Clothes Washing Machines and Extractors.
UL 2158	Electric Clothes Dryers.

The designations and titles of the above test standards were current at the time of the preparation of this notice.

OSHA's recognition of NSF, or any NRTL, for a particular test standard is limited to equipment or materials (*i.e.,* products) for which OSHA standards require third-party testing and certification before use in the workplace. Consequently, if a test standard also covers any product(s) for which OSHA does not require such

testing and certification, an NRTL's scope of recognition does not include that product(s).

Many UL test standards also are approved as American National Standards by the American National Standards Institute (ANSI). However, for convenience, we use the designation of the standards developing organization for the standard as opposed to the ANSI designation. Under our procedures, any NRTL recognized for an ANSI-approved test standard may use either the latest proprietary version of the test standard or the latest ANSI version of that standard. You may contact ANSI to find out whether or not a test standard is currently ANSI-approved.

Preliminary Finding on the Application

NSF has submitted an acceptable request for expansion of its recognition as an NRTL. In connection with this request, OSHA did not perform an on-site review of NSF's NRTL testing facilities. However, NRTL Program assessment staff reviewed information pertinent to the request and recommended that NSF's recognition be expanded to include the twenty additional test standards listed above (see Exhibit 16–3). Our review of the application file, the assessor's recommendation, and other pertinent documents indicate that NSF can meet the requirements, as prescribed by 29 CFR 1910.7, for the expansion for the twenty additional test standards listed above. This preliminary finding does not constitute an interim or temporary approval of the application.

OSHA welcomes public comments, in sufficient detail, as to whether NSF has met the requirements of 29 CFR 1910.7 for expansion of its recognition as a Nationally Recognized Testing Laboratory. Your comments should consist of pertinent written documents and exhibits. Should you need more time to comment, you must request it in writing, including reasons for the request. OSHA must receive your written request for extension at the address provided above no later than the last date for comments. OSHA will limit any extension to 30 days, unless the requester justifies a longer period. We may deny a request for extension if it is not adequately justified. You may obtain or review copies of NSF's requests, the on-site review report, other pertinent documents, and all submitted comments, as received, by contacting the Docket Office, Room N–2625, Occupational Safety and Health Administration, U.S. Department of Labor, at the above address. Docket No. NRTL2–98 contains all materials in the record concerning NSF's application.

The NRTL Program staff will review all timely comments and, after resolution of issues raised by these comments, will recommend whether to grant NSF's expansion request. The Assistant Secretary will make the final decision on granting the expansion and, in making this decision, may undertake other proceedings that are prescribed in Appendix A to 29 CFR 1910.7. OSHA will publish a public notice of this final decision in the **Federal Register.**

Signed at Washington, DC this 29th day of March, 2006.

Jonathan L. Snare,

Acting Assistant Secretary.

[FR Doc. E6–7519 Filed 5–17–06; 8:45 am]

BILLING CODE 4510–26–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Meetings

May 11, 2006.

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: Vol. 71, No. 84, at 25860, May 2, 2006.

PREVIOUSLY ANNOUNCED TIME AND DATE: 10 a.m., Thursday, May 18, 2006.

PLACE: The Richard V. Backley Hearing Room, 9th Floor, 601 New Jersey Avenue, NW., Washington, DC.

STATUS: Open.

CHANGE IN MEETING: The Commission has postponed the meeting to consider and act upon *Secretary of Labor* v. *Cumberland Coal Resources, LP*, Docket Nos. PENN 2004–73–R, PENN 2004–74–R, 2004–75–R, PENN 2004–85–R, PENN 2004–86–R, PENN 2004–87–R, PENN 2004–88–R, PENN 2004–104–R, PENN 2004–105–R, PENN 2004–181, and PENN 2005–8. No earlier announcement of the change in meeting was possible.

FOR FURTHER INFORMATION CONTACT: Jean Ellen, (202) 434–9950/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

Jean H. Ellen,

Chief Docket Clerk.

[FR Doc. 06–4676 Filed 5–16–06; 11:15 am]

BILLING CODE 6735–01–M

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Meeting

DATE: May 11, 2006.

TIME AND DATE: 10 a.m., Thursday, May 25, 2006.

PLACE: The Richard V. Backley Hearing Room, 9th Floor, 601 New Jersey Avenue, NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following in open session: *Secretary of Labor* v. *Cumberland Coal Resources, LP,* Docket Nos. PENN 2004–73–R, PENN 2004–74–R, PENN 2004–75–R, PENN 2004–85–R, PENN 2004–86–R, PENN 2004–87–R, PENN 2004–88–R, PENN 2004–104–R, PENN 2004–105–R, PENN 2004–181, and PENN 2005–8. (Issues include whether substantial evidence supports the judge's findings that Cumberland violated 30 CFR 75.334(b)(1) on three occasions because its bleeder system failed to effectively dilute and carry away methane; whether substantial evidence supports the judge's finding that Cumberland had notice that its bleeder system violated 30 CFR 75.334(b)(1); and whether the judge correctly found that MSHA acted within its discretion in issuing imminent danger withdrawal orders on two occasions.)

The Commission heard oral argument in this matter on May 11, 2006.

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs, subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

FOR FURTHER INFORMATION CONTACT: Jean Ellen, (202) 434–9950/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

Jean H. Ellen,

Chief Docket Clerk.

[FR Doc. 06–4680 Filed 5–16–06; 11:15 am]

BILLING CODE 6735–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–416]

Entergy Operations, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, and Entergy Mississippi, Inc., Grand Gulf Nuclear Station, Unit 1; Notice of Withdrawal of Application for Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has granted the request of Entergy Operations, Inc., et al. (the licensee) to withdraw its application for proposed amendment to Facility Operating License No. NPF–29 for the Grand Gulf Nuclear Station, Unit 1, located in Claiborne County, Mississippi, dated June 27, 2005.

The proposed amendment would have revised the Facility Operating License to change Technical Specification 3.6.1.3, Required Actions A.1 and B.1, to add closed relief valves as acceptable isolation devices provided that the relief setpoint is greater than 1.5 times containment design pressure

The Commission had previously issued a Notice of Consideration of Issuance of Amendment, published in the **Federal Register** on August 30, 2005 (70 FR 51381). However, by letter dated May 5, 2006, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated June 27, 2005, and the licensee's letter dated May 5, 2006, which withdrew the application for license amendment. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm.html*.

Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, or 301–415–4737 or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 12th day of May 2006.

For the Nuclear Regulatory Commission.

Bhalchandra Vaidya,

Project Manager, Plant Licensing Branch IV, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E6–7573 Filed 5–17–06; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–266, 50–301, 50–282, and 50–306]

Nuclear Management Company, LLC; Point Beach Nuclear Plant, Units 1 and 2; Prairie Island Nuclear Generating Plant, Units 1 and 2; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of exemptions from Title 10 of the *Code of Federal Regulations* (10 CFR), section 50.71(e)(4), for Facility Operating License Nos. DPR–24, DPR–27, DPR–42, and DPR–60, issued to Nuclear Management Company, LLC (NMC, the licensee), for operation of the Point Beach Nuclear Plant (PBNP), Units 1 and 2, located in Manitowoc County, Wisconsin, and the Prairie Island Nuclear Generating Plant (PINGP), Units 1 and 2, located in Goodhue County, Minnesota. Therefore, as required by 10 CFR 51.21, the NRC is issuing this environmental assessment and finding of no significant impact.

Environmental Assessment

Identification of the Proposed Action

The proposed actions would exempt the licensee from the requirements of 10 CFR 50.71(e)(4) regarding submission of revisions to the updated Final Safety Analysis Report (FSAR). The updated FSAR at PINGP is called the Updated Safety Analysis Report (USAR). Under the proposed exemptions, the licensee would submit updates to the updated FSARs once per fuel cycle, within 6 months following completion of each PBNP, Unit 1, refueling outage and within 6 months of each PINGP, Unit 2, refueling outage, respectively, not to exceed 24 months from the last submittal for either site. PBNP and PINGP are two-unit sites, each site sharing a common updated FSAR.

The proposed actions are in accordance with the licensee's application dated October 12, 2005.

The Need for the Proposed Action

Section 50.71(e)(4) requires licensees to submit updates to their FSARs annually or within 6 months after each refueling outage provided that the interval between successive updates does not exceed 24 months. Since the units for each site share a common FSAR, the licensee must update the same document annually or within 6 months after a refueling outage for each unit. The underlying purpose of the rule was to relieve licensees of the burden of filing annual FSAR revisions while ensuring that such revisions are made at least every 24 months. The NRC reduced the burden, in part, by permitting a licensee to submit its FSAR revisions 6 months after refueling outages for its facility, but it did not provide in the rule for multiple-unit facilities sharing a common FSAR. Rather, the NRC stated, ''[w]ith respect to the concern about multiple facilities sharing a common FSAR, licensees will have maximum flexibility for scheduling updates on a case-by-case basis'' (57 FR 39355). Allowing the exemptions would keep the updated FSARs current within 24 months of the last revision, while reducing the burden on the licensee.

Environmental Impacts of the Proposed Action

The NRC has completed its evaluation of the proposed actions and concludes that they involve administrative activities unrelated to plant operation, and therefore there would be no significant environmental impacts associated with the proposed actions.

The proposed actions will not significantly increase the probability or consequences of accidents. No changes are being made in the types of effluents that may be released off site.

There is no significant increase in the amount of any effluent released off site. There is no significant increase in occupational or public radiation exposure. Therefore, there are no significant radiological environmental impacts associated with the proposed actions.

With regard to potential non-radiological impacts, the proposed actions do not have a potential to affect any historic sites. They do not affect non-radiological plant effluents and have no other environmental impact. Therefore, there are no significant non-radiological environmental impacts associated with the proposed actions.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed actions.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed actions, the NRC staff considered denial of the proposed actions (*i.e.*, the ''no-action'' alternative). Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed actions and the alternative action are similar.

Alternative Use of Resources

The proposed actions do not involve the use of any different resources than those previously considered in the Final Environmental Statement for PBNP, dated May 1972; in NUREG–1437, Supplement 23, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants [regarding PBNP],'' dated August 2005; and in the Final Environmental Statement for PINGP, dated May 1973.

Agencies and Persons Consulted

In accordance with its stated policy, the staff consulted with the Wisconsin State official, Mr. J. Kitsembel of the Public Service Commission, on April

24, 2006, and with the Minnesota State official, Ms. D. Pile of the Commerce Department, on April 26, 2006, regarding the environmental impact of the proposed actions. The State officials had no comments.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed actions will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed actions.

For further details with respect to the proposed actions, see the licensee's letter dated October 12, 2005. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209 or 301–415–4737, or send an e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 11th day of May 2006.

For the Nuclear Regulatory Commission.

Carl F. Lyon,

Project Manager, Plant Licensing Branch III–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E6–7572 Filed 5–17–06; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 27317; 812–13156]

Van Kampen Asset Management, et al.; Notice of Application

May 12, 2006.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of application for an order under sections 6(c) and 23(c)(3) of the Investment Company Act of 1940 (the ''Act'') for an exemption from rule 23c–3 under the Act.

APPLICANTS: Van Kampen Asset Management (the ''VK Adviser''), Van Kampen Funds Inc. (the ''VK Distributor''), Van Kampen Senior Loan Fund (formerly known as Van Kampen Prime Rate Income Trust) (the ''VK Trust''), Morgan Stanley Investment Advisors Inc. (the ''MS Adviser''), Morgan Stanley Distributors Inc. (the ''MS Distributor'') and Morgan Stanley Prime Income Trust (the ''MS Trust'', and, together with the VK Trust, the ''Trusts'').

SUMMARY OF APPLICATION: Applicants request an order under sections 6(c) and 23(c)(3) of the Act for an exemption from certain provisions of rule 23c–3 to permit certain registered closed-end investment companies to make repurchase offers on a monthly basis.

FILING DATES: The application was filed on January 25, 2005 and amended on December 29, 2005 and May 5, 2006.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on June 6, 2006, and should be accompanied by proof of service on the applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090; Applicants, c/o Charles B. Taylor, Esq., Skadden, Arps, Slate, Meagher & Flom LLP, 333 West Wacker Drive, Chicago, Illinois 60606.

FOR FURTHER INFORMATION CONTACT: Shannon Conaty, Senior Counsel, at (202) 551–6827, or Janet M. Grossnickle, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 100 F Street, NE., Washington, DC 20549–0102 (tel. (202) 551–8090).

Applicants' Representations

1. Each of the Trusts is a closed-end management investment company registered under the Act and organized as a Massachusetts business trust. The VK Adviser and the MS Adviser, both investment advisers registered under the Investment Advisers Act of 1940 (the ''Advisers Act''), serve as investment adviser to the VK Trust and the MS Trust, respectively. The VK Distributor, a broker-dealer registered under the Securities Exchange Act of 1934 (the ''Exchange Act''), distributes the VK Trust's shares and serves as the VK Trust's administrator. The MS Distributor, a broker-dealer registered under the Exchange Act, distributes the MS Trust's shares. The VK Adviser, the VK Distributor, the MS Adviser and the MS Distributor are all direct or indirect wholly-owned subsidiaries of Morgan Stanley. Applicants request that any relief granted also apply to any registered closed-end management investment company that operates as an interval fund pursuant to rule 23c–3 for which the VK Adviser, the VK Distributor, the MS Adviser, the MS Distributor or any entity controlling, controlled by or under common control (within the meaning of section 2(a)(9) of the Act) with the VK Adviser, the VK Distributor, the MS Adviser or the MS Distributor acts as investment adviser, principal underwriter or administrator (collectively, the ''Other Trusts'').[1]

2. The VK Trust's investment objective is to provide a high level of current income, consistent with the preservation of capital. The VK Trust invests primarily in adjustable rate senior loans made to corporations and other borrowers. Under normal market conditions, the VK Trust invests at least 80% of its net assets (plus any borrowings for investment purposes) in adjustable rate senior loans. The VK Trust may also invest up to 20% of its total assets in senior loans that are not secured by any specific collateral, senior loans made to borrowers located outside the U.S. (provided no more than 5% of these loans or other assets are non-U.S. dollar denominated), and in any combination of warrants and equity securities incidental to investment in senior loans, junior debt securities, high quality short-term debt securities, credit-linked deposits and Treasury Inflation Protected Securities (or other inflation-indexed bonds issued by the U.S. government, its agencies or instrumentalities).

3. The MS Trust's investment objective is to provide a high level of current income, consistent with the preservation of capital. The MS Trust

[1] All entities currently intending to rely on the requested relief have been named as applicants. Any entity that relies on the requested order in the future will do so only in accordance with the terms and conditions of the application.

invests primarily in collateralized senior loans made to corporations, partnerships or other entities. Under normal market conditions, the MS Trust invests at least 80% of its total assets in collateralized senior loans. The MS Trust may also invest up to 20% of its total assets in cash or short-term high quality money market instruments, credit-linked deposits, junior debt securities or securities with a lien on collateral that is lower than a senior claim on collateral, and in loans that hold the most senior position in a borrower's capital structure, but are unsecured.

4. The VK Trust continuously offers three classes of shares to the public at net asset value. The VK Trust currently operates as an ''interval fund'' pursuant to rule 23c–3 under the Act, and makes quarterly tender offers to repurchase its shares.[2] The MS Trust continuously offers one class of shares to the public at net asset value, but it intends to add multiple classes of shares. The MS Trust also intends to operate as an ''interval fund'' pursuant to rule 23c–3 under the Act, and make quarterly tender offers to repurchase its shares.[3] Applicants request an order to permit each of the VK Trust and the MS Trust (and any Other Trust) to offer to repurchase a portion of its common shares at one–month intervals, rather than the three, six, or twelve–month intervals specified by rule 23c–3. Shares of the VK Trust and the MS Trust are offered with initial or deferred sales charges and certain classes of the VK Trust's shares also carry asset-based distribution and service fees.[4] The Trusts or any Other Trust may in the future offer additional classes of common shares with a front-end sales charge, an EWC and/or asset-based distribution or service fees. The Trusts' common shares are not offered or traded in the secondary market and are not listed on any exchange or quoted on any quotation medium.

5. Each of the Trusts and any Other Trust will disclose in its prospectus and annual reports its fundamental policy to make monthly offers to repurchase a portion of its common shares at net asset value, less deduction of a repurchase fee, if any, as permitted by rule 23c–3(b)(1), and the imposition of EWCs as permitted pursuant to exemptive relief previously granted by the Commission. The fundamental policy will be changeable only by a majority vote of the holders of such trust's outstanding voting securities. Under the fundamental policy, the repurchase offer amount will be determined by the board of trustees of the relevant Trust or Other Trust (''Board'') prior to each repurchase offer. The Trusts and any Other Trust will comply with rule 23c–3(b)(8)'s requirements with respect to its trustees who are not interested persons of the VK Trust, the MS Trust or Other Trust, as applicable, within the meaning of section 2(a)(19) of the Act (''Disinterested Trustees'') and their legal counsel. Under its fundamental policy, each Trust and Other Trust will make monthly offers to repurchase not less than 5% of its outstanding shares at the time of the repurchase request deadline. The repurchase offer amounts for the then-current monthly period, plus the repurchase offer amounts for the two monthly periods immediately preceding the then-current monthly period, will not exceed 25% of the outstanding common shares of the relevant Trust or Other Trust.

6. The prospectus of each Trust and Other Trust will state the means to determine the repurchase request deadline and the maximum number of days between each repurchase request deadline and the repurchase pricing date. Each Trust's or Other Trust's repurchase pricing date normally will be the same date as the repurchase request deadline and pricing will be determined after close of business on that date.

7. Pursuant to rule 23c–3(b)(1), each Trust and any Other Trust will repurchase shares for cash on or before the repurchase payment deadline, which will be no later than seven calendar days after the repurchase pricing date. Each Trust and Other Trust currently intends to make payment by the third business day following the repurchase pricing date. Each Trust and Other Trust will make payment for shares repurchased in the previous month's repurchase offer at least five business days before sending notification of the next repurchase offer. The VK Trust has not and currently does not intend to deduct any repurchase fees from the repurchase proceeds payable to tendering shareholders, but the Trusts and Other Trusts reserve the right to do so in compliance with rule 23c–3(b)(1).

8. Each Trust and Other Trust will provide common shareholders with notification of each repurchase offer no less than seven days and no more than fourteen days prior to the repurchase request deadline. The notification will include all information required by rule 23c–3(b)(4)(i). Each Trust and Other Trust will file the notification and the Form N–23c–3 with the Commission within three business days after sending the notification to its respective common shareholders.

9. Each Trust and Other Trust will not suspend or postpone a repurchase offer except pursuant to the vote of a majority of its Disinterested Trustees, and only under the limited circumstances specified in rule 23c–3(b)(3)(i). The Trusts and any Other Trust will not condition a repurchase offer upon tender of any minimum amount of shares. In addition, each of the Trusts and any Other Trust will comply with the pro ration and other allocation requirements of rule 23c–3(b)(5) if common shareholders tender more than the repurchase offer amount. Further, each Trust and any Other Trust will permit tenders to be withdrawn or modified at any time until the repurchase request deadline, but will not permit tenders to be withdrawn or modified thereafter.

10. From the time a Trust or any Other Trust sends its notification to shareholders of the repurchase offer until the repurchase pricing date, a percentage of such trust's assets equal to at least 100% of the repurchase offer amount will consist of: (a) Assets that can be sold or disposed of in the ordinary course of business at approximately the price at which such trust has valued such investment within a period equal to the period between the repurchase request deadline and the repurchase payment deadline; or (b) assets that mature by the next repurchase payment deadline. In the event the assets of a Trust or Other Trust fail to comply with this requirement, the Board will cause such trust to take such action as it deems appropriate to ensure compliance.

11. In compliance with the asset coverage requirements of section 18 of

[2] From its inception in 1989 until February 2005, the VK Trust considered each quarter to offer to repurchase a portion of its outstanding shares at their then-current net asset value pursuant to rule 13e–4 of the Exchange Act. In February 2005, the VK Trust began operating as an interval fund making quarterly repurchases pursuant to Rule 23c–3.

[3] From its inception in 1989, the MS Trust has considered each quarter to offer to repurchase a portion of its outstanding shares at their then-current net asset value pursuant to rule 13e–4 of the Exchange Act. The MS Trust is currently in the process of converting to an interval fund making quarterly repurchases pursuant to Rule 23c–3.

[4] The VK Trust currently offers Class A, B and C shares. (The VK Trust also has IB shares and IC shares which are not continuously offered.) Each class of continuously offered shares is subject to annual asset-based distribution and service fees. Class B and C shares are subject to early withdrawal charges (''EWCs''). The MS Trust's single class of shares is not subject to any annual asset-based distribution and service fees, but is subject to an EWC. The applicants previously obtained exemptive relief from the Commission as it relates to the imposition of EWCs. *See* In the Matter of Van Kampen Investment Advisory Corp., *et al.*, Investment Company Act Rel. Nos. 25924 (February 3, 2003) (notice) and 25951 (March 3, 2003) (order).

the Act, any senior security issued by, or other indebtedness of, each of the Trusts and any Other Trust will either mature by the next repurchase pricing date or provide for such trust's ability to call, repay or redeem such senior security or other indebtedness by the next repurchase pricing date, either in whole or in part, without penalty or premium, as necessary to permit that trust to complete the repurchase offer in such amounts determined by its Board.

12. The Board of each Trust and any Other Trust will adopt written procedures to ensure that such trust's portfolio assets are sufficiently liquid so that it can comply with its fundamental policy on repurchases and the liquidity requirements of rule 23c–3(b)(10)(i). The Board will review the overall composition of the portfolio and make and approve such changes to the procedures as it deems necessary.

Applicants' Legal Analysis

1. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision of the Act or rule thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

2. Section 23(c) of the Act provides in relevant part that no registered closed-end investment company shall purchase any securities of any class of which it is the issuer except: (a) On a securities exchange or other open market; (b) pursuant to tenders, after reasonable opportunity to submit tenders given to all holders of securities of the class to be purchased; or (c) under such other circumstances as the Commission may permit by rules and regulations or orders for the protection of investors.

3. Rule 23c–3 under the Act permits a registered closed-end investment company to make repurchase offers for its common stock at net asset value at periodic intervals pursuant to a fundamental policy of the investment company. ''Periodic interval'' is defined in rule 23c–3(a)(1) as an interval of three, six, or twelve months. Rule 23c–3(b)(4) requires that notification of each repurchase offer be sent to shareholders no less than 21 calendar days and no more than 42 calendar days before the repurchase request deadline.

4. Applicants request an order pursuant to sections 6(c) and 23(c) of the Act exempting them from rule 23c–3(a)(1) to the extent necessary to permit the Trusts and any Other Trust to make monthly repurchase offers. Applicants also request an exemption from the notice provisions of rule 23c–3(b)(4) to the extent necessary to permit the Trusts and any Other Trust to send notification of an upcoming repurchase offer to shareholders at least seven days but no more than fourteen calendar days in advance of the repurchase request deadline.

5. Applicants contend that monthly repurchase offers are in the shareholders' best interests and consistent with the policies underlying rule 23c–3. Applicants assert that monthly repurchase offers will provide investors with more liquidity than quarterly repurchase offers. Applicants assert that shareholders will be better able to manage their investments and plan transactions, because if they decide to forego a repurchase offer, they will only need to wait one month for the next offer. Applicants also contend that the portfolios of the Trusts and any Other Trust will be managed to provide ample liquidity for monthly repurchase offers. Applicants do not believe that a change to monthly repurchases would necessitate any change in portfolio management practices of the Trusts or any Other Trust in order to satisfy rule 23c–3. In fact, applicants expect limited or no impact on overall portfolio management or performance of such trusts upon converting to monthly offers and believe that it may be easier to manage the cash of the portfolio for the smaller monthly offers compared to the larger quarterly ones.

6. Applicants propose to send notification to shareholders at least seven days, but no more than fourteen calendar days, in advance of a repurchase request deadline. Applicants assert that, because the Trusts and any Other Trust intend to price on the repurchase request deadline and pay by the third business day following the pricing date, the entire procedure can be completed before the next notification is sent out to shareholders; thus avoiding any overlap. Applicants believe that these procedures will eliminate any possibility of investor confusion. Applicants also state that monthly repurchase offers will be a fundamental feature of the Trusts and any Other Trust, and their prospectuses will provide a clear explanation of the repurchase program.

7. Applicants submit that for the reasons given above the requested relief is appropriate in the public interest and is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

Applicants' Conditions

Applicants agree that any order granting the requested relief shall be subject to the following conditions:

1. Each Trust (and any Other Trust relying on this relief) will make a repurchase offer pursuant to rule 23c–3(b) for a repurchase offer amount of not less than 5% in any one-month period. In addition, the repurchase offer amount for the then-current monthly period, plus the repurchase offer amounts for the two monthly periods immediately preceding the then-current monthly period, will not exceed 25% of the Trust's (or Other Trust's) outstanding shares. Each Trust (or Other Trust relying on this relief) may repurchase additional tendered shares pursuant to rule 23c–3(b)(5) only to the extent the percentage of additional shares so repurchased does not exceed 2% in any three-month period.

2. Payment for repurchased shares will occur at least five business days before notification of the next repurchase offer is sent to shareholders of any Trust (or Other Trust relying on this relief).

For the Commission, by the Division of Investment Management, under delegated authority.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E6–7567 Filed 5–17–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold the following meetings during the week of May 22, 2006: An Open Meeting will be held on Monday, May 22, 2006 at 10 a.m. in the Auditorium, Room LL–002 and Closed Meetings will be held on Monday, May 22, 2006 at 11 a.m. and on Thursday, May 25, 2006 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meetings. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), (8), (9)(B), (10) and 17 CFR 200.402(a)(3), (5), (7), (8), (9)(ii), and (10) permit consideration of

the scheduled matters at the Closed Meeting.

Commissioner Nazareth, as duty officer, voted to consider the items listed for the closed meetings in closed session, and determined that no earlier notice thereof was possible.

The subject matter of the Open Meeting scheduled for Monday, May 22, 2006 will be: The Commission will hear oral argument in an appeal by Gateway International Holdings, Inc., and its president and chief executive officer, Lawrence A. Consalvi, from an administrative law judge's decision. The law judge found that Gateway failed to file with the Commission a total of seven annual and quarterly reports due between May 2003 and December 2004, and that, by doing so, Gateway violated Section 13(a) of the Securities Exchange Act of 1934 and Rules 13a–1 and 13a–13 thereunder. The law judge also found that Consalvi caused Gateway's violations. The law judge revoked the registration of Gateway's common stock and ordered Consalvi to cease and desist from committing or causing any violations or future violations of Exchange Act Section 13(a) and Exchange Act Rules 13a–1 and 13a–3. Among the issues likely to be argued is whether and to what extent sanctions should be imposed on Respondents.

The subject matter of the Closed Meeting scheduled for Monday, May 22, 2006 will be: Post-argument discussion.

The subject matter of the Closed Meeting scheduled for Thursday, May 25, 2006 will be: Formal orders of investigation; Institution and settlement of injunctive actions; Institution and settlement of administrative proceedings of an enforcement nature; Request for information in an investigative file; Resolution of litigation claims; and Litigation matters.

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: May 16, 2006.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 06–4706 Filed 5–16–06; 3:52 pm]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–53795; File No. SR–Phlx–2005–61]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change, and Amendment Nos. 1 and 2 Thereto, Relating to the Deletion of Certain Exchange Rules

May 12, 2006.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and 19b–4 thereunder,[2] notice is hereby given that on October 14, 2005, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Phlx. On March 10, 2006, the Exchange submitted Amendment No. 1 to the proposed rule change.[3] Phlx filed amendment No. 2 to the proposed rule change on May 1, 2006.[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 Phlx, pursuant to section 19(b)(1) of the Act[5] and Rule 19b–4 thereunder,[6] proposes to delete Phlx Rules 129, 241–248, and 923.

The text of the proposed rule change, as amended, appears below. Additions are *italicized*; deletions are [bracketed].

* * * * *

Rule 129 [Withdrawal of Orders] *Reserved*

[The withdrawal from the Floor of the Exchange of an order for the purchase or sale of securities, or any part thereof, at the request of another member of the Exchange, for the purpose of the purchase or sale of the securities so withdrawn outside of the Exchange is prohibited.]

Rule 241 [Special Offerings] *Reserved*

[Notwithstanding the provisions of other Rules, which might otherwise apply, the Exchange may, subject to the conditions specified in this Rule and to compliance with the provisions contained herein, permit a ''Special Offering'' (as herein defined) to be made through the facilities of the Exchange, provided that the Exchange (after consulting and with the concurrence of a Governor who is active on the Floor of the Exchange) shall have determined that the regular market on the Exchange cannot, within a reasonable time and at a reasonable price or prices, absorb the particular block of a security which is to be the subject of such Special Offering. In making such determination the following factors shall be taken into consideration, via:

(a) Price range and the volume of transactions in such security on the Floor of the Exchange during the preceding six months;

(b) Attempts which have been made to dispose of the security in the regular market on the Floor of the Exchange;

(c) The apparent past and current interest in such security in such regular market on the Floor; and

(d) The number of shares or bonds and the current market value of the block of such security proposed to be covered by such Special Offering.

Except in special circumstances a Special Offering will not be permitted unless the offering involves at least 1,000 shares of stock with an aggregate market value of not less than $25,000, or $15,000 par value in bonds with an aggregate market value of not less than $10,000.]

Rule 242 [Definition] *Reserved*

[A Special Offering is defined as an offering (designated as a fixed price offering) by one or more members or member organizations acting for his or its own account or for the account of one or more other persons, for the sale of a block of a security dealt in on the Exchange through the facilities of the Exchange at a price not in excess of the last sale of such security or the current offer of such security in the regular market on the Floor of the Exchange, whichever is the lower, but equal to or higher than the current bid for such security in such market, whereby the offer or agrees to pay a special commission to such members and member organizations as may accept all or any part of such Offering for the account of his or its customers; provided, that the security which is the

[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 clarifying changes to the proposed rule change and sought to retain Phlx Rules 229 Supplementary Material .07(c)(ii) and 236.

[4] Amendment No. 2, which replaced the original filing and Amendment No. 1 in their entirety, made general clarifying changes to the proposed rule change and sought to retain Phlx Rule 219, as well as Phlx Rules 229 Supplementary Material .07(c)(ii) and 236. Phlx states that it plans to propose to delete Phlx Rules 219, 229 Supplementary Material .07(c)(ii), and 236 in a future proposed rule change regarding a change to Phlx systems.

[5] 15 U.S.C. 78s(b)(1).

[6] 17 CFR 240.19b–4.

subject of such Offering is a security to which the exemption afforded by Rule 240.10b–2(d)(1) issued by the Securities and Exchange Commission, and such amendments thereto as have been or may be from time to time adopted, is available at the time of such Offering.]

Rule 243 [Conditions] *Reserved*

[No Special Offering, as provided in these Rules shall be made unless each of the following conditions is complied with, via:

(a) The person for whose account such Special Offering is to be made shall at the time of such Offering be the owner of the entire block of the security so to be offered, except that, for the purpose of stabilizing, there also may be sold for such person's account, or for the account of any member organization offering the block of security on his behalf, as part of the Special Offering, an amount not to exceed 10% of the shares or bonds owned and originally offered in the Special Offering by such person.

(b) The person for whose account such Special Offering is to be made shall include within the Offering all of the security which he then intends to offer within a reasonable time, and there shall be furnished to the Exchange before the Offering is made a written statement by the offeror to that effect or a written statement by his broker stating that the broker has been so advised by the offeror.

(c) A Special Offering shall be automatically suspended as long as an offering exists ''regular way'' at a price which would permit a purchase at a lower net cost than in the Special Offering. Unless otherwise specifically exempted by the Exchange, every Special Offering shall remain open for a minimum period of 15 minutes, inclusive of any period during which it is suspended by operation of the above provision. A Special Offering which has not been completed in the 15 minute minimum period shall not be withdrawn before completion without the approval of the Exchange.

(d) The person for whose account such Special Offering is made shall agree that during the period such offering is open, he will not offer in the regular market on the floor of the Exchange any shares or bonds of the security which is the subject of such Special Offering, unless the prior permission of the Exchange is first obtained.

(e) The special commission referred to in Rule 242 shall not exceed $1 per share on purchases at a price of $50 or less per share, or 2% of the purchase price on purchases at a price in excess of $50 per share. In the case of bonds such commission shall not exceed 2½% of the purchase price.

(f) No member or member organization shall directly or indirectly receive any part of the special commission referred to in Rule 242 in connection with any purchase for his or its own account or the account of a partner thereof or a stockholder therein or for the account of any other member or member organization or partner thereof or stockholder therein, made pursuant to a Special Offering.

(g) A Special Offering shall not be made unless it can be accepted in a lesser amount or amounts than the total of the securities offered.

(h) A Special Offering shall be made for acceptance in round lots or in odd lots, without preference, and in the case of an odd-lot purchase no differential shall be added to the gross purchase price of the Special Offering.

(i) When buying orders in a Special Offering exceed the amount available in the offering, the offered security will be allocated in reasonably proportionate amounts.]

Rule 244 [When Effective] *Reserved*

[A Special Offering, when approved, shall become effective upon announcement by the Exchange on the tape of the terms and conditions of such Offering.]

Rule 245 [Terms of Offering on Tape] *Reserved*

[The terms of a Special Offering shall be printed on the tape before it is effective, with a statement, if such be the fact, that stabilizing transactions have been effected or are contemplated and that it is intended to over allot as permitted by Rule 243(a). Transactions effected pursuant to a Special Offering shall when feasible be printed currently on the tape, and the tape shall show the gross price and the special commission in a legend such as: ''SP OFF 100 XYZ 40 COM .50'', as well as the number of orders involved in such transaction where more than one order is involved; and after the close of the market, any unprinted remainder of such transactions executed during the day shall be so printed. When the offering is terminated, an announcement to that effect shall be printed on the tape; and when the intention to stabilize is terminated, such fact shall be announced on the tape, together with a statement that stabilizing transactions have been effected, if such be the fact.]

Rule 246 [Odd Lots] *Reserved*

[Transactions effected pursuant to a Special Offering shall not elect the execution of any outstanding ''regular way'' odd-lot orders.]

Rule 247 [Authorization] *Reserved*

[(a) A Special Offering may be approved and made only if the person or persons for whose account it is proposed to be made shall have specifically authorized such Offering and its terms.

Disclosure

(b) A member organization effecting for the account of a customer a purchase pursuant to a Special Offering shall confirm such transaction to such customer at the offering price and shall not charge to or collect from such customer any commission on account of such transaction.

The confirmation by a member organization to a buyer or seller in a Special Offering shall state in full the terms and conditions of the Special Offering. The confirmation to a buyer shall state at least:

(1) That the purchase was part of a Special Offering;

(2) That no commission is to be charged to the customer;

(3) That the seller is to pay a special commission to the member organization, if such be the fact;

(4) The amount of such special commission;

(5) The information printed on the tape regarding stabilizing transactions or the intention to stabilize; and

(6) The nature of the member organization's interest in the Special Offering, if any, other than its interest as a recipient of the special commission.

(c) A member organization soliciting purchase orders for execution pursuant to a Special Offering shall advise the person so solicited of the terms and conditions of such Offering before effecting any transaction for such person pursuant thereto. Such disclosure shall include at least the items described in paragraphs (1) to (6) of Rule 247(b).

(d) A member organization with an order for the purchase of a security which is the subject of a Special Offering shall effect such purchase in the regular market whenever a ''regular way'' offering is available which would permit such purchase at a lower net cost than in the Special Offering. Every order for purchase in a Special Offering shall be accepted pursuant to the above condition.]

Rule 248 [Information Regarding Special Offerings] *Reserved*

[It is not the purpose of these Rules to supersede the auction market or supplant approved secondary distributions, but to provide means for

the handling of blocks of securities dealt in on the Exchange, through the facilities of the Exchange, where such blocks, under current conditions, cannot readily be absorbed in the auction market within a reasonable time and at a reasonable price.

Rules 241–248 are intended primarily to provide for Special Offerings on an agency basis by members or member organizations on behalf of their non-member customers. However, the Rules do not prohibit a Special Offering by a member or member organization for his or its own account.

.01 Preliminary Information Required.—The broker for the offeror will be required to furnish the following information to the Exchange prior to the announcement of the Special Offering on the tape:

(a) Name of the security and ticker symbol.

(b) Number of shares or bonds.

(c) Special Offering price.

(d) Special commission.

(e) Name of the offeror.

(f) Written assurance of the offeror, or of the broker upon advice from the offeror, that the shares or bonds contained in the Offering are all of the security which he then intends to offer within a reasonable time, as required in Rule 243(b).

(g) Assurance of agreement of offeror to terms of Offering.

(h) Statement as to whether stabilizing operations will be engaged in to facilitate Special Offering.

(i) Statement as to whether the offeror or his agent intends, for the purpose of stabilizing, to sell shares or bonds in the Special Offering in excess of that owned and included in the original offer as permitted by Rule 243(a).

(j) Statement that the shares or bonds covered by the application do or do not require registration under the Securities Act of 1933, together with explanation thereof. This information should be given to the Exchange as soon as possible in advance of the time it is proposed to make the Special Offering. Announcement will not be made on the tape of the Special Offering (and the Special Offering thus cannot become effective) until the Exchange has the requisite information and has approved it.

.02 Ownership.—The offeror in a Special Offering must be the bona fide owner of the entire block of security offered, net of any short account the offeror may have in such security. Sales for the purpose of stabilizing as permitted by Rule 243(a) are excepted.

.03 ''Piecemeal.''—''All or None'' Offerings. ''Piecemeal'' or successive offerings of the same security by the same offeror, and offerings on an ''all-or-none'' basis, will not be permitted.

.04 Minimum Period of Offering.—Rule 243(c) provides in part that unless otherwise specifically exempted by the Exchange, every Special Offering shall remain open for a minimum period of 15 minutes. An exemption from this minimum requirement is specifically given to any offering which has been announced on the Exchange ticker tape at least one hour before the offering becomes effective. An offering so exempted from the minimum 15 minute requirement shall not be closed without the approval of the Exchange.

.05 Other Offers by Offeror.—It should be noted that, under Rule 243(d), an offeror may not, while his Special Offering is open, offer any shares or bonds of the same security in the regular auction market, without prior permission of the Exchange.

.06 Orders after Close.—Orders accumulated after the close shall be completed on the Floor of the Exchange at the opening of the next market session.

.07 Handling of Special Offering Transactions.—Purchases against Special Offerings must be completed on the Floor of the Exchange at the post where the security is dealt in. The handling of the Floor end of the business, on either the purchase or the offering side, may be entrusted to a Floor broker or in the same manner as in the case of regular commission orders. In reference to Rule 247 attention is directed to the fact that in connection with a Special Offering, the broker for the buyer is acting in an agency capacity and the agency obligation to buy at the most advantageous cost to the customer shall be observed.

.08 Stabilizing.—The right to sell an amount not to exceed 10 per cent of the number of shares or bonds owned and originally offered in the Special Offering, for the purpose of stabilizing and as part of a Special Offering, is subject to the prior approval of the Exchange. Stabilizing operations in connection with Special Offerings must be discussed in advance with the staff of the Exchange.

.09 Stop Orders—Odd-lot Orders.—Transactions effected pursuant to Special Offerings shall not elect stop-orders or open odd-lot orders for execution in the regular market.

.10 Confirmations.—The information to be furnished on confirmations in conformity with Rule 247(b) may be inserted on the face of an appropriate form of confirmation in type no smaller than other surrounding type or it may appear on the back of such confirmation in the same type, provided the face of the confirmation contains the following legend in the type illustrated as follows:

''IMPORTANT—SEE REVERSE SIDE''

The information may also be attached and made a part of an appropriate form of confirmation in type no smaller than 8 point.

.11 Reports.—The applicant shall submit to the Exchange at the close of each day a report of all transactions in the offered security effected for the account of any person having an interest, as seller or as agent, offering the block of the security on the seller's behalf, in the Special Offering. Such reports shall cover the period beginning with the date of commencement of the offering or the stabilizing, whichever is earlier, and ending with the date on which the short position has been covered or the Special Offering account has been terminated, whichever is later.]

Rule 923 [Member Officers] Reserved

[A member of the Exchange shall be an officer of the member organization that is a corporation. He shall own and continue to own such an interest in the voting stock of said corporation as shall be acceptable to the Committee; provided that the Committee may waive such requirement of voting stock ownership, if the voting stock ownership is otherwise satisfactory to the Committee.]

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Phlx has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change, as amended, is to update Phlx's rules to remove rules that, according to the Exchange, are no longer applicable due to changes in the law or methods of business on the Exchange.

Phlx Rule 129 Withdrawal of Orders

Phlx Rule 129 prohibits the withdrawal of an order from the Exchange, at the request of another member, for the purpose of the purchase or sale of the securities outside of the Exchange. The Exchange speculates that this rule was possibly adopted in the 1930's or 1940's to keep orders presented on the Phlx market subject to the regulatory protections available to them on the Exchange. Since that time, the over the counter markets have become more sophisticated. Currently, it is understood that members, in exercising their agency duty to obtain best execution for orders entrusted to them, may remove orders from the Exchange and seek execution in other venues. Therefore, the Exchange believes that deletion of Phlx Rule 129 should assist members in fulfilling their best execution obligations.

Phlx Rules 241–248 Rules for Special Offerings

Phlx Rules 241–248 concern special offerings of securities on the Exchange. In 1942, the Commission amended Rule 10b–2 under the Act [7] to permit an exemption for special offerings under a plan filed with the Commission by an exchange.[8] Phlx's Plan, contained in Phlx Rules 241–248, permits special offerings, at a fixed price and for a fixed period of time, on the Exchange where the quantity of stock involved cannot be absorbed in the regular auction market within a reasonable time and at a reasonable price. Phlx Rules 241–248 permit a person making a special offering to pay a special commission to a broker for a purchasing customer.

Generally, Phlx Rules 241–248 specify a minimum share size of 1,000 shares, with a value of $25,000. According to the Exchange, by today's standards, 1,000 shares of stock with a value of $25,000 is not a quantity of stock that cannot readily be absorbed in the regular auction market. Phlx Rules 241–248 predate Phlx crossing Rule 126, which has special cross provisions for Trust Shares of 25,000 shares or greater and all securities of 5,000 shares or greater, and PACE, which is described in Phlx Rule 229 and sets minimum automatic execution sizes for securities on the system of 599 shares, noting that specialists may set higher levels.

In proposing the rescission of Rule 10b–2, the Commission indicated that it believed that the significant changes that have taken place in the securities markets since Rule 10b–2's adoption, and the coverage of other anti-fraud and anti-manipulation provisions of the federal securities laws, such as Rules 10b–5 [9] and 10b–6 [10] under the Act, made it appropriate to rescind Rule 10b–2. The Exchange now proposes to delete Phlx Rules 241–248, the plan adopted in response to Rule 10b–2, because it believes that these rules are obsolete as the Commission rescinded Rule 10b–2 and the Exchange has not utilized Phlx Rules 241–248 in the past twenty years.[11]

Phlx Rule 923 Member Officers

Phlx Rule 923 requires members associated with member corporations to be officers and voting stockholders of those member corporations, noting that the Exchange may waive the voting stock requirement of the rule. This rule was adopted at least fifty years ago, when most member corporations were small regional companies. The purpose of this rule at that time may have been to provide an additional means of obtaining security for the debts of the member corporation by requiring that the members who were trading the securities also be officers and/or owners of the corporation. Today, the Phlx has other rule-based means to require adequate financial security for the debts of member corporations and for ensuring that member corporations are generally financially solvent. Phlx Rule 909 requires member organizations to provide and maintain security for any claims owed to the Exchange and other members and member organizations.[12] Phlx Rule 924 complements Phlx Rule 909 by making the member organization liable for the fees, fines, dues, penalties and other amounts imposed by the Exchange on its members. This provision applies regardless of the officer or ownership status of the member. Finally, Rule 15c3–1 under the Act [13] requires certain minimum net capital requirements for broker-dealers, which include Exchange member corporations. Therefore, Phlx does not believe that the requirement in Phlx Rule 923 serves to protect the Exchange and believes deletion gives a member corporation maximum flexibility to choose whom in their company to employ as members of the Exchange.

2. Statutory Basis

The Exchange believes that its proposal, as amended, is consistent with section 6(b) of the Act,[14] in general, and furthers the objectives of section 6(b)(5) of the Act,[15] in particular, in that it is designed to 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 to protect investors and the public interest by updating the Exchange's rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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 Phlx 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

[7] 17 CFR 240.10b–2.

[8] Phlx filed its plan in 1943. *See* Securities Exchange Act Release No. 3487 (September 23, 1943).

[9] 17 CFR 240.10b–5.

[10] 17 CFR 240.10b–6.

[11] Similarly, the New York Stock Exchange (''NYSE'') rescinded a rule (NYSE Rule 391) similar to Phlx Rules 241–248 in 1993 in response to the Commission's rescission of Rule 10b–2. *See* Securities Exchange Act Release No. 32822 (August 31, 1993), 58 FR 47484 (September 9, 1993) (SR–NYSE–93–20).

[12] Phlx notes that member corporations are a subset of member organizations. Therefore, Phlx Rules 909 and 924 apply to member corporations.

[13] 17 CFR 240.15c3–1.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2005–61 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–Phlx–2005–61. 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, as amended, that are filed with the Commission, and all written communications relating to the proposed rule change, as amended, between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2005–61 and should be submitted on or before June 8, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E6–7566 Filed 5–17–06; 8:45 am]

BILLING CODE 8010–01–P

[16] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 5411]

Determination and Certification Under Section 40A of the Arms Export Control Act

Pursuant to section 40A of the Arms Export Control Act (22 U.S.C. 2781), and Executive Order 11958, as amended, I hereby determine and certify to the Congress that the following countries are not cooperating fully with United States antiterrorism efforts:

Cuba
Iran
North Korea
Syria
Venezuela

I hereby notify that the decision not to include Libya on the list of countries not cooperating fully with U.S. antiterrorism efforts comes as the result of a comprehensive review of Libya's record of support for terrorism over the last three years. Libya has taken significant and meaningful steps during this time to repudiate its past support for terrorism and to cooperate with the United States in our antiterrorism efforts.

This determination and certification shall be transmitted to the Congress and published in the **Federal Register**.

Dated: May 8, 2006.

Condoleezza Rice,

Secretary of State, Department of State.

[FR Doc. 06–4656 Filed 5–17–06; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF STATE

[Public Notice 5410]

Bureau of Educational and Cultural Affairs (ECA); Request for Grant Proposals: Regional Educational Advising Coordinator Program

Announcement Type: New Cooperative Agreement.

Funding Opportunity Number: ECA/A/S/A–07–03.

Catalog of Federal Domestic Assistance Number: 00.000.

Key Dates: Program start date: October 1, 2006.

Application Deadline: July 10, 2006.

Executive Summary: The Educational Information and Resources Branch in the Office of Global Educational Programs of the Bureau of Educational and Cultural Affairs (ECA) announces an open competition for a cooperative agreement to support the Regional Educational Advising Coordinator (REAC) Program. The underlying goal of this cooperative agreement is to foster international student mobility between the United States and the rest of the world. The grantee organization will provide programmatic oversight and coordination, communication and information channels, training and logistical support, and human resource services to eight REACs, thus assuring their capacity to supply the EducationUSA network of 450 State Department-supported educational advising centers with adequate resources and professional training, and in turn, hundreds of thousands of overseas students with objective, accurate and timely information on U.S. higher education. The grantee organization will also ensure that the Bureau, U.S. embassies and Fulbright commissions receive thoughtful assessments of issues concerning advising centers and regional trends in student mobility from the REACs.

Non-profit higher education organizations with the infrastructure to manage programs in all regions of the world may submit proposals which demonstrate their knowledge of international student mobility, understanding of the needs of the EducationUSA network, and the capacity to support REACs based in Ghana, Germany, Mexico, Morocco, Pakistan, Peru, Russia, and Thailand. Pending availability of FY07 funding, this grant will provide an assistance award in the range of $1,273,000 to $1,433,000.

I. Funding Opportunity Description

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.

Purpose

The State Department and ECA are committed to facilitating and increasing the flow of international students to the U.S. in order to provide future world leaders with opportunities to understand U.S. society, culture and values. The REACs' role is critical to the Bureau's pursuit of this objective.

REACs and the EducationUSA advisers they support are catalysts for the exchange of U.S. Government-sponsored students and scholars as well as those who pursue U.S. educational programs through their own means or

with the aid of other sponsors. REACs and the EducationUSA network market U.S. higher education abroad, promote study by international students, scholars and professionals in the U.S., and encourage study abroad by Americans. EducationUSA advisers counsel international students, parents and foreign government officials, and bring U.S. educational opportunities to the attention of a broad and diverse segment of young people. Advisers also facilitate outreach by U.S. institutions to these populations. (For more information, please see *http://www.educationUSA.state.gov.*)

Program Information

The grantee organization will ensure that REACs have the necessary logistical and programmatic support to provide comprehensive and accurate information to EducationUSA advisers through regional listservs and newsletters; to evaluate the need of advising centers for resources and training and to provide advisers appropriate training through regional workshops, internships and other professional opportunities; to conduct site visits to centers and report to ECA's Educational Information and Resources Branch (ECA/A/S/A); and to provide analyses to the Public Affairs and Consular sections of U.S. embassies on issues concerning the advising centers and trends in student mobility, with special reference to underserved groups. The grantee should also ensure that REACs represent the views of advisers and international students to educational institutions in the United States for the purpose of facilitating the enrollment of students in U.S. institutions.

REACs have been employed previously through a variety of mechanisms, including grants to U.S.-based non-governmental organizations as well as transfers of funds to U.S. embassies and Fulbright Commissions. Through this cooperative agreement, the Bureau intends to provide a coherent administrative structure for the REACs, while maintaining the Bureau's traditionally substantial level of involvement in overseeing the format and content of assistance provided by the REACs to EducationUSA advisers. The grantee organization will use funding made available through this agreement to provide a uniform and equitable structure for REACs' salaries, health insurance, pensions, professional development, travel, equipment, and logistical support. The grantee organization should serve as a partner to REACs by facilitating and supporting them to conduct an adequate number of regional adviser training sessions and workshops. The grantee should facilitate communication and information flow among and between REACs via a listserv or other means. Ongoing REAC office expenses, including rent, are also eligible for funding. Should additional monies become available, the agreement will also pay for a part-time assistant for each REAC, where feasible and not already furnished from other sources; applicants should discuss in their proposals how they would provide part-time assistants.

Applicant organizations should include in their proposals a plan to maintain REACs in the cities and countries where they are currently based. Applicants must be willing to enter into a sub-grant agreement with certain current REAC host organizations, and to pay any applicable office rental fees as needed. Please contact ECA/A/S/A Program Officer Rachel Waldstein for more information on individual incumbent REAC situations. If a vacancy occurs, the grantee organization will be expected to recruit and select new REACs, in close consultation with ECA/A/S/A.

Please see the Program Objectives, Goals and Implementation (POGI) for further details on REAC responsibilities and qualifications, grantee organization responsibilities and the ECA/A/S/A role.

II. Award Information

Type of Award: Cooperative Agreement. Under this cooperative agreement, ECA/A/S/A will be substantially involved in program activities above and beyond routine grant monitoring. It will play a central role in reviewing staff selection, travel plans and budget, and issues requiring consultation with Fulbright Commission or U.S. embassy personnel. Please see the POGI for details.

Fiscal Year Funds: 2007.

Approximate Total Funding: Minimum of $1,273,000 and up to $1,433,000, pending availability of FY07 funds.

Approximate Number of Awards: One.

Approximate Average Award: Minimum of $1,273,000 and up to $1,433,000, pending availability of funds.

Anticipated Award Date: Pending availability of funds, October 1, 2006.

Anticipated Project Completion Date: December 31, 2007.

Additional Information: Pending successful implementation of this program and the availability of funds in subsequent fiscal years, it is ECA's intent to renew 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 possible in support of its programs. Proposals that include significant cost sharing will be deemed more competitive.

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 which 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:*

(a.) Bureau grant guidelines require that organizations with less than four years experience in conducting international exchanges be limited to $60,000 in Bureau funding. ECA anticipates awarding one grant, in an amount of approximately $1,273,000 to $1,433,000 to support program and administrative costs required to implement this 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.

(b.) Organizations may collaborate in the submission of an application to manage this program. In such a case, the agreement will be made with one organization that should be prepared to work with its institutional partners on the basis of one or more sub-agreements.

IV. Application and Submission Information

Note: Please read the complete 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/A, Room 349, U.S. Department of State, SA–44, 301 4th Street, SW., Washington, DC 20547, telephone: 202–453–8866, fax number: 202–453–8890, e-mail: *Waldsteinre@state.gov* to request a Solicitation Package. Please refer to the Funding Opportunity Number ECA/A/S/A–07–03 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 Rachel Waldstein, Program Officer, and refer to the Funding Opportunity Number ECA/A/S/A–07–03 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 application should be submitted per the instructions under IV.3f. ''Submission Dates and Times 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:* For applicants' information only, 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. The Grantee will be responsible for issuing DS–2019 forms to participants in this program.

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.

Describe your plans for: i.e. sustainability, overall program management, staffing, coordination with ECA and PAS or any other requirements etc.

IV.3e. Please take the following information into consideration when preparing your budget:

IV.3e.1. *Budget:* Applicants must submit a comprehensive budget for the entire program. There must be a summary budget as well as breakdowns reflecting both administrative and program budgets. Applicants may provide separate sub-budgets for each REAC or for each program component, phase, location, or activity to provide clarification. Administrative and indirect costs may not exceed 30% and may not be charged against program costs such as REAC per diem, or lodging and per diem for advisers attending regionally based training.

IV.3e.2. Allowable costs for the program include the following:

(1) REAC salaries, benefits, health insurance, retirement.

(2) Costs for REAC professional development and for facilitating communication and information flow among REACs and with advising centers.

(3) Part-time assistant salaries.

(4) REAC travel.

(5) Logistical support and equipment.

(6) Cost of organizing regional adviser training programs.

Please refer to the Solicitation Package for complete budget guidelines and formatting instructions.

IV.3f. *Application Deadline and Methods of Submission:*

Application Deadline Date: July 10, 2006.

Reference Number: ECA/A/S/A–07–03.

Methods of Submission: 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.1. *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 seven 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/A–07–03, Program Management, ECA/EX/PM, Room 534, 301 4th Street, SW., Washington, DC 20547.

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 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 applications have 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 a confirmation e-mail from grants.gov upon the successful submission of an application. ECA will not notify you upon receipt of electronic applications.

IV.3g. *Intergovernmental Review of Applications:* Executive Order 12372 does not apply to this program.

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. All eligible proposals will be reviewed by the program office, as well as the Public Diplomacy section overseas, where appropriate. 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. Please see POGI for a description of each criterion.

1. Program planning/Ability to achieve program objectives.
2. Institution's capacity/record.
3. Cost effectiveness/cost sharing.
4. Multiplier effect/impact.
5. Support of diversity.
6. Project evaluation.
7. Area expertise.

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:

(1) A final program and financial report no more than 90 days after the expiration of the award;

(2) Quarterly program and financial reports. Program reports should include travel and budget updates for each REAC.

Grantees will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. (Please refer to IV. 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.

Program Data Requirements: Organizations awarded grants will be required to maintain specific data on program participants (REACs and EducationUSA advisers) and activities in an electronically accessible database format that can be shared with the Bureau as required. As a minimum, the data must include the following:

(1) Name, address, contact information and biographic sketch of all persons who travel internationally on funds provided by the grant or who benefit from the grant funding but do not travel.

(2) Information on international and domestic travel, providing dates of travel and cities in which any exchange experiences take place. Final schedules for in country and U.S. activities must be received by the ECA Program Officer at least seven work days prior to the official opening of the activity.

VII. Agency Contacts

For questions about this announcement, contact: Rachel Waldstein, Program Officer, Educational Information and Resources Branch, Office of Global Educational Programs, ECA/A/S/A, Room 349, ECA/A/S/A–07–03, U.S. Department of State, SA–44, 301 4th Street, SW., Washington, DC 20547, telephone: 202–453–8866, fax: 202–453–8890, e-mail address: *Waldsteinre@state.gov.*

All correspondence with the Bureau concerning this RFGP should reference the above title and number ECA/A/S/A–07–03.

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: May 12, 2006.

Dina Habib Powell,

Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E6–7601 Filed 5–17–06; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 5385]

Shipping Coordinating Committee; Notice of Meeting

The Shipping Coordinating Committee (SHC) will conduct an open meeting from 10 a.m. until 11 a.m. on Thursday, June 1, in Room 4420, at U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593–0001. The purpose of the meeting is to finalize preparations for the 56th Session of the Technical Co-operation Committee and the 96th Session of the Council of the International Maritime Organization (IMO), which are scheduled for June 13–23, at the IMO Headquarters in London. Discussion will focus on papers received and draft U.S. positions.

Items of particular interest include:

—Reports of Committees;
—Resource Management;
—Reports and financing of the Integrated Technical Co-operation Programme; and
—Strategy and planning.

Members of the public may attend these meetings up to the seating capacity of the room. Interested persons can obtain information by writing: Director, International Affairs, U.S. Coast Guard Headquarters, Commandant (G–CI), room 2114, 2100 Second Street, SW., Washington, DC 20593–0001 or by calling: (202) 267–2280.

Dated: April 27, 2006.

Clay Diamond,

Executive Secretary, Shipping Coordinating Committee, Department of State.

[FR Doc. E6–7578 Filed 5–17–06; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF STATE

[Public Notice 5386]

Shipping Coordinating Committee; Notice of Meeting

The Shipping Coordinating Committee (SHC) will conduct an open meeting at 1 p.m. on Thursday, June 22, 2006, in Room 6319 of the United States Coast Guard Headquarters Building, 2100 2nd Street SW., Washington, DC 20593–0001. The primary purpose of the meeting is to complete preparations for the 49th Session of the International Maritime Organization (IMO) Sub-Committee on Stability and Load Lines and on Fishing Vessels Safety to be held at IMO Headquarters in London, England from July 24th to 28th.

The primary matters to be considered include:

—Development of explanatory notes for harmonized SOLAS Chapter II–1;
—Passenger ship safety;
—Review of the Intact Stability Code;
—Safety of small fishing vessels;
—Tonnage measurement of open-top containerships;
—Review of the SPS Code.

Members of the public may attend this meeting up to the seating capacity of the room.

Interested persons may seek information by writing to Mr. Paul Cojeen, Commandant (G–PSE), U.S. Coast Guard Headquarters, 2100 Second Street SW., Room 1308, Washington, DC 20593–0001 or by calling (202) 267–2988.

Dated: April 27, 2006.

Clay L. Diamond,

Executive Secretary, Shipping Coordinating Committee, Department of State.

[FR Doc. E6–7580 Filed 5–17–06; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF STATE

[Public Notice 5391]

Shipping Coordinating Committee; Notice of Meeting

The Shipping Coordinating Committee (SHC) will conduct an open meeting at 9:30 a.m. on Tuesday, May 30, 2006, in Room 2415 of the United States Coast Guard Headquarters Building, 2100 2nd Street, SW., Washington, DC 20593–0001. The primary purpose of the meeting is to prepare for the 14th Session of the International Maritime Organization (IMO) Sub-Committee on Flag State Implementation to be held at IMO Headquarters in London, England from June 5th to 9th.

The primary matters to be considered include:

—Responsibilities of Governments and measures to encourage flag State compliance;
—Port State Control (PSC) on seafarer's working hours;
—Harmonization of port State control activities;
—Comprehensive analysis of difficulties encountered in the implementation of IMO instruments;
—Mandatory reports under International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL 73/78);
—Casualty statistics and investigations;
—Review of the Code for the investigation of marine casualties and incidents;
—Review of the Survey Guidelines under the Harmonized System of Survey and Certification (HSSC)—(resolution A.948(23));
—Development of guidelines on port State control under the 2004 Ballast Water Management (BWM) Convention;
—Development of survey guidelines required by regulation E–1 of the 2004 BWM Convention;
—Port reception facilities-related issues;
—Illegal, unregulated and unreported (IUU) fishing and implementation of resolution A.925(22);
—Consideration of International Association of Classification Societies (IACS) unified interpretations;

Members of the public may attend this meeting up to the seating capacity of the room. Interested persons may seek information by writing to Mr. E.J. Terminella, Commandant (G–PCV), U.S. Coast Guard Headquarters, 2100 Second Street, SW., Room 1116, Washington, DC 20593–0001 or by calling (202) 267–2978.

Dated: May 5, 2006.

Clay Diamond,

Executive Secretary, Shipping Coordinating Committee, Department of State.

[FR Doc. E6–7581 Filed 5–17–06; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF STATE

[Delegation of Authority 292]

Delegation by the Deputy Secretary of State to the Assistant Secretary for Near Eastern Affairs of Authority To Submit Certain Iraq Reports to the Congress

By virtue of the authority vested in the Secretary of State, including section 1 of the State Department Basic Authorities Act, as amended (22 U.S.C. 2651a) and the Presidential Memorandum For the Secretary of State—Delegation of Certain Reporting Authority, dated July 2, 2004 (69 FR 43723), and delegated to the Deputy Secretary of State pursuant to Delegation of Authority 245 of April 23, 2001, I hereby delegate to the Assistant Secretary for Near Eastern Affairs the authority to approve submission of reports to the Congress pursuant to section 4 (a) of the Authorization for Use of Military Force Against Iraq

Resolution of 2002, Public Law 107–243 and section 3 of the Authorization for Use of Military Force Against Iraq Resolution, Public Law 102–1.

Any act, executive order, regulation or procedure subject to, or affected by, this delegation shall be deemed to be such act, executive order, regulation or procedure as amended from time to time.

Notwithstanding this delegation of authority, the Secretary, the Deputy Secretary or the Under Secretary for Political Affairs may at any time exercise any authority or function delegated by this delegation of authority.

This delegation of authority shall be published in the **Federal Register**.

Dated: May 10, 2006.

Robert B. Zoellick,

Deputy Secretary of State, Department of State.

[FR Doc. E6–7579 Filed 5–17–06; 8:45 am]

BILLING CODE 4710–31–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed the Week Ending April 28, 2006

The following Agreements were filed with the Department of Transportation under Sections 412 and 414 of the Federal Aviation Act, as amended (4 U.S.C. 1382 and 1384) and procedures governing proceedings to enforce these provisions. Answers may be filed within 21 days after the filing of the application.

Docket Number: OST–2006–24605.
Date Filed: April 24, 2006.
Parties: Members of the International Air Transport Association.
Subject:
Mail Vote 486—Resolution 010m, TC123 South Atlantic,
Special Passenger Amending Resolution from Singapore (SG) to South Atlantic (Memo 0330).
Intended effective date: April 1, 2006.

Docket Number: OST–2006–24606.
Date Filed: April 24, 2006.
Parties: Members of the International Air Transport Association.
Subject:
PTC2 Mail Vote 485,
Special Passenger Amending Resolution 0101 from Israel to Europe.
Intended effective date: April 27, 2006.

Docket Number: OST–2006–24607.
Date Filed: April 24, 2006.
Parties: Members of the International Air Transport Association.
Subject:
Mail Vote 483—Resolution 010j, TC31 South Pacific,
Special Passenger Amending Resolution between Chile and Australia, New Zealand.
Intended effective date: April 15, 2006.

Docket Number: OST–2006–24608.
Date Filed: April 24, 2006.
Parties: Members of the International Air Transport Association.
Subject:
Mail Vote 487—Resolution 010n,
TC3 Within South East Asia / South East Asia-South Asian, Subcontinent/ South East Asia-Japan, Korea,
Special Passenger Amending Resolution from Philippines to South East Asia, South Asian Subcontinent, Japan, Korea.
Intended effective date: May 11, 2006.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register, Liaison.

[FR Doc. E6–7569 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket OST–2005–20570]

Application of Tradewind Aviation, LLC for Commuter Authority

AGENCY: Department of Transportation.

ACTION: Notice of Order to Show Cause (Order 2005–5–10).

SUMMARY: The Department of Transportation is directing all interested persons to show cause why it should not issue an order finding Tradewind Aviation, LLC fit, willing, and able, and awarding it Commuter Air Carrier Authorization.

DATES: Persons wishing to file objections should do so no later than May 26, 2006

ADDRESSES: Objections and answers to objections should be filed in Docket OST–2005–20570 and addressed to U.S. Department of Transportation, Docket Operations, (M–30, Room PL–401), 400 Seventh Street, SW., Washington, DC 20590, and should be served upon the parties listed in Attachment A to the order.

FOR FURTHER INFORMATION CONTACT: Damon D. Walker, Air Carrier Fitness Division (X–56, Room 6401), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366–7785.

Dated: May 12, 2006.

Michael W. Reynolds,

Acting Assistant Secretary for Aviation and International Affairs.

[FR Doc. E6–7570 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending April 28, 2006.

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: OST–2006–24629.
Date Filed: April 25, 2006.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: May 16, 2006.
Description: Application of Yangtze River Express Airlines Co., Ltd. requesting a foreign air carrier permit to operate scheduled cargo only air services between Shanghai, People's Republic of China (PRC) and Los Angeles, CA, United States of America (USA), via Anchorage, AK, USA (technical stop only).

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. E6–7568 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Opportunity for Public Comment on Surplus Property Release at Dare County Regional Airport, Manteo, NC

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: Under the provisions of Title 49, U.S.C. 47153(d), notice is being given that the FAA is considering a request from the County of Dare to waive the requirement that a 34.4 acre parcel of surplus property, located at the Dare County Regional Airport, be used for aeronautical purposes.

DATES: Comments must be received on or before June 19, 2006.

ADDRESSES: Comments on this notice may be mailed or delivered in triplicate to the FAA at the following address: Atlanta Airports District Office, 1701 Columbia Ave., Campus Building, Suite 2–260, College Park, GA 30337.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Bobby Outten, Dare County Attorney at the following address: P.O. Box 1000, Manteo, NC 27954.

FOR FURTHER INFORMATION CONTACT: Rusty Nealis, Program Manager, Atlanta Airports District Office, 1701 Columbus Ave., Campus Bldg., Suite 2–260, College Park, GA 30337, (404) 305–7142. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA is reviewing a request by the County of Dare to release 34.4 acres of surplus property at the Dare County Regional Airport. The surplus property will be used to construct a facility for the University of North Carolina Coastal Studies Institute (CSI).

Any person may inspect the request in person at the FAA office listed above under the **FOR FURTHER INFORMATION CONTACT.** In addition, any person may, upon request, inspect the request, notice and other documents germane to the request in person at the Dare County Administration Office, 211 Budleigh Street, Manteo, NC.

Issued in Atlanta, Georgia on May 10, 2006.

Scott L. Seritt,

Manager, Atlanta Airports District Office, Southern Region.

[FR Doc. 06–4623 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Noise Exposure Map Notice: Receipt of Noise Compatibility Program and Request for Review

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its determination that the noise exposure maps submitted by Mobile Airport Authority for Mobile Regional Airport under the provisions of 49 U.S.C. 47501 *et seq.* (Aviation Safety and Noise Abatement Act) and 14 CFR part 150 are in compliance with applicable requirements. The FAA also announces that it is reviewing a proposed noise compatibility program update that was submitted for Mobile Regional Airport under part 150 in conjunction with the noise exposure map, and that this program will be approved or disapproved on or before October 27, 2006.

DATES: *Effective Date:* The effective date of the FAA's determination on the noise exposure maps and of the start of its review of the associated noise compatibility program is May 1, 2006. The public comment period ends June 29, 2006.

FOR FURTHER INFORMATION CONTACT: Kristi Ashley, 100 West Cross Street, Suite B, Jackson, MS 39208, (601) 664–9891. Comments on the proposed noise compatibility program update should also be submitted to the above office.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA finds that the noise exposure maps submitted for Mobile Regional Airport are in compliance with applicable requirements of part 150, effective May 1, 2006. Further, FAA is reviewing a proposed noise compatibility program update for that airport which will be approved or disapproved on or before October 27, 2006. This notice also announces the availability of this program for public review and comment.

Under 49 U.S.C. 47503 (the Aviation Safety and Noise Abatement Act, hereinafter referred to as ''the Act''), an airport operator may submit to the FAA noise exposure maps which meet applicable regulations and which depict non-compatible land uses as of the date of submission of such maps, a description of projected aircraft operations, and the ways in which such operations will affect such maps. The Act requires such maps to be developed in consultation with interested and affected parties in the local community, government agencies, and persons using the airport.

An airport operator who has submitted noise exposure maps that are found by FAA to be in compliance with the requirements of Federal Aviation Regulations (FAR) part 150, promulgated pursuant to the Act, may submit a noise compatibility program for FAA approval which sets forth the measures the operator has taken or proposes to take to reduce existing non-compatible uses and prevent the introduction of additional non-compatible uses.

Mobile Airport Authority submitted to the FAA on December 30, 2005 noise exposure maps, descriptions and other documentation that were produced during the Mobile Regional Airport Noise Compatibility Study Update. It was requested that the FAA review this material as the noise exposure maps, as described in section 47503 of the Act, and that the noise mitigation measures, to be implemented jointly by the airport and surrounding communities, be approved as a noise compatibility program under section 47504 of the Act.

The FAA has completed its review of the noise exposure maps and related descriptions submitted by Mobile Airport Authority. The specific documentation determined to constitute the noise exposure maps includes current and forecast NEM graphics, plus all other narrative, graphic, or tabular representations of the data required by section A150.101 of part 150, and sections 47503 and 47506 of the Act, more specifically considered by FAA to be Chapter 6 of the Airport Noise Compatibility Study Update submitted to FAa on December 30, 2005. The FAA has determined that these maps for Mobile Regional Airport are in compliance with applicable requirements. This determination is effective on May 1, 2006. FAA's determination on an airport operator's noise exposure maps is limited to a finding that the maps were developed in accordance with the procedures contained in appendix A of FAR part 150. Such determination does not constitute approval of the applicant's data, information or plans, or constitute a commitment to approve a noise compatibility program or to fund the implementation of that program.

If questions arise concerning the precise relationship of specific properties to noise exposure contours depicted on a noise exposure map submitted under section 47503 of the Act, it should be noted that the FAA is not involved in any way in determining the relative locations of specific properties with regard to the depicted noise contours, or in interpreting the noise exposure maps to resolve questions concerning, for example, which properties should be covered by the provisions of section 47506 of the Act. These functions are inseparable from the ultimate land use control and planning responsibilities of local government. These local responsibilities are not changed in any way under part 150 or through FAA's review of noise

exposure maps. Therefore, the responsibility for the detailed overlaying of noise exposure contours onto the map depicting properties on the surface rests exclusively with the airport operators that submitted those maps, or with those public agencies and planning agencies with which consultation is required under section 47503 of the Act. The FAA has relied on the certification by the airport operator, under section 150.21 of FAR part 150, that the statutorily required consultation has been accomplished.

The FAA has formally received the noise compatibility program for Mobile Regional Airport, also effective on May 1, 2006. Preliminary review of the submitted material indicates that it conforms to the requirements for the submittal of noise compatibility programs, but that further review will be necessary prior to approval or disapproval of the program. The format review period, limited by law to a maximum of 180 days, will be completed on or before October 27, 2006.

The FAA's detailed evaluation will be conducted under the provisions of 14 CFR part 150, section 150.33. The primary considerations in the evaluation process are whether the proposed measures may reduce the level of aviation safety, create an undue burden on interstate or foreign commerce, or be reasonably consistent with obtaining the goal of reducing existing non-compatible land uses and preventing the introduction of additional non-compatible land uses.

Interested persons are invited to comment on the proposed program with specific reference to these factors. All comments, other than those properly addressed to local land use authorities, will be considered by the FAA to the extent practicable. Copies of the noise exposure maps, the FAA's evaluation of the maps, and the proposed noise compatibility program are available for examination at the following locations:

Federal Aviation Administration, Jackson Airports District Office, 100 West Cross Street, Suite B, Jackson, MS 39208, Mobile Regional Airport, Mobile Airport Authority, 8400 Airport Blvd., Mobile, AL 36608.

Questions may be directed to the individual named above under the heading, **FOR FURTHER INFORMATION CONTACT.**

Issued in Jackson, MS, May 1, 2006.

Rans Black,

Manager, Jackson Airports District Office.

[FR Doc. 06–4621 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Approval of Noise Compatibility Program; Vero Beach Municipal Airport; Vero Beach, FL

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its findings on the noise compatibility program submitted by the City of Vero Beach, Florida under the provisions of 49 U.S.C. (the Aviation Safety and Noise Abatement Act, hereinafter referred to as ''the Act'') and 14 CFR part 150. These findings are made in recognition of the description of Federal and nonfederal responsibilities in Senate Report No. 96–52 (1980). On October 28, 2003, the FAA determined that the noise exposure maps submitted by the City of Vero Beach, Florida under part 150 were in compliance with applicable requirements. On April 28, 2006, the FAA approved the Vero Beach Municipal Airport noise compatibility program. Most of the recommendations of the program were approved.

DATES: *Effective Date:* The effective date of the FAA's approval of the Vero Beach Municipal Airport noise compatibility program is April 28, 2006.

FOR FURTHER INFORMATION CONTACT: Ms. Lindy McDowell, Federal Aviation Administration, Orlando Airports District Office, 5950 Hazeltine National Dr., Suite 400, Orlando, Florida 32822, (407) 812–6331, Extension 130. Documents reflecting this FAA action may be reviewed at this same location.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA has given its overall approval to the noise compatibility program for Vero Beach Municipal Airport, effective April 28, 2006.

Under Section 47504 of the Act, an airport operator who has previously submitted a noise exposure map may submit to the FAA a noise compatibility program which sets forth the measures taken or proposed by the airport operator for the reduction of existing non-compatible land uses and prevention of additional non-compatible land uses within the area covered by the noise exposure maps. The Act requires such programs to be developed in consultation with interested and affected parties including local communities, government agencies, airport users, and FAA personnel.

Each point noise compatibility program developed in accordance with Federal Aviation Regulations (FAR) Part 150 is a local program, not a Federal Program. The FAA does not substitute its judgment for that of the airport proprietor with respect to which measure should be recommended for action. The FAA's approval or disapproval of FAR part 150 program recommendations is measured according to the standards expressed in part 150 and the Act, and is limited to the following determinations.

a. The noise compatibility program was developed in accordance with the provisions and procedures of FAR Part 150;

b. Program measures are reasonably consistent with achieving the goals of reducing existing non-compatible land uses around the airport and preventing the introduction of additional non-compatible land uses;

c. Program measures would not create an undue burden on interstate or foreign commerce, unjustly discriminate against types or classes of aeronautical uses, violate the terms of airport grant agreements, or intrude into areas preempted by the Federal government; and

d. Program measures relating to the use of flight procedures can be implemented within the period covered by the program without derogating safety, adversely affecting the efficient use and management of the navigable airspace and air traffic control systems, or adversely affecting other powers and responsibilities of the Administrator prescribed by law.

Specific limitations with respect to FAA's approval of an airport noise compatibility program are delineated in FAR Part 150, Section 150.5. Approval is not a determination concerning the acceptability of land uses under Federal, state, or local law. Approval does not by itself constitute an FAA implementing action. A request for Federal action or approval to implement specific noise compatibility measures may be required, and an FAA decision on the request may require an environmental assessment of the proposed action. Approval does not constitute a commitment by the FAA to financially assist in the implementation of the program nor a determination that all measures covered by the program are eligible for grant-in-aid funding from the FAA. Where Federal funding is sought, requests for project grants must be submitted to the FAA Airports District Office in Orlando, Florida.

The City of Vero Beach, Florida submitted to the FAA on July 16, 2003, the noise exposure maps, descriptions, and other documentation produced during the noise computability planning

study conducted from September 6, 2002, through November 2, 2005. The Vero Beach Municipal Airport noise exposure maps were determined by FAA to be in compliance with applicable requirements on October 28, 2003. Notice of this determination was published in the **Federal Register** on October 28, 2003.

The Vero Beach Municipal Airport study contains a proposed noise compatibility program comprised of actions designed for phased implementation by airport management and adjacent jurisdictions from April 28, 2006 beyond the year 2011. It was requested that FAA evaluate and approve this material as a noise compatibility program as described in section 47504 of the Act. The FAA began its review of the program on November 2, 2005 and was required by a provisions of the Act to approve or disapprove the program within 180-days (other than the use of new or modified flight procedures for noise control). Failure to approve or disapprove such program within the 180-day period shall be deemed to be an approval of such program.

The submitted program contained eleven (11) proposed actions for noise mitigation (on and off the airport). The FAA completed its review and determined that the procedural and substantive requirements of the Act and FAR Part 150 have been satisfied. The overall program, therefore, was approved by the FAA effective April 28, 2006.

Outright approval was granted for six (6) of the specific program elements. One (1) measure was disapproved because of its impact on the safe and efficient use of airspace and four (4) were approved in part. Partial approval was based on issues outside of the 65 DNL contour of which the local community determined that no non-competitive land uses exist.

Operational Measures

1. Maintenance Run-Up Practices

This measure is to amend the existing voluntary procedures for Aircraft Engine Maintenance Run-ups to include that aircraft will be oriented in a northerly direction during calm wind and other proper wind conditions at the existing run-up pad. Should this method prove unsatisfactory following implementation, the alternative of aircraft orientation plus noise barrier/earth berm may be pursued based upon further analysis.

The existing maintenance engine run-up procedures will continue with the following measures: All maintenance run-up areas must be considered to ensure safety, practicality and the most community friendly location; Maintenance run-ups should be preformed at an established maintenance run-up area on the tenant's leased property for no more than 15–20 minutes at a time; For extended run-ups or multiple run-ups proportionate to the 15–20 minute limit, run-ups shall be completed on the run-up area for Runway 22 or Runway 11R; and, Maintenance run-ups should be scheduled between the hours of 7 a.m. and 9 p.m. In the event a maintenace run-up must be performed beyond the permitted hours, the run-ups should take place at the Designated Run-up Locations (Figure 2.2). (NCP, pages 13, 15–18, Figure 2.2, Figure 2.3, and Figure 2.4).

FAA Action: Continuation of existing maintenance run-up procedures, as modified, is approved as voluntary as traffic, weather, and airspace safety and efficiency permit.

Further analysis of a noise barrier/earth berm is approved.

2. Voluntary Touch and Go Flight Training Procedures

The City of Vero Beach will continue the following current touch and go procedures: Runway 11L/29R and 4/22 will be closed to touch and go traffic when the tower is closed (currently 9 a.m. to 7 a.m.); Runway 11R will use left traffic pattern when the tower is closed; Runway 29L will use a right traffic pattern when the tower is closed; The Traffic Pattern Altitude (TPA) for propeller aircraft will be 1,000 feet above ground level and turboprop and jet aircraft will use 1,500 feet above ground level; Touch and go operations are strongly discouraged during the hours of 10 p.m. to 7 a.m. (local) Monday–Saturday, and 10 p.m. to 12 noon (local) on Sunday; and, Intersection departures are discouraged. (NCP, pages 19–21).

FAA Action: Approved in part as voluntary, disapproved in part.

Measures to set the traffic pattern altitude and hours of touch and go operations are approved as voluntary. Page 21 states ''The revised NEM (Figure 2.1) reflects the benefits of this measure by maintaining the DNL contours within areas of compatible land use.''

The measure to close the crosswind runway is disapproved. For purposes of aviation safety, the crosswind runway should be made available to use during high crosswind conditions regardless of the time of day. There is insufficient information in the NCP about potential noise benefits if this measure were to be implemented on a voluntary basis.

The measure to have converging traffic patterns (Runway 11R left traffic pattern with Runway 29L right traffic pattern) when the tower is closed is disapproved. The FAA considers this procedure to have the potential to cause unsafe situation.

3. Voluntary Noise Abatement Departure Procedures

The City of Vero Beach will continue to recommend that pilots use National Business Aviation Association (NBAA) close-in noise abatement departure profile. (NCP, pages 21–22)

FAA Action: Approved as voluntary as traffic, weather, and airspace safety and efficiency permit.

4. Runway 11R Straight-out Noise Abatement Departure Track for Jet Aircraft

The following changes to jet aircraft departure tracks are recommended:

- At the appropriate time with regard to the installation of the Vero Beach (VRB) ASR–11, the City of Vero Beach will initiate the development of a Departure Procedure to facilitate the use of the straight-out noise abatement departure track for Runway 11R, and potentially Runway 29L.
- For Runway 11R, following the installation and commissioning of the VRB ASR–11, departing jet aircraft may be assigned a straight-out departure heading.
- Until comissioning of VRB ASR–11, Runway 11R will maintain use of alternatve straight-out, left and right departure headings. (NCP, pages 22–24)

FAA Action: Disapproved. All three headings for departures on Runway 11R are required for successive departures because of current non-radar services, as determined by FAA's Miami ARTCC. In addition, this measure does not satisfy FAR Part 150 approval criteria because it does not provide evidence of a noise benefit.

Land Use Measures

5. Airport Zoning

The City of Vero Beach recommends that the Noise Impact Zone, which is currently defined as the area extending from the edge of the pavement of each runway a distance equal to one mile on either side of each runway centerline, and two miles at the end of each runway, be revised to encompass areas of known high community annoyance and areas where noise monitoring and modeling data support special consideration. (NCP, pages 25–28, Figure 2.5)

FAA Action: Approval in part. This measure is approved to the extent it includes the existing and forecasts NEM DNL 65 dB noise contour. The DNL 65dB noise contour falls completely on airport property. The airport sponsor adopted the Federal guidelines designating DNL 65 dB as the level at which aircraft noise is compatible with residential land uses and the local jurisdiction has not adopted local land use compatibility standard below the DNL 65 dB contour. Outside the DNL 65 dB contour, FAA as a matter of policy encourages local efforts to prevent new noncompatible development immediately abutting the DNL 65 dB contour and to provide a buffer for possible growth in noise contours beyond the forecast period. The federal government has no authority to conrol land use. Local governments have the authority to implement this measure.

6. Real Estate Disclosure

The City of Vero Beach recommends the following:

- The City of Vero Beach will publish the airport noise exposure contours in the Vero Beach Press Journal and Hometown News three times each year. The publication will include a diagram of the contours overlaid with an illustration of the Noise Impact Zones and three-mile notification area;
- The City of Vero Beach will send the contours along with appropriate text to explain the contours and their meaning, on a routine basis, to the Indian River County Board of Realtors for their notification;
- The City of Vero Beach will develop a method to notify indivdiual property owners of their location within the three-mile notification area; and,
- The City of Vero Beach should monitor efforts of the Florida Legislature to enact a State Statute requiring real estate disclosure at all airports. (NCP, page 28)

FAA Action: Approved in part. Elements recommending publication of the noise contours, distributing and explaining the meaning of the noise contours to the Board of Realtors, and monitoring efforts of the Florida Legislature to enact a State statute requiring real estate disclosure at all airports are approved. The DNL 65 dB noise contour falls completely on airport property. Outside the DNL 65 dB contour, FAA as a matter of policy encourages local efforts to prevent new noncompatible development immediately abutting the DNL 65 dB contour and to provide a buffer for possible growth in noise contours beyond the forecast period. The federal government has no authority to control land use. Local governments have the authority to implement this measure.

7. Periodic Noise, Operations and Flight Track Monitoring

The City of Vero Beach recommends the periodic collection of data as part of the NCP implementation to evaluate the effectiveness of the voluntary touch and go training procedures and the ''close-in'' noise departure procedure by jet aircraft. It will allow the City of Vero Beach to monitor any changes in the airport's fleet mix and other operational characteristics that may trigger the need to revise the noise exposure maps of the NCP. (NCP, pages 28–30)

FAA Action: Approved in part. Approved with respect to monitoring to determine if operational increases or other changes at the airport occur that are of sufficient magnitude to significantly affect the 5-year NEM 65 dB noise contour. The airport sponsor adopted the Federal guidelines designating DNL 65 dB as the level at which aircraft noise is compatible with residential land uses and the local jurisdiction has not adopted local land use compatibility standard below the DNL 65 dB contour. For purposes of aviation safety, this approval does not extend to the use of monitoring equipment for enforcement purposes by in-situ measurement of any present noise thresholds and shall not be used for mandatory enforcement of any voluntary measure.

8. Pilot Education

This program includes publication of flight cards or inserts designed to fit into a pilot's flight manual, customized poster to be placed in all FBO flight planning rooms and flight schools, and an informational handout to be provided to the area's flight training students, and available at FAA Flight Standards District Office pilot safety and training seminars. (NCP, pages 30–31)

FAA Action: Approved. Inserts or other information must not be construed as mandatory air traffic procedure. The content of the inserts are subject to specific approval by appropriate FAA officials outside of the FAR Part 150 process and are not approved in advance by this determination.

9. Community Information Program

The City of Vero Beach recommends the development of an ongoing community information program to maintain the current level of education of involved citizens, and to reach new residents and others who become interested in the activities at VRB and the City's efforts to control aircraft noise impacts. (NCP, page 31)

FAA Action: Approved.

10. Annual Review of NCP Implementation

The City of Vero Beach recommends the annual review of the implementation status of the NCP measures.

FAA Action: Approved. The airport sponsor has indicated in a letter dated 4/20/06 that under this measure, the NCP would be updated if made necessary by changes to the NEM (150.23(e)(9)).

11. FAA ATCT Tower Order

The City of Vero Beach recommends that an FAA Tower Order is the appropriate mechanism to document the elements of the recommended program that will be implemented by local air traffic control tower personnel. The FAA will develop the Tower Order, with input from the City of Vero Beach, to meet certain FAA ATCT standards. The Order will be signed by the local tower manager, and will outline the purpose, the background of its development, the effective date and who or what types of aircraft or operators it applies to, and a description of what actions the ATCT will take to implement the measures.

FAA Action: Approved for operational measures within this ROA that normally would be included in a tower order (for example, the touch and go procedures and altitudes). The FAA will determine the appropriate elements of the noise compatibility program to include in the Order, and the language describing them, consistent with applicable Federal requirements.

These determinations are set forth in detail in a Record of Approval signed by the FAA on April 28, 2006. The Record of Approval, as well as other evaluation materials and the documents comprising the submittal, are available for review at the FAA office listed above and at the administrative office of the City of Vero Beach, Florida. The Record of Approval also will be available online at *http://www.faa.gov/arp/environmental/14cfr150/index14.cfm.*

Issued in Orlando, Florida on May 2, 2006.

Bart Vernace,

Acting Manager, Orlando Airports District Office.

[FR Doc. 06–4622 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA 2006–24798]

Emergency OMB Approval for the National Historic Covered Bridge Preservation Program (NHCBP)

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Emergency **Federal Register** notice.

SUMMARY: The Federal Highway Administration has submitted the following request for emergency processing of a public information collection to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35.) This notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to OMB for review, comment and approval. The ICR describes the nature of the information collection and the expected burden.

Comments: Comments should be directed to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 Seventeenth Street, NW., Washington, DC 20503, Attention: Desk Officer for the Federal Highway Administration.

Type of Request: New.

DATES: OMB Approval has been requested by June 9th, 2006.

FOR FURTHER INFORMATION CONTACT: For questions concerning the NHCBP program, please contact Dr. Edgar P. Small, Office of Bridge Technology, HIBT–30, at (202) 366–4622, fax (202) 366–3077, or e-mail *edgar.small@dot.gov;* and Mr. Everett Mattias, Office of Bridge Technology, HIBT–30, at (202) 366–6712, fax (202) 366–3077, or e-mail *everett.mattias@dot.gov.* For legal questions, please contact Mr. Robert Black, Office of the Chief Counsel, (202) 366–1359, *robert.black@fhwa.dot.gov;* Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: National Historic Covered Bridge Preservation Program.

OMB Control Number: None assigned.

Frequency: Annual beginning in Fiscal Year 2006 and ending in 2009.

Respondents: The 50 State DOTs and Puerto Rico and the District of Columbia.

Background: Covered bridges are unique structures embodying character, functionality and historical prominence. The National Historic Covered Bridge Preservation Program has been established to find comprehensive and proven means of maintaining the ability of these vestiges of our bridge-building heritage to continue to serve current and future generations. The program was originally established under section 1224 of TEA–21 and continued under section 1804 of SAFETEA–LU. The legislation authorizes $10 million annually to be appropriated for each fiscal year between FY 2006 and FY 2009. The program is established to provide grants to States for rehabilitation, repair and preservation of historic covered bridges and to enable the Secretary of Transportation to perform research and initiate education programs on historic covered bridges.

Projects eligible for grants include rehabilitation and repair together with preservation through: Installation of fire protection systems, including a fireproofing or fire detection system and sprinklers, installation of a system to prevent vandalism and arson, or relocation of a bridge to a preservation site. The statute requires that, to the maximum extent practicable, grant projects are carried out in the most historically appropriate manner, preserve the existing structure of the historic covered bridge, and provide for the replacement of wooden components with wooden components, unless the use of wood is impracticable for safety reasons.

Research and education activities include the collection and dissemination of information on historic covered bridges; conducting educational programs relating to the history and construction techniques of historic covered bridges; conducting research on the history of historic covered bridges; and conducting research on, and study techniques for, protecting historic covered bridges from rot, fire, natural disasters, or weight-related damage.

Guidelines and Administration

To administer this program for fiscal years 2006 through 2009, the FHWA will collect information necessary to evaluate and rank projects. The information collection was developed considering public input [1] and is intended to only address the project funding allotted through the program. Research funding will be administered separately through the FHWA Office of Infrastructure Research and Development (R&D) at the Turner Fairbank Highway Research Center, who will also administer the research and education activities. The FHWA Office of Bridge Technology will administer the grant program to assist the States in their efforts to rehabilitate, repair or preserve the Nation's historic covered bridges, which are listed or eligible for listing on the National Register of Historic Places. The FHWA will award grants based on applications received and funds available through accompanying appropriations legislation.

Information Proposed for Collection

Information recommended under TEA–21 and proposed for the current program includes the following:

- State's Priority Ranking;
- National Bridge Inventory (NBI) Structure Number;
- Bridge Name;
- Description of Location;
- Congressional District and Representative;
- Year Built;
- Whether the structure is on or eligible for listing on the National Register of Historic Places and description of the qualities that qualify the bridge for the National Register;
- Structure description (e.g., number of spans, length, width, design type, description of decking, beams/stringers, sides and roof, wood species, wood preservation system in use, builder, traffic carried, etc.);
- General plan and elevation;
- Description of previous repair work (description, year, etc.);
- Description of proposed work including wood preservative system, fire protection, vandalism and arson prevention systems to be used;
- Indication of whether the State has a historic bridge inventory/management plan accepted by the State Historic Preservation Officer (SHPO). A programmatic agreement for historic bridges with the SHPO, FHWA and the Advisory Counsel on Historic Preservation (ACHP) may substitute;
- Description of whether the SHPO has reviewed and certified this project is warranted in accordance with the SHPO's statewide historic preservation plan; how it benefits statewide preservation efforts; how it enhances cultural tourism or enhances the history/economic development of the community; and other benefits upon successful completion of this project;
- Amount of State or local government matching funds or other resources (donated materials or labor may qualify);

[1] Implementation Guidance for the National Historic Covered Bridge Preservation Program, August 23, 2000; 65 FR 51401.

• A Statement addressing when the project is complete, will the bridge meet the current State or AASHTO standards for the roadway classification that it carries;

• Plan for documentation of the bridge and the work performed;

• Scheduled start and completion date for the project (month and year); and

• Contact information for the State DOT, Local Agency (if applicable), FHWA Division Office, and State Historic Preservation Officer.

As indicated above, the FHWA has developed a template for the application and the application may be made based on this template provided by the FHWA including this information. This template is available through the FHWA Division Offices and through the FHWA Office of Bridge Technology and is available at the following URL: *http://www.fhwa.dot.gov/bridge/022803a.htm#application.* The template is not required but rather is provided for convenience of the applicants.

Burden Hours for Information Collection

Burden hours estimates and discussions are provided for each item presented and required within the application submittal process.

• State's Priority Ranking; 30 minutes.

○ The priority ranking will be performed by the submitting agency. Given that a small number of applications will be submitted by an individual State, the prioritization process will be limited and 30 minutes is conservatively assumed to include any potential discussion.

• NBI Structure Number; 5 minutes.

○ Projects submitted must be legally defined as a 'bridge' and must be located on a public road. With this constraint, each structure will already have an NBI Structure Number assigned.

• Bridge Name; 5 minutes.

○ A description of the bridge may be included in the NBI database; however, this may or may not be the commonly referenced name used locally. A burden of 5 minutes is assumed to permit the applicant to review the NBI record and any additional documentation to isolate the common bridge name.

• Description of Location; 10 minutes.

○ The location is already included in the NBI database. A burden of 10 minutes is provided assuming that the applicant will elaborate on the location information.

• Congressional District and Representative; 5 minutes.

○ The location of the bridge will be known from the information in the NBI database. A 5-minute burden is specified assuming that the applicant will have to cross reference the location with Congressional district maps. This time would be negligible if the State has employed a GIS system including the infrastructure information and the political boundaries.

• Year Built; 5 minutes.

○ The year built is already recorded in the National Bridge Inventory

• Whether the structure is on or eligible for listing on the National Register of Historic Places and description of the qualities that qualify the bridge for the National Register. 15 minutes.

○ The NBI record indicated whether the structure is located on or eligible for the National Register of Historic Places. The 15-minute burden is assumed to allow the applicant to describe the qualities that qualify the bridge for the National Register.

• Structure description (e.g., number of spans, length, width, design type, description of decking, beams/stringers, sides and roof, wood species, wood preservation system in use, builder, traffic carried, etc.); 15 minutes.

○ Most of this information will be included within the NBI database or on the inspection reports. 15 minutes is assumed for the applicant to synthesize information.

• General plan and elevation; 5 minutes.

○ This information is available for structures that have been placed on the National Register of Historic Places or for those, which are eligible and have applications complete. This information is also available for projects that have completed conceptual and preliminary engineering and design.

• Description of previous repair work (description, year, etc.); 15 minutes.

○ This information is available from bridge inspection reports and bridge files located within the State Transportation Agency. Time estimated is intended for synthesis of information from other sources.

• Description of proposed work including wood preservative system, fire protection, vandalism and arson prevention systems to be used; 15 minutes.

○ This information will be established by the need when identified and the details will be identified through the conceptual and preliminary engineering process, which is done independently. A 15-minute burden is assumed to synthesize the existing information.

• Indication of whether the State has a historic bridge inventory/management plan accepted by the State Historic Preservation Officer (SHPO). A programmatic agreement for historic bridges with the SHPO, FHWA and the Advisory Counsel on Historic Preservation (ACHP) may substitute; 5 minutes.

○ This item is readily obtained through contact with the State Historic Preservation Officer.

• Description of whether the SHPO has reviewed and certified this project is warranted in accordance with the SHPO's statewide historic preservation plan; how it benefits statewide preservation efforts; how it enhances cultural tourism or enhances the history/economic development of the community; and other benefits upon successful completion of this project; 45 minutes.

○ This information is readily obtained through contact with the State Historic Preservation Officer. A total of 45 minutes includes time for the State Historic Preservation Officer to review the project, in relation to the statewide preservation efforts, to articulate the benefits, and to document the findings.

• Amount of State or local government matching funds or other resources (donated materials or labor may qualify); 5 minutes.

○ A nominal amount of time is required to document the matching funds and amounts.

• When the project is complete, will the bridge meet the current State or AASHTO standards for the roadway classification that it carries; 5 minutes.

○ A nominal amount of time is required to ascertain and identify whether the bridge will meet the standards for the roadway classification as any exception to the standard will be identified through the preliminary engineering process and already documented.

• Plan for documentation of the bridge and the work performed; 15 minutes.

○ A plan for documentation is encouraged. Typically, each State Transportation Agency will already have a process in place to document work performed. Applicants are encouraged to identify any additional requirements warranted for these historical structures and to articulate the overall plan within the application.

• Scheduled start and completion date for the project (month and year); 5 minutes.

○ This will be determined through other processes that are performed independent of this program, including preliminary engineering and the STIP process. The available information must be synthesized on the application, which takes a nominal amount of time.

• Contact information for the State DOT, Local Agency (if applicable), FHWA Division Office, and State Historic Preservation Officer; 5 minutes.

○ This requires providing a list of contacts and involves a nominal amount of time.

The total amount of time estimated to complete the application is 3½ hours. It is estimated that FHWA will receive 30 reports giving us a total of 105 burden hours.

(Authority: Section 1804 of Pub. L. 105–59.)

James R. Kabel,

Chief, Management Programs and Analysis Division.

[FR Doc. E6–7525 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA 2006–24802]

Agency Information Collection Activities: Request for Comments for New Information Collection

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice and request for comments.

SUMMARY: The FHWA invites public comments about our intention to request the Office of Management and Budget (OMB) approval for a new information collection, which is summarized below under **SUPPLEMENTARY INFORMATION**. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by July 17, 2006.

ADDRESSES: You may submit comments identified by DOT DMS Docket Number 2006–24802 to the Docket Clerk, via the following methods:

• Web Site: *http://dms.dot.gov*. Follow the instructions for submitting comments on the DOT electronic docket site.

• Fax: 1–202–493–2251.

• Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.

• Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: For questions concerning the NHCBP program, please contact Dr. Edgar P. Small, Office of Bridge Technology, HIBT–30, at (202) 366–4622, FAX (202) 366–3077, or e-mail *edgar.small@dot.gov*; and Mr. Everett Mattias, Office of Bridge Technology, HIBT–30, at (202) 366–6712, FAX (202) 366–3077, or e-mail *everett.mattias@dot.gov*. For legal questions, please contact Mr. Robert Black, Office of the Chief Counsel, (202) 366–1359, *robert.black@fhwa.dot.gov*; Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: National Historic Covered Bridge Preservation Program.

OMB Control Number: None Assigned.

Frequency: Annual.

Respondents: The 50 State DOTs, Puerto Rico and the District of Columbia.

Background: Covered bridges are unique structures embodying character, functionality and historical prominence. The National Historic Covered Bridge Preservation Program has been established to find comprehensive and proven means of maintaining the ability of these vestiges of our bridge-building heritage to continue to serve current and future generations. The program was originally established under section 1224 of TEA–21 and continued under section 1804 of SAFETEA–LU. The legislation authorizes $10 million annually to be appropriated for each fiscal year between FY 2006 and FY 2009. The program is established to provide grants to States for rehabilitation, repair and preservation of historic covered bridges and to enable the Secretary of Transportation to perform research and initiate education programs on historic covered bridges.

Projects eligible for grants include rehabilitation and repair together with preservation through: Installation of fire protection systems, including a fireproofing or fire detection system and sprinklers, installation of a system to prevent vandalism and arson, or relocation of a bridge to a preservation site. The statute requires that, to the maximum extent practicable, grant projects are carried out in the most historically appropriate manner, preserve the existing structure of the historic covered bridge, and provide for the replacement of wooden components with wooden components, unless the use of wood is impracticable for safety reasons.

Research and education activities include the collection and dissemination of information on historic covered bridges; conducting educational programs relating to the history and construction techniques of historic covered bridges; conducting research on the history of historic covered bridges; and conducting research on, and study techniques for, protecting historic covered bridges from rot, fire, natural disasters, or weight-related damage.

Guidelines and Administration

To administer this program for fiscal years 2006 through 2009, the FHWA will collect information necessary to evaluate and rank projects. The information collection was developed considering public input [1] and is intended to only address the project funding allotted through the program. Research funding will be administered separately through the FHWA Office of Infrastructure Research and Development (R&D) at the Turner Fairbank Highway Research Center, who will also administer the research and education activities. The FHWA Office of Bridge Technology will administer the grant program to assist the States in their efforts to rehabilitate, repair or preserve the Nation's historic covered bridges, which are listed or eligible for listing on the National Register of Historic Places. The FHWA will award grants based on applications received and funds available through accompanying appropriations legislation.

Information Proposed for Collection

Information recommended under TEA–21 and proposed for the current program includes the following:

• State's Priority Ranking;

• National Bridge Inventory (NBI) Structure Number;

• Bridge Name;

• Description of Location;

• Congressional District and Representative;

• Year Built;

• Whether the structure is on or eligible for listing on the National Register of Historic Places and description of the qualities that qualify the bridge for the National Register;

[1] Implementation Guidance for the National Historic Covered Bridge Preservation Program, August 23, 2000; 65 FR 51401.

- Structure description (e.g., number of spans, length, width, design type, description of decking, beams/stringers, sides and roof, wood species, wood preservation system in use, builder, traffic carried, etc.);
- General plan and elevation;
- Description of previous repair work (description, year, etc.);
- Description of proposed work including wood preservative system, fire protection, vandalism and arson prevention systems to be used;
- Indication of whether the State has a historic bridge inventory/management plan accepted by the State Historic Preservation Officer (SHPO). A programmatic agreement for historic bridges with the SHPO, FHWA and the Advisory Council on Historic Preservation (ACHP) may substitute;
- Description of whether the SHPO has reviewed and certified this project is warranted in accordance with the SHPO's statewide historic preservation plan; how it benefits statewide preservation efforts; how it enhances cultural tourism or enhances the history/economic development of the community; and other benefits upon successful completion of this project;
- Amount of State or local government matching funds or other resources (donated materials or labor may qualify);
- A statement addressing when the project is complete, will the bridge meet the current State or AASHTO standards for the roadway classification that it carries;
- Plan for documentation of the bridge and the work performed;
- Scheduled start and completion date for the project (month and year); and
- Contact information for the State DOT, Local Agency (if applicable), FHWA Division Office, and State Historic Preservation Officer.

As indicated above, the FHWA has developed a template for the application and the application may be made based on this template provided by the FHWA including this information. This template is available through the FHWA Division Offices and through the FHWA Office of Bridge Technology and is available at the following URL: *http://www.fhwa.dot.gov/bridge/022803a.htm#application*. The template is not required but rather is provided for convenience of the applicants.

Burden Hours for Information Collection

Burden hour's estimates and discussions are provided for each item presented and required within the application submittal process.

- State's Priority Ranking; 30 minutes.
- The priority ranking will be performed by the submitting agency. Given that a small number of applications will be submitted by an individual State, the prioritization process will be limited and 30 minutes is conservatively assumed to include any potential discussion.
- NBI Structure Number; 5 minutes.
  - Projects submitted must be legally defined as a 'bridge' and must be located on a public road. With this constraint, each structure will already have an NBI Structure Number assigned.
- Bridge Name; 5 minutes.
  - A description of the bridge may be included in the NBI database; however, this may or may not be the commonly referenced name used locally. A burden of 5 minutes is assumed to permit the applicant to review the NBI record and any additional documentation to isolate the common bridge name.
- Description of Location; 10 minutes.
  - The location is already included in the NBI database. A burden of 10 minutes is provided assuming that the applicant will elaborate on the location information.
- Congressional District and Representative; 5 minutes.
  - The location of the bridge will be known from the information in the NBI database. A 5-minute burden is specified assuming that the applicant will have to cross reference the location with Congressional district maps. This time would be negligible if the State has employed a GIS system including the infrastructure information and the political boundaries.
- Year Built; 5 minutes.
  - The year built is already recorded in the National Bridge Inventory
- Whether the structure is on or eligible for listing on the National Register of Historic Places and description of the qualities that qualify the bridge for the National Register. 15 minutes.
  - The NBI record indicated whether the structure is located on or eligible for the National Register of Historic Places. The 15-minute burden is assumed to allow the applicant to describe the qualities that qualify the bridge for the National Register.
- Structure description (e.g., number of spans, length, width, design type, description of decking, beams/stringers, sides and roof, wood species, wood preservation system in use, builder, traffic carried, etc.); 15 minutes.
  - Most of this information will be included within the NBI database or on the inspection reports. 15 minutes is assumed for the applicant to synthesize information.
- General plan and elevation; 5 minutes.
  - This information is available for structures that have been placed on the National Register of Historic Places or for those, which are eligible and have applications complete. This information is also available for projects that have completed conceptual and preliminary engineering and design.
- Description of previous repair work (description, year, etc.); 15 minutes.
  - This information is available from bridge inspection reports and bridge files located within the State Transportation Agency. Time estimated is intended for synthesis of information from other sources.
- Description of proposed work including wood preservative system, fire protection, vandalism and arson prevention systems to be used; 15 minutes.
  - This information will be established by the need when identified and the details will be identified through the conceptual and preliminary engineering process, which is done independently. A 15-minute burden is assumed to synthesize the existing information.
- Indication of whether the State has a historic bridge inventory/management plan accepted by the State Historic Preservation Officer (SHPO). A programmatic agreement for historic bridges with the SHPO, FHWA and the Advisory Counsel on Historic Preservation (ACHP) may substitute; 5 minutes.
  - This item is readily obtained through contact with the State Historic Preservation Officer.
- Description of whether the SHPO has reviewed and certified this project is warranted in accordance with the SHPO's statewide historic preservation plan; how it benefits statewide preservation efforts; how it enhances cultural tourism or enhances the history/economic development of the community; and other benefits upon successful completion of this project; 45 minutes.
  - This information is readily obtained through contact with the State Historic Preservation Officer. A total of 45 minutes includes time for the State Historic Preservation Officer to review the project, in relation to the statewide preservation efforts, to articulate the benefits, and to document the findings.
- Amount of State or local government matching funds or other resources (donated materials or labor may qualify); 5 minutes.

○ A nominal amount of time is required to document the matching funds and amounts.

• When the project is complete, will the bridge meet the current State or AASHTO standards for the roadway classification that it carries; 5 minutes.

○ A nominal amount of time is required to ascertain and identify whether the bridge will meet the standards for the roadway classification as any exception to the standard will be identified through the preliminary engineering process and already documented.

• Plan for documentation of the bridge and the work performed; 15 minutes.

○ A plan for documentation is encouraged. Typically, each State Transportation Agency will already have a process in place to document work performed. Applicants are encouraged to identify any additional requirements warranted for these historical structures and to articulate the overall plan within the application.

• Scheduled start and completion date for the project (month and year); 5 minutes.

○ This will be determined through other processes that are performed independent of this program, including preliminary engineering and the STIP process. The available information must be synthesized on the application, which takes a nominal amount of time.

• Contact information for the State DOT, Local Agency (if applicable), FHWA Division Office, and State Historic Preservation Officer; 5 minutes.

• This requires providing a list of contacts and involves a nominal amount of time.

The total amount of time estimated to complete the application is 3½ hours. It is estimated that FHWA will receive 30 reports giving us a total of 105 burden hours.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FHWA's performance; (2) the accuracy of estimated burdens; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that burdens could be minimized, including use of electronic technology, without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.

James R. Kabel,

Chief, Management Programs and Analysis Division.

[FR Doc. E6–7530 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement; Davis County, UT

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an Environmental Impact Statement will be prepared for proposed transportation improvements in Davis County, Utah.

FOR FURTHER INFORMATION CONTACT: Gregory Punske, Environmental Program Manager, Federal Highway Administration, 2520 West 4700 South, Suite 9A, Salt Lake City, Utah 84118, Telephone: (801) 963–0182.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Utah Department of Transportation (UDOT) and Layton City, will prepare an Environmental Impact Statement (EIS) on a proposal to address current and projected traffic demand and operations for the South Layton Interchange (1–15 Milepost 330) and to improve transportation access across the Union Pacific Railroad (UPRR) to the developing area of west Layton. The proposed project study area will extend from the Kaysville 200 North Interchange on the south to the Hill Field Interchange on the north and along an east-west corridor from Fort Lane Street to Flint Street or further west as determined during the environmental process. The project study area lies within Layton City and Kaysville City in Davis County.

The public, as well as Federal, State, and local agencies, will be invited to participate in project scoping to ensure that a full range of alternatives is considered and that all appropriate environmental issues and resources are evaluated. The environmental process will include opportunities to provide comments on the purpose and need for the project, potential alternatives, and social, economic, and environmental issues of concern.

The FHWA will consider a reasonable range of alternatives, based on agency and public input, to meet the project objectives of addressing current and projected traffic demand and operations at the 1–15 South Layton Interchange (1–15 Milepost 330) and improving transportation access to the area west of the Union Pacific Railroad.

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State, and local agencies, and to private organizations and citizens who have previously expressed or who are known to have an interest in this proposal.

The public is invited to participate in a scoping meeting on May 24, 2006 at the Layton Elementary School at 369 West Gentile Street, Layton, Utah. This public meeting will be an open house format from 5 p.m. to 8 p.m.

To ensure that the full range of issues related to this proposed action is addressed and all significant issues are identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Dated: May 12, 2006.

Gregory S. Punske,

Environmental Program Manager, Salt Lake City, Utah.

[FR Doc. 06–4644 Filed ?–??–06; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2006–24674]

National Registry of Certified Medical Examiners

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of Public Listening Sessions.

SUMMARY: FMCSA announces two Public Listening Sessions. The Listening Sessions will continue the dialogue on the National Registry of Certified Medical Examiners (NCRME) program for interstate commercial motor vehicle drivers.

DATES: The First NCRME Listening Session will be held from 9 a.m.–12 p.m. on June 29, 2006. The Second NCRME Listening Session will be held

from 9 a.m.–12 p.m. on July 26, 2006. (Registration begins at 8 a.m).

ADDRESSES: The first meeting will take place at the Hilton San Diego Airport/ Harbor Island, 1960 Harbor Island Drive, San Diego, CA 92101. The second meeting will take place at the Renaissance Grand Hotel, 800 Washington Avenue, St. Louis, MO 63101.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Chief, Physical Qualifications Division, 202–366–4001, FMCSA, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

Information on Services for Individuals with Disabilities: For information on facilities or services for individuals with disabilities or to request special assistance at the June and July meetings, contact Ms. Margo Weeks, Axiom Resource Management, Inc., 703–575–8192, ext 266.

SUPPLEMENTARY INFORMATION: Section 4116 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU, Pub. L. 109–59) requires the Secretary of Transportation ''to establish and maintain a current national registry of medical examiners who are qualified to perform examinations and issue medical certificates.'' To implement this requirement, the Federal Motor Carrier Safety Administration is developing the National Registry of Certified Medical Examiners (NCRME) program that was announced at a June 22, 2005, public meeting in Arlington, Virginia (70 FR 28596; May 18, 2005). The NRCME program would be comprised, in part, of a training and testing program that would result in a public registry of certified medical examiners who are authorized to conduct medical examinations of interstate commercial motor vehicle drivers and determine their physical qualifications to operate in interstate commerce as defined in 49 CFR 391.41. Once the program is implemented, FMCSA would accept only medical examinations conducted by medical examiners listed on the Registry. The NRCME program would require training using a standardized curriculum, a certification test, and procedures to maintain the quality of the program in accordance with national accreditation standards.

Participation in Public Listening Sessions

We encourage all interested persons to attend, including medical examiners, motor carriers, and drivers. We also encourage other interested parties to attend such as representatives of medical associations, certification and accreditation organizations, medical training organizations, state motor carrier enforcement agencies and safety organizations. View the following Web site for more information: *http://www.nrcme.fmcsa.dot.gov.*

Issued on: May 12, 2006.

Rose A. McMurray,

Associate Administrator, Policy and Program Development.

[FR Doc. E6–7539 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[FMCSA Docket No. FMCSA–2006–24016]

Qualification of Drivers; Exemption Application From Thomas Deke; Diabetes

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt Mr. Thomas Deke from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemption will enable Mr. Deke to operate CMVs in interstate commerce.

DATES: The exemption is effective May 18, 2006. The exemption expires on May 18, 2008.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Chief, Physical Qualifications Division, (202) 366–4001, *maggi.gunnels@dot.gov*, FMCSA, Department of Transportation, 400 Seventh Street, SW., Room 8301, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Document Management System (DMS) at: *http://dmses.dot.gov*.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* and/or Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone may search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, or other entity). You may review DOT's complete Privacy Act Statement in the **Federal Register** (65 FR 19477, April 11, 2000). This statement is also available at *http://dms.dot.gov*.

Background

Current applicant has had ITDM since 2002. This applicant reports no hypoglycemic reaction that resulted in loss of consciousness or seizure, that required the assistance of another person, or resulted in impaired cognitive function without warning symptoms in the past 5 years (with one year of stability following any such episode). An endocrinologist has verified that the driver has demonstrated willingness to properly monitor and manage their diabetes, received education related to diabetes management, and is on a stable insulin regimen. This driver reports no other disqualifying conditions, including diabetes-related complications. He meets the vision standard at 49 CFR 391.41(b)(10).

The qualifications and medical condition of this applicant were stated and discussed in detail in the April 06, 2006, **Federal Register** Notice (70 FR 75236). Because there were no docket comments on the specific merits or qualifications of any applicant, we have not repeated the individual's profile here. The Agency would like to publish a correction to Mr. Deke's Profile. Mr. Deke was published as having a Class A Commercial Driver's License (CDL) from the State of Montana when he actually holds a Class A CDL from the State of Missouri.

Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the diabetes standard in 49 CFR 391.41(b)(3) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows the applicant to operate CMVs in interstate commerce.

To evaluate the effect of this exemption on safety, FMCSA considered medical reports about the applicant's ITDM and vision, and reviewed the treating endocrinologist's medical opinion related to the ability of the driver to safely operate a CMV while using insulin.

Consequently, FMCSA finds that exempting this applicant from the diabetes standard in 49 CFR 391.41(b)(3)

is likely to achieve a level of safety equal to that existing without the exemption. The Agency is granting the exemption for the 2-year period allowed by 49 U.S.C. 31136(e) and 31315 to Thomas G. Deke.

Conditions and Requirements

The terms and conditions of the exemption will be provided to the applicant in the exemption document.

Discussion of Comments

FMCSA received four comments in this proceeding. The comments are considered and discussed below.

Three letters of recommendation were received in favor of granting the Federal diabetes exemption to Mr. Thomas Deke. They suggested that this applicant be granted the Federal diabetes exemption due to his high level of professionalism and safety while driving.

One individual commented that the application process is burdensome and discriminatory. She also stated that she feels that many diabetic drivers are not forthcoming with medical information during their physical examinations because they fear they will lose their commercial license.

FMCSA has initiated numerous improvements in the application process for exemption program applicants, including developing Web-based solutions to streamline the application process and redrafting the application to incorporate SAFETEA–LU changes and to make it user friendly. FMCSA notes that SAFETEA–LU provides specific changes to the driving requirement for interstate operators with ITDM. These changes eliminate the three-year CMV driving requirement and significantly reduce the required time for management of the diabetic condition with insulin treatment.

FMCSA's exemption process supports drivers with ITDM who seek to operate in interstate commerce. In addition, the Federal Motor Carrier Safety Regulations (FMCSRs) are not contrary to the Americans with Disabilities Act (ADA) of 1990. The mandates of the ADA do not require that FMCSA alter the driver qualification requirements contained in 49 CFR part 391. The Senate report on the ADA, submitted by its Committee on Labor and Human Resources, included the following explanation:

> With respect to covered entities subject to rules promulgated by the Department of Transportation regarding physical qualifications for drivers of certain classifications of motor vehicles, it is the Committee's intent that a person with a disability applying for or currently holding a job subject to these standards must be able to satisfy these physical qualification standards in order to be considered a qualified individual with a disability under Title I of this legislation. S. Rep. 101–116, at 27 (1989).

FMSCA relies on the expert medical opinion of the endocrinologist and the medical examiner, who are required to analyze individual ability to control and manage the diabetic condition, including the individual ability and willingness of the driver to monitor blood glucose level on an ongoing basis. Until the Agency issues a Final Rule, however, insulin-treated diabetic drivers must continue to apply for exemptions from FMCSA, and request renewals of such exemptions in a timely manner. FMCSA will grant exemptions only to those applicants who meet the specific conditions and comply with all the requirements of the exemption.

Conclusion

After considering the comments to the docket and based upon its evaluation of the exemption application, FMCSA exempts Thomas G. Deke from the ITDM standard in 49 CFR 391.41(b)(3), subject to the conditions listed under ''Conditions and Requirements'' above.

In accordance with 49 U.S.C. 31136(e) and 31315, the exemption will be valid for two years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31315 and 31136. If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: May 12, 2006.

Rose A. McMurray,

Associate Administrator, Policy and Program Development.

[FR Doc. E6–7540 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Agency Information Collection Activities

AGENCY: Federal Railroad Administration, DOT.

ACTION: Notice of OMB approvals.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.5(b), this notice announces that new information collections requirements (ICRs) listed below have been approved by the Office of Management and Budget (OMB). These new ICRs pertain to 49 CFR parts 213, 216, 229, and 238. Additionally, FRA hereby announces that other ICRs listed below have been re-approved by the Office of Management and Budget (OMB). These ICRs pertain to parts 230, 241, and 260. The OMB approval numbers, titles, and expiration dates are included herein under **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Mr. Robert Brogan, Office of Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 25, Washington, DC 20590 (telephone: (202) 493–6292), or Victor Angelo, Office of Support Systems, RAD–43, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 35, Washington, DC 20590 (telephone: (202) 493–6470). (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, § 2,109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR part 1320, require Federal agencies to display OMB control numbers and inform respondents of their legal significance once OMB approval is obtained. The following new FRA information collections were approved in the past four months: (1) OMB No. 2130–0010, Track Safety Standards (Continuous Welded Rail) (49 CFR 213) (Interim Final Rule). The expiration date for this collection of information is January 31, 2009. (2) OMB No. 2130–0544, Passenger Equipment Safety Standards (49 CFR 216, 229, and 238) (NPRM). The expiration date for this collection of information is March 31, 2009. (3) OMB No. 2130–0568, Emergency Order No. 24. The expiration date for this collection of information is June 30, 2006. (4) OMB No. 2130–0570, Work Schedules and Sleep Patterns of Railroad Dispatchers (Forms FRA F 6180.122 and FRA F 6180.123). The expiration date for this collection of information is February 28, 2009.

The following information collections were re-approved: (1) OMB No. 2130–0505, Inspection and Maintenance Standards for Steam Locomotives (49 CFR 230) (Forms FRA–1, FRA–2, FRA–3, FRA–4, FRA–5, FRA–19). The new expiration date for this information collection is February 28, 2009. (2) OMB

No. 2130–0500, Accident/Incident Reporting and Recordkeeping (49 CFR 2225) (Forms FRA F 6180.54/55/55a/56/57/78/81/97/98/99/107). The new expiration date for this information collection is December 31, 2007. (3) OMB No. 2130–0548, Railroad Rehabilitation and Improvement Financing Program (49 CFR 260). The new expiration date for this information collection is February 28, 2009. (4) OMB No. 2130–0556, U.S. Locational Requirement for Dispatching U.S. Rail Operations (49 CFR 241). The new expiration date for this information collection is February 28, 2009.

Persons affected by the above referenced information collections are not required to respond to any collection of information unless it displays a currently valid OMB control number. These approvals by the Office of Management and Budget (OMB) certify that FRA has complied with the provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) and with 5 CFR 1320.5(b) by informing the public about OMB's approval of the information collection requirements of the above cited forms and regulations.

Authority: 44 U.S.C. 3501–3520.

Issued in Washington, DC on May 11, 2006.

Belinda Ashton,

Acting Director, Office of Budget, Federal Railroad Administration.

[FR Doc. E6–7517 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Notice of Limitation on Claims Against Proposed Public Transportation Projects

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of limitation on claims.

SUMMARY: This notice announces final environmental actions taken by the Federal Transit Administration (FTA) for public transportation projects in Norfolk, Virginia; Nashville, Tennessee; Phoenix, Arizona; San Francisco, California; and Portland, Oregon. The purpose of this notice is to activate the limitation on any claims that may challenge these final FTA environmental actions.

DATES: By this notice, FTA is advising the public of final agency actions subject to 23 U.S.C. 139(l). A claim seeking judicial review of any of the FTA actions announced herein for the listed public transportation projects will be barred unless the claim is filed on or before November 14, 2006. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then the shorter time period applies.

FOR FURTHER INFORMATION CONTACT: Carl Bausch, Director, Office of Human and Natural Environment, (202) 366–1626. FTA is located at 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 8 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: Notice is hereby given that FTA has taken final agency actions by issuing certain approvals for the public transportation projects listed below. The actions on these projects, as well as the laws under which such actions were taken, are described in the documentation issued in connection with the project to comply with the National Environmental Policy Act (NEPA), and in other documents in the FTA administrative record for the project. The final agency environmental decision documents—Records of Decision (RODs) and Findings of No Significant Impact (FONSIs)—for the listed projects are available online at *http://www.fta.dot.gov/18087_ENG_HTML.htm* or may be obtained by contacting the FTA Regional Office for the urbanized area where the project is located. Contact information for the FTA Regional Offices may be found at *http://www.fta.dot.gov/about/offices/4978_ENG_HTML.htm*.

This notice applies to all FTA decisions on the listed projects as of the issuance date of this notice and all laws under which such actions were taken, including, but not limited to, the National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4375], section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303], section 106 of the National Historic Preservation Act of 1966 [16 U.S.C. 470f], and the Clean Air Act [42 U.S.C. 7401–7671q].

The projects and actions that are the subject of this notice are:

1. *Project name and location:* Norfolk Light Rail Transit Project, Norfolk, Virginia. *Project sponsor:* Hampton Roads Transit. *FTA Regional Office:* Region III in Philadelphia. *Project description:* The project is a 7.4-mile light rail transit (LRT) system consisting of an exclusive double-track guideway that generally follows the Norfolk Southern Railroad's South Beach Branch right-of-way, with street-running operations through downtown Norfolk to the Eastern Virginia Medical Center. The project includes 11 LRT stations, a vehicle storage-and-maintenance facility, and park-and-ride lots at four of the LRT stations. *Final agency actions:* ROD issued April 26, 2006; Section 4(f) Finding; Section 106 Memorandum of Agreement; project-level Air Quality Conformity Determination. *Supporting documentation:* Final Environmental Impact Statement issued October 28, 2005.

2. *Project name and location:* Nashville Central Station Project, Nashville, Tennessee. *Project sponsor:* Nashville Metropolitan Transit Authority. *FTA Regional Office:* Region IV in Atlanta. *Project description:* The project involves building a downtown bus transit center and transfer station. *Final agency actions:* FONSI issued February 6, 2006; project-level Air Quality Conformity Determination. *Supporting documentation:* Environmental Assessment, issued in June 2005, revised in February 2006.

3. *Project name and location:* Central Phoenix/East Valley Light-Rail Project, in metropolitan Phoenix, Arizona. *Project sponsor:* Valley Metro Rail. *FTA Regional Office:* Region IX in San Francisco. *Project description:* The project is a 20-mile light rail transit (LRT) line from the vicinity of Phoenix Spectrum Mall, through Tempe, to the East Valley Institute of Technology (EVIT) in Mesa. The LRT line will generally operate at grade on dual tracks in the center or at the side of existing streets, with crossings over the Grand and Tempe Canals and Tempe Town Lake. The project includes 28 stations, a maintenance facility and storage yard for the light rail vehicles, park-and-ride facilities at nine of the stations, off-street bus transfer facilities at five of the stations, and an operations control center. *Final agency actions:* ROD issued January 24, 2003; Section 4(f) finding; Section 106 Memorandum of Agreement; project-level Air Quality Conformity Determination. *Supporting documentation:* Final Environmental Impact Statement issued November 1, 2002.

4. *Project name and location:* Transbay Terminal/Caltrain Downtown Extension/Redevelopment Project in San Francisco, California. *Project sponsor:* Transbay Joint Powers Authority. *FTA Regional Office:* Region IX in San Francisco. *Project description:* The project consists of three major components: a new, multi-modal Transbay Transit Center on the site of the present Transbay Terminal; the extension of Caltrain commuter rail line from its current San Francisco terminus at Fourth and Townsend streets to a new underground station underneath

the new Transbay Transit Center; and the establishment of a redevelopment area with related development activities, including transit-oriented development on publicly owned land in the vicinity of the new Transbay Transit Center. *Final agency actions:* ROD issued February 8, 2005; Section 4(f) finding; Section 106 Memorandum of Agreement; project-level Air Quality Conformity Determination. *Supporting documentation:* Final Environmental Impact Statement issued April 2, 2004.

5. *Project name and location:* South Corridor I–205/Portland Mall Light Rail Transit Project. *Project sponsors:* Portland Metro and Tri-County Metropolitan Transportation District. *FTA Regional Office:* Region X in Seattle. *Project description:* The project has two major components: a 6.5-mile light rail transit (LRT) line along I–205 from the Clackamas Town Center to the Gateway Transit Center where it connects to the existing Banfield LRT line; and a 1.8-mile downtown transit mall LRT segment connecting into the existing light rail system at the Steel Bridge. The I–205 segment includes eight new LRT stations and five new park-and-ride lots. The Portland Mall segment adds seven pairs of LRT stations on 5th and 6th Avenues. The project includes the expansion of the Ruby Junction light rail vehicle storage and maintenance facility. Final agency actions: ROD issued February 22, 2005; Section 4(f) Finding; Section 106 Memorandum of Agreement; project-level Air Quality Conformity Determination. Supporting documentation: Final Environmental Impact Statement issued December 17, 2004.

Issued on: May 11, 2006.

Ronald Fisher,

Acting Associate Administrator for Planning and Environment, Washington, DC.

[FR Doc. E6–7527 Filed 5–17–06; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–55 (Sub-No. 664X)]

CSX Transportation, Inc.—Abandonment Exemption—in Anderson County, SC

On April 28, 2006, CSX Transportation, Inc. (CSXT) filed with the Surface Transportation Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a 12.74-mile rail line between milepost AKL 26.26 near Belton, the end of the line, and milepost AKL 39.00, near Pelzer, on the Southern Region, Florence Division, Belton Subdivision, in Anderson County, SC. The line traverses United States Postal Service Zip Codes 29627 and 29654 and includes one station, the Belton Station, at milepost AKL 31.0.

CSXT states that, based on information in its possession, the line does not contain federally granted rights-of-way. Any documentation in CSXT's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by August 16, 2006.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each offer must be accompanied by a $1,300 filing fee. *See* 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than June 7, 2006. Each trail use request must be accompanied by a $200 filing fee. *See* 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to STB Docket No. AB–55 (Sub-No. 664X), and must be sent to: (1) Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001, and (2) Louis E. Gitomer, 1455 F Street, NW., Suite 225, Washington, DC 20005. Replies to CSXT's petition are due on or before June 7, 2006.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Services at (202) 565–1592 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis (SEA) at (202) 565–1539. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by SEA will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Other interested persons may contact SEA to obtain a copy of the EA (or EIS). EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA will generally be within 30 days of its service.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: May 10, 2006.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. E6–7398 Filed 5–17–06; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–103320–00]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, REG–103320–00, Disclosure of Returns and Return Information to Designee of Taxpayer.

DATES: Written comments should be received on or before July 17, 2006 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn Kirkland, Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this regulation should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Disclosure of Returns and Return Information to Designee of Taxpayer.

OMB Number: 1545–1816.

Regulation Project Number: REG–103320–00.

Abstract: Abstract Regulation section 301.6103(c)–1 generally authorizes the IRS and its agents to disclose returns and return information to such person or persons as the taxpayer may designate in a written request for or consent to disclosure, or to any other person at the taxpayer's written or nonwritten request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person. The regulation requires a taxpayer who wishes to authorize disclosure of his or her returns or return information to provide the IRS or its agents with certain information, such as information identifying the taxpayer, the returns or return information to be disclosed, and the person to whom the disclosure is to be made.

Current Actions: There is no change to this final regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, business or other for-profit organizations, not-for-profit institutions, farms, and Federal, state, local or tribal governments.

Estimated Number of Respondents: 4,000.

Estimated Time Per Respondent: 12 minutes.

Estimated Total Annual Burden Hours: 800.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: April 27, 2006.

Allan Hopkins,

IRS Reports Clearance Officer.

[FR Doc. E6–7534 Filed 5–17–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Earned Income Tax Credit Issue Committee

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Earned Income Tax Credit Issue Committee will be conducted (via teleconference). The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, June 13, 2006.

FOR FURTHER INFORMATION CONTACT: Audrey Y. Jenkins at 1–888–912–1227 (toll-free), or 718–488–2085 (non toll-free).

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 an open meeting of the Taxpayer Advocacy Panel Earned Income Tax Credit Issue Committee will be held Tuesday, June 13, 2006 from 12 p.m. to 1 p.m. ET via a telephone conference call. The public is invited to make oral comments. Individual comments will be limited to 5 minutes. For information or to confirm attendance, notification of intent to attend the meeting must be made with Audrey Y. Jenkins. Ms. Jenkins may be reached at 1–888–912–1227 or (718) 488–2085, send written comments to Audrey Y. Jenkins, TAP Office, 10 MetroTech Center, 625 Fulton Street, Brooklyn, NY 11201 or post comments to the Web site: *http://www.improveirs.org*. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made in advance.

The agenda will include various IRS issues.

Dated: May 11, 2006.

John Fay,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E6–7535 Filed 5–17–06; 8:45 am]

BILLING CODE 4830–01–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, June 13, 2006, at 9:30 a.m. Central Time.

FOR FURTHER INFORMATION CONTACT: Mary Ann Delzer at 1–888–912–1227, or (414) 231–2365.

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, June 13, 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) 231–2363, or by mail to Taxpayer Advocacy Panel, Stop1006MIL, 211 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) 231–2365 for additional information.

The agenda will include the following: Various IRS issues.

Dated: May 11, 2006.

John Fay,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E6–7536 Filed 5–17–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0017]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection and allow 60 days for public comment in response to this notice. This notice solicits comments on the information needed to ensure that fiduciary's are properly administering VA beneficiaries' compensation and pension payments.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before July 17, 2006.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0017'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title:

a. Annual-Final Report and Account, VA Form 21–4706.

b. Federal Fiduciary's Account, VA Form 21–4706b.

c. Court Appointed Fiduciary's Account, VA Form 21–4706c.

d. Account Book, VA Form 21–4718.

e. Certificate of Balance on Deposit and Authorization to Disclose Financial Records (Pursuant to Title 38, U.S.C., Chapter 55 and Title 12, U.S.C., Chapter 35), VA Form 27–4718a.

OMB Control Number: 2900–0017.

Type of Review: Extension of a currently approved collection.

Abstract: VA maintain supervision of the distribution and use of VA benefits paid to fiduciaries on behalf of VA claimants who are incompetent, a minor, or under legal disability. The forms are used to verify beneficiaries' deposit remaining at a financial institution against a fiduciary's accounting. The following forms will be used to ensure claimants' benefits payments are administered properly.

a. VA Forms 21–4706, 4706b and 4706c are used by estate to determine proper usage of benefits paid to fiduciaries. The 21–4706 and 21–4706b are both necessary to conform to requirement of various state courts.

b. VA Form 21–4718 is provided to VA fiduciaries to submit accountings to either State courts or the VA. It is not a reporting form per se, but a vehicle to assist the fiduciary in accurately maintaining records of monies received and spent.

c. VA Form 21–4718a—Fiduciaries are required to obtain certifications that the balances remaining on deposit in financial institutions as shown on accountings are correct. Certifying official at a financial institution completing the form must affix the institution's official seal or stamp. The data collected is used to appoint an appropriate fiduciary for a VA beneficiary and to prevent fiduciaries from supplying false certification, embezzling funds, and possibly prevent and/or identify fraud, waste and abuse of government funds paid to fiduciaries on behalf of VA beneficiaries.

Affected Public: Individuals or households.

Estimated Annual Burden: 29,566.

a. Annual-Final Report and Account, VA Form 21–4706—1,100.

b. Federal Fiduciary's Account, VA Form 21–4706b—6,300.

c. Court Appointed Fiduciary's Account, VA Form 21–4706c—2,000.

d. Account Book, VA Form 21–4718—20,000.

e. Certificate of Balance on Deposit and Authorization to Disclose Financial Records, VA Form 27–4718a—165.

Estimated Average Burden Per Respondent:

a. Annual-Final Report and Account, VA Form 21–4706—30 minutes.

b. Federal Fiduciary's Accounts, VA Form 21–4706b—27 minutes.

c. Court Appointed Fiduciary's Account, VA Form 21–4706c—30 minutes.

d. Account Book, VA Form 21–4718—2½ hours.

e. Certificate of Balance on Deposit and Authorization to Disclose Financial Records, VA Form 27–4718a—3 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents: 31,512.

a. Annual-Final Report and Account, VA Form 21–4706—2,200.

b. Federal Fiduciary's Accounts, VA Form 21–4706b—14,000.

c. Court Appointed Fiduciary's Account, VA Form 21–4706c—4,000.

d. Account Book, VA Form 21–4718—8,000.

e. Certificate of Balance on Deposit and Authorization to Disclose Financial Records, VA Form 27–4718a—3,312.

Dated: May 4, 2006.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E6–7541 Filed 5–17–06; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0110]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and

its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before June 19, 2006.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Denise McLamb, Records Management Service (005G2), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 565–8374, FAX (202) 565–6950 or e-mail: *denise.mclamb@mail.va.gov*. Please refer to ''OMB Control No. 2900–0110.''

Send comments and recommendations concerning any aspect of the information collection to VA's Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0110'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Application for Assumption Approval and/or Release from Personal Liability to the Government on a Home Loan, VA Form 26–6381.

OMB Control Number: 2900–0110.

Type of Review: Extension of a currently approved collection.

Abstract: Veteran-borrows complete VA Form 26–6381 to sell their home by assumption rather than requiring the purchaser to obtain their own financing to pay off the VA guaranteed home loan. In order for the veteran-borrower to be release from personal liability, the loan must be current and the purchaser must assume all of the veteran's liability to the Government and to the mortgage holder and meet the credit and income requirements.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on January 31, 2006 at pages 5120–5121.

Affected Public: Individuals or households, Business or other for profit.

Estimated Annual Burden: 500 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: One-time.

Estimated Number of Respondents: 3,000.

By direction of the Secretary:

Dated: May 4, 2006.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E6–7542 Filed 5–17–06; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–New (IL)]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before June 19, 2006.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005G2), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 565–8374, FAX (202) 565–6950 or e-mail *denise.mclamb@mail.va.gov*. Please refer to ''OMB Control No. 2900–New (IL).''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7316. Please refer to ''OMB Control No. 2900–New (IL)'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Preliminary Independent Living (IL) Assessment, VA Form 28–0791.

OMB Control Number: 2900–New (IL).

Type of Review: New collection.

Abstract: VA case managers use VA Form 28–0791 while evaluating the independent living needs of veterans with severe disabilities. The data is used to determine the scope of the veteran's independent living needs under the Vocational Rehabilitation and Employment program.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on December 9, 2005 at pages 73328–73329.

Affected Public: Individuals or households.

Estimated Annual Burden: 2,500 hours.

Estimated Average Burden Per Respondent: 1 hour.

Frequency of Response: One-time.

Estimated Number of Respondents: 2,500.

Dated: May 4, 2006.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E6–7543 Filed 5–17–06; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Health Services Research and Development Service Merit Review Board; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463, Federal Advisory Committee Act, that a meeting of the Health Services Research and Development Service Merit Review Board will be held August 28–30, 2006 at the Hyatt Harborside Hotel, 101 Harborside Drive, Boston, MA. Various subcommittees of the Board will meet during that period.

Each subcommittee meeting of the Merit Review Board will be open to the public the first day from 8 a.m. until 8:30 a.m. to cover administrative matters and to discuss the general status of the program. The remaining portion of each meeting will be closed. The closed portion of the meeting will involve discussion, examination, reference to, and oral review of the research proposals and critiques.

On Monday, August 28, 2006, an orientation session will be held from 6 p.m. to 7 p.m. On Tuesday, August 29, 2006, five subcommittees will convene from 8 a.m. to 5 p.m.—Implementation and Management Research Science, Chronic Disease Management & Long Term Aging, General Health Services Research, Special Populations and the Nursing Research Initiative (NRI). On Wednesday, August 30, 2006, five subcommittees will convene from 8 a.m. to 5 p.m.—Implementation and Management Research Science (continuation), Special Populations (continuation) General Health Services Research (continuation), Chronic Disease Management (continuation) and Equity/Women's Health review group.

The purpose of Board is to review research and development applications concerned with the measurement and evaluation of health care services, the

testing of new methods of health care delivery and management, and nursing research. Applications are reviewed for scientific and technical merit. Recommendations regarding funding are prepared for the Chief Research and Development Officer.

After the subcommittees meet there will be a debriefing provided to members of Health Services Research & Development Service Merit Review Board. This debriefing, by teleconference, will be to discuss the outcomes of the review sessions and to ensure the integrity and consistency of the review process.

During the closed portion of the meeting, discussion and recommendations will include qualifications of the personnel conducting the studies (the disclosure of which would constitute a clearly unwarranted invasion of personal privacy), as well as research information (the premature disclosure of which would be likely to compromise significantly the implementation of proposed agency action regarding such research projects). As provided by subsection 10(d) of Public Law 92–463, as amended by Public Law 94–409, closing portions of these meetings is in accordance with 5 U.S.C. 552b(c)(6) and (9)(B).

Those who plan to attend the open session should contact the Scientific Merit Review Program Manager (124R), Health Services Research and Development Service, Department of Veterans Affairs, 1722 Eye Street, NW., Washington, DC 20006 at least five days before the meeting. For further information, call (202) 254–0207.

By Direction of the Secretary.

Dated: May 9, 2006.

E. Philip Riggin,

Committee Management Officer.

[FR Doc. 06–4643 Filed 5–17–06; 8:45am]

BILLING CODE 8320–01–M

Corrections

Federal Register

Vol. 71, No. 96

Thursday, May 18, 2006

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

FEDERAL TRADE COMMISSION

16 CFR Part 305

Rule Concerning Disclosures Regarding Energy Consumption and Water Use of Certain Home Appliances and Other Products Required Under the Energy Policy and Conservation Act (''Appliance Labeling Rule'')

Correction

In rule document 06–882 beginning on page 4983 in the issue of Tuesday, January 31, 2006, make the following corrections:

Appendix A7 to Part 305 [Corrected]

1. On page 4985, in Appendix A7 to Part 305, in the third column, in the table heading for Appendix A7, in the third line, ''Without'' should read ''With'',

Appendix B1 to Part 305 [Corrected]

2. On page 4986, in Appendix B1 to Part 305, in in the first column, in the table, under the column entitled ''High'', in the sixth entry, ''341'' should read ''454''.

[FR Doc. C6–882 Filed 5–17–06; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Thursday,
May 18, 2006

Part II

Department of Labor

Mine Safety and Health Administration

30 CFR Part 57

Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Miners; Final Rule

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Part 57

RIN 1219–AB29

Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Miners

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Final rule.

SUMMARY: This final rule revises the May 20, 2006 effective date of the diesel particulate matter (DPM) final concentration limit of 160 micrograms of total carbon (TC) per cubic meter of air (160_{TC} μg/m³) promulgated in the 2001 final rule ''Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Miners,'' and published in the **Federal Register** on January 19, 2001 (66 FR 5706) and amended on September 19, 2005 (70 FR 55019).

This final rule increases flexibility of compliance for mine operators by allowing staggered effective dates for implementation of the final DPM limit, phased-in over a two-year period, primarily based on feasibility issues which have surfaced since promulgation of the 2001 final rule.

Furthermore this final rule establishes requirements for medical evaluation of miners required to wear respiratory protection and transfer of miners who are medically unable to wear a respirator; deletes the existing provision that restricts newer mines from applying for an extension of time in which to meet the final concentration limit; addresses technological and economic feasibility issues, and the costs and benefits of this rule.

EFFECTIVE DATE: This final rule is effective on May 18, 2006 except for amendments to § 57.5060(d), which is effective August 16, 2006.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Acting Director, Office of Standards, Regulations, and Variances, MSHA, 1100 Wilson Blvd., Room 2350, Arlington, Virginia 22209–3939; 202–693–9440 (telephone); or 202–693–9441 (facsimile).

You may obtain copies of this final rule and the Regulatory Economic Analysis (REA) in alternative formats by calling 202–693–9440. The alternative formats are either a large print version of these documents or electronic files that can be sent to you either on a computer disk or as an attachment to an e-mail. The documents also are available on the Internet at *http://www.msha.gov/REGSINFO.HTM*.

SUPPLEMENTARY INFORMATION:

Outline of Preamble

This outline will assist the mining community in finding information in this preamble.

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  C. The Treasury and General Government Appropriations Act of 1999: Assessment of Federal Regulations and Policies on Families
  D. Executive Order 12630: Government Actions and Interference With Constitutionally Protected Property Rights
  E. Executive Order 12988: Civil Justice Reform
  F. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
  G. Executive Order 13132: Federalism
  H. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
  I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
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XIV. References Cited
XV. Regulatory Text

I. List of Common Terms

Listed below are the common terms used in the preamble.

31 Mine Study	Joint MSHA/Industry Study: Determinations of DPM levels in Underground Metal and Nonmetal Mines.
Commission	Federal Mine Safety and Health Review Commission.
CV	Coefficient of Variation.
DPF	diesel particulate filter.
DPM	diesel particulate matter.
EC	elemental carbon.
ETS	environmental tobacco smoke.
Filter Selection Guide	Diesel Particulate Filter Selection Guide for Diesel-powered Equipment in Metal and Nonmetal Mines.
First Partial Settlement Agreement	66 FR 35518 (2001) & 66 FR 35521 (2001): basis for July 5, 2001 NPRM.
MARG	Methane Awareness Resource Group.
M/NM	metal/non-metal.
MSHA	Mine Safety and Health Administration.
NIOSH	National Institute for Occupational Safety and Health.
NTP	National Toxicology Program.
OC	organic carbon.
PAPR	powered air-purifying respirator.
PEL	permissible exposure limit.
PPM	parts per million.
QRA	quantitative risk assessment.
REA	Regulatory Economic Analysis.

Second Partial Settlement Agreement	67 FR 47296 (2002): basis for August 14, 2003 NPRM.
SD	standard deviation.
SKC	SKC, Inc.
TC	total carbon (the sum of elemental and organic carbon).
USWA	United Steelworkers of America.
USW	United Steelworkers.
$\mu g/cm^2$	micrograms per square centimeter.
$\mu g/m^3$	micrograms per cubic meter.
2001 final rule	January 19, 2001 DPM final rule.
Amended 2001 final rule	2001 final rule amended on February 27, 2002.
2002 final rule	February 27, 2002 final rule.
2002 ANPRM	Advance Notice of Proposed Rulemaking published on September 25, 2002.
2003 NPRM	Notice of Proposed Rulemaking published on August 14, 2003.
2005 final rule	June 6, 2005 final rule.
2005 proposed rule	Notice of Proposed Rulemaking published on September 7, 2005.

II. Background

On January 19, 2001, MSHA published a final rule addressing the health hazards to underground metal and nonmetal miners from exposure to diesel particulate matter (DPM) (66 FR 5706). The rule established new health standards for these miners by requiring, among other things, mine operators to use engineering and work practice controls to reduce DPM to prescribed limits. It set an interim and final DPM concentration limit in the underground metal and nonmetal mining environment with staggered effective dates for implementation of the concentration limits. The interim concentration limit of 400_{TC} $\mu g/m^3$ was to become effective on July 20, 2002. The final concentration limit of 160_{TC} $\mu g/m^3$ was scheduled to become effective January 20, 2006. In the 2001 final rule, MSHA projected that the mining industry would meet the final concentration limit in their mines through the use of diesel particulate filtration devices, ventilation changes, and the turnover of equipment and engines to less polluting models (66 FR 5713, 5888).

Several mining trade associations and individual mine operators challenged the final rule and the United Steelworkers of America (USWA) intervened in the case, which is now pending in the United States Court of Appeals for the District of Columbia Circuit. The parties agreed to resolve their differences through settlement negotiations with MSHA and we delayed the effective date of certain provisions of the standard.

A. First Partial Settlement Agreement

On July 5, 2001, as a result of an agreement reached in settlement negotiations, MSHA published two notices in the **Federal Register**. One notice (66 FR 35518) delayed the effective date of § 57.5066(b) related to tagging requirements in the maintenance standard. The second notice (66 FR 35521) proposed a rule to make limited revisions to § 57.5066(b) and added a new paragraph to § 57.5067(b) ''Engines'' regarding the definition of the term ''introduced.'' MSHA published the final rule on February 27, 2002 (67 FR 9180).

B. Second Partial Settlement Agreement

Settlement negotiations continued on the remaining unresolved issues in the litigation, and on July 15, 2002, the parties finalized a written agreement (67 FR 47296, 47297). Under the agreement, the interim concentration limit of 400_{TC} $\mu g/m^3$ became effective on July 20, 2002, without further legal challenge. MSHA afforded mine operators one year to develop and implement good-faith compliance strategies to meet the interim concentration limit, and MSHA agreed to provide compliance assistance during this one-year period. MSHA also agreed to propose rulemaking on several other disputed provisions of the 2001 final rule. The legal challenge to the rule was stayed pending completion of the additional rulemakings.

On July 20, 2003, MSHA began full enforcement of the interim concentration limit of 400_{TC} $\mu g/m^3$. MSHA's enforcement policy was also based on the terms of the second partial settlement agreement and includes the use of elemental carbon (EC) as an analyte to ensure that a citation based on the 400 TC concentration limit is valid and not the result of interferences (67 FR 47298). The policy was discussed with the DPM litigants and stakeholders on July 17, 2003.

III. Rulemaking History

A. Advance Notice of Proposed Rulemaking (ANPRM) on the Interim and Final Concentration Limits

On September 25, 2002, MSHA published an Advance Notice of Proposed Rulemaking (ANPRM) (67 FR 60199). MSHA noted in the ANPRM that the scope of the rulemaking was limited to the terms of the Second Partial Settlement Agreement and posed a series of questions to the mining community related to the 2001 final rule. MSHA also stated its intent to propose a rule to revise the surrogate for the interim and final concentration limits and to propose a DPM control scheme similar to that included in our longstanding hierarchy of controls scheme used in MSHA's air quality standards (30 CFR 56.5001 through 56.5005 and 57.5001 through 57.5005) for M/NM mines. In addition, MSHA stated that it would consider technological and economic feasibility for the underground M/NM mining industry to comply with revised interim and final DPM limits. MSHA determined at that time that some mine operators had begun to implement control technology on their underground diesel-powered equipment. Therefore, MSHA requested relevant information on current experiences with availability of control technology, installation of control technology, effectiveness of control technology to reduce DPM levels, and cost implications of compliance with the 2001 final rule.

B. Notice of Proposed Rulemaking (NPRM) on the Interim Limit

In response to our publication of the ANPRM, some commenters recommended that MSHA propose separate rulemakings for revising the interim and final concentration limits to give MSHA an opportunity to gather further information to establish a final DPM limit, particularly regarding feasibility. In the subsequent notice of proposed rulemaking (NPRM) published on August 14, 2003 (68 FR 48668), MSHA concurred with these commenters and notified the public in the NPRM that we would propose a separate rulemaking to amend the existing final concentration limit of 160_{TC} $\mu g/m^3$. MSHA also requested comments on an appropriate final DPM limit and solicited additional information on feasibility. The proposed rule also addressed the interim concentration limit by proposing a

comparable PEL of 308 μg/m³ based on the EC surrogate and included a number of other provisions.

C. Final Rule Revising the Interim Concentration Limit

MSHA published the final rule revising the interim concentration limit on June 6, 2005 (70 FR 32868). This rule changed the interim concentration limit of 400 μg/m³ measured by TC to a comparable PEL of 308 μg/m³ measured by EC. The rule requires MSHA's longstanding hierarchy of controls that is used for other MSHA exposure-based health standards at M/NM mines, but retains the prohibition on rotation of miners for compliance. Furthermore, the rule, among other things, requires MSHA to consider economic as well as technological feasibility in determining if operators qualify for an extension of time in which to meet the final DPM limit, and deletes the requirement for a control plan.

Currently, the following provisions of the DPM standard are effective: § 57.5060(a), establishing the interim PEL of 308 micrograms of EC per cubic meter of air which is comparable in effect to 400 micrograms of TC per cubic meter of air; § 57.5060(d), Addressing control requirements; § 57.5060(e), Prohibiting rotation of miners for compliance with the DPM standard; § 57.5061, Compliance determinations; § 57.5065, Fueling practices; § 57.5066, Maintenance standards; § 57.5067, Engines; § 57.5070, Miner training; § 57.5071, Exposure monitoring; and, § 57.5075, Diesel particulate records.

D. September 2005 Notice of Proposed Rulemaking

On September 7, 2005, (70 FR 53280) MSHA proposed a rule to phase in the final DPM limit because MSHA was concerned that there may be feasibility issues for some mines to meet that limit by January 20, 2006.

Accordingly, the proposed rule considered staggering the effective date for implementation of the final DPM limit, phased in over a five-year period, primarily based on feasibility issues which had surfaced since promulgation of the 2001 final rule. MSHA also proposed to delete existing § 57.5060(c)(3)(i) that restricts new mines from applying for an extension of time for meeting the final concentration limit. MSHA sought comment and data on an appropriate conversion factor for the final DPM limit, technological implementation issues, and the costs and benefits of the final rule. In addition, MSHA requested comments on the appropriateness of including in a final rule a provision for medical evaluation of miners required to wear respiratory protection and transfer of miners who have been determined by a medical professional to be unable to wear a respirator.

MSHA set hearing dates and a deadline for receiving comments on the September 7, 2005 proposed rule with the expectation that MSHA would complete the rulemaking to phase in the final DPM limit before January 20, 2006.

After publication of the September 7, 2005 proposed rule, MSHA received a request from the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) for more time to comment on the proposed rule. The USW explained that Hurricane Katrina had placed demands on their resources that would prevent them from participating effectively in the rulemaking under the current schedule for hearings and comments. MSHA recognized the USW's need to devote resources to respond to the aftermath of Hurricane Katrina and the impact that would have on their participation under the current timetable. MSHA also received a request from the National Stone, Sand and Gravel Association (NSSGA) for additional time to comment on the proposed rule and for an additional public hearing in Arlington, Virginia.

Accordingly, due to requests from the USW and NSSGA, MSHA published a notice on September 19, 2005 (70 FR 55018) that changed the public hearing dates from September 2005 to January 2006. MSHA also extended the public comment period from October 14, 2005 to January 27, 2006. Also on September 19, 2005, MSHA issued a second notice delaying the applicability of the final concentration limit of 160TC μg/m³ until May 20, 2006.

Public hearings were held on the proposed rule in Arlington, Virginia on January 5, 2006; Salt Lake City, Utah on January 9, 2006; Kansas City, Missouri on January 11, 2006; and Louisville, Kentucky on January 13, 2006. The comment period was scheduled to close on January 27, 2006. However, the National Mining Association and the Methane Awareness Resource Group (MARG) Diesel Coalition requested that the comment period be extended an additional 30 days beyond January 27, 2006 to allow for more time to prepare their comments. Additionally, the Agency received a request from the National Institute for Occupational Safety and Health (NIOSH) for a three week extension. On January 26, 2006, MSHA determined that a three week extension of the comment period was sufficient to allow additional public comment on the proposed rule and extended the comment period until February 17, 2006.

What follows is a discussion of the specific revisions to the 2001 DPM standard. The final rule addresses:

- Section 57.5060(b) addressing the final dpm concentration limit;
- Section 57.5060(c)(3)(i) addressing special extensions;
- Section 57.5060(d)addressing medical evaluation and transfer; and
- Section 57.5075 addressing recordkeeping requirements.

IV. Risk Assessment

A. Introduction

We rely on our comprehensive January 2001 risk assessment published at 66 FR 5752–5855 (as corrected at 66 FR 35518–35520) to support this final rule. This risk assessment was updated in the 2005 final rule (70 FR 32868) establishing the 308EC μg/m³ interim permissible exposure limit (PEL). In the following discussion, we will refer to the risk assessment published in the 2001 final rule as the ''2001 risk assessment'' and the updates published in the 2005 final rule as the ''updated 2001 risk assessment.''

The discussion of the 2001 risk assessment in our 2005 final rule presented our evaluation of health risks associated with DPM exposure levels encountered in the mining industry and is based on a review of the scientific literature available through March 31, 2000, along with consideration of all material submitted during the public comment periods for the 2001 and 2005 rulemakings.

The 2001 risk assessment was divided into three main sections. Section 1 (66 FR 5753–5764) contained a discussion of U.S. miner exposures based on field data collected through mid-1998. Section 2 of the 2001 risk assessment (66 FR 5764–5822) reviewed the extensive scientific literature on health effects associated with exposures to DPM. In section 3 of the 2001 risk assessment (66 FR 5822–5855), we evaluated the best available evidence to ascertain whether exposure levels currently existing in mines warranted regulatory action pursuant to the Mine Act. After careful consideration of all the submitted public comments, the 2001 risk assessment established three main conclusions:

1. Exposure to DPM can materially impair miner health or functional capacity. These material impairments include acute sensory irritations and respiratory symptoms (including allergenic responses); premature death from cardiovascular, cardiopulmonary, or respiratory causes; and lung cancer.

2. At DPM levels currently observed in underground mines, many miners are presently at significant risk of incurring these material impairments due to their occupational exposures to DPM over a working lifetime.

3. By reducing DPM concentrations in underground mines, the rule will substantially reduce the risks of material impairment faced by underground miners exposed to DPM at current levels (66 FR 5854–5855).

Exposure to DPM can materially impair miner health or functional capacity. These material impairments include acute sensory irritations and respiratory symptoms (including allergenic responses); premature death from cardiovascular, cardiopulmonary, or respiratory causes; and lung cancer. Scientific evidence gathered after the peer-review of the 2001 risk assessment generally supports our conclusions, and nothing in our reviews suggests that they should be altered.

Some commenters presented critiques challenging the 2001 risk assessment and disputing scientific support for any DPM exposure limit, especially by means of an EC surrogate. Other commenters endorsed the risk assessment and stated that recent scientific publications support our conclusions.

Some commenters continue to question the scientific basis for linking DPM exposures with an increased risk of adverse health effects. Many of these comments are the same as those addressed in the 2005 final rule. We refer the reader to section VI, DPM Exposures and Risk Assessment, in the 2005 final rule (70 FR at 32888) for discussions addressing earlier commenters' positions on the underlying basis of the risk assessment.

After considering the additional peer-reviewed scientific literature submitted in response to the proposed rule, and all of the comments, we did not identify any reason to reduce our concern with regard to adverse health risks associated with DPM exposure as identified in the 2001 risk assessment.

Section IV.B, summarizes the DPM exposure data that became available after publication of the 2001 final rule. Section IV.C, Health Effects, summarizes additional scientific literature pertaining to adverse health effects of DPM and fine particulates submitted to the record since our 2005 final rule. The reader is encouraged to refer to the 2001 quantitative risk assessment (66 FR 5752–5855) that reviewed the health effects associated with exposure to DPM. This discussion evaluates the extent to which literature added to the record changes the conclusions of the 2001 risk assessment. Section IV.D, Significance of Risk, supplements Section 2 of the 2001 risk assessment (66 FR 5764–5822) by addressing comments related to the risk assessment.

We reviewed comments on the potential health effects of substituting EC for TC as a surrogate measure of DPM. We believe that the issue of an appropriate surrogate for a measure of DPM is separate from the issue of determining whether adverse health effects are caused by whole DPM or a specific component of DPM. The 2001 risk assessment is definitive in explaining relevant adverse health effects caused by exposure to DPM. The risk assessment accurately portrays adverse health effects ranging from sensory irritation to lung cancer caused by exposure to DPM. The method by which exposures are measured does not affect the conclusion that exposure to DPM produces serious adverse health effects. Comments concerning the analytical method are addressed in part VIII.A. Section 57.5060(b), addressing the final limits.

B. Exposures to DPM in Underground Metal and Nonmetal Mines

The 2001 risk assessment and the update presented in 2005 used the best available data on exposure to DPM at underground M/NM mines to quantify excess lung cancer risk. ''Excess risk'' refers to the lifetime probability of dying from lung cancer during or after a 45-year occupational DPM exposure. All of the exposure-response models for lung cancer are monotonic (i.e., increased exposure yields increased excess risk).

We evaluated exposures based on 355 samples collected at 27 underground U.S. M/NM mines prior to promulgating the 2001 rule. Mean DPM concentrations found in the production areas and haulageways at those mines ranged from about 285 μg/m^3 to about 2000 μg/m^3, with some individual measurements exceeding 3500 μg/m^3. The overall mean DPM concentration was 808 μg/m^3. All of the samples considered in the 2001 risk assessment were collected prior to 1999.

Two sets of DPM exposure data, collected after promulgation of the 2001 final rule, were compiled for underground M/NM mines: (1) data collected in 2001 and 2002 from 31 mines for purposes of the 31-Mine Study (Table IV–1) and (2) data collected between 10/30/2002 and 10/29/2003 from 183 mines to establish a baseline for future sample comparisons (Table IV–2). The mean whole DPM concentration across all 358 valid samples in the 31-Mine Study was 432_{DPM} μg/m^3. The mean concentration across all valid 1,194 baseline samples was 318_{DPM} μg/m^3.[1]

TABLE IV–1.—DPM CONCENTRATIONS (μg/m^3) BY MINE CATEGORY FOR SAMPLES COLLECTED FOR THE 31-MINE STUDY (2001–2002)

[DPM is estimated by TC ÷ 0.8]

	Estimated 8-hour Full Shift Equivalent DPM Concentration (μg/m^3)			
	Metal	Stone	Trona	Other
No. of samples	116	105	54	83
Minimum	46	16	20	27
Maximum	2,581	1,845	331	1,210
Median	491	331	82	341
Mean	610	465	94	359
Std. Error	45	36	9	27
95% UCL	699	537	113	412
95% LCL	522	394	75	306

[1] The relationship DPM ≈ TC/0.8 is the same as that assumed in the 2001 risk assessment. The relationship TC ≈ 1.3 × EC was formulated under the Second Partial Settlement Agreement, based on TC:EC ratios observed in the joint 31-Mine Study.

TABLE IV–2.—DPM CONCENTRATIONS BY MINE CATEGORY FOR SAMPLES COLLECTED DURING THE BASELINE SAMPLING PERIOD (10/30/2002–10/29/2003)

[DPM is estimated by (1.3 × EC) ÷ 0.8.]

	Estimated 8-hour Full Shift Equivalent DPM Concentration (μg/m³)					
	Metal	Stone	Other N/M	Trona	Total	Total excluding Trona
No. of Samples	284	689	196	25	1,194	1,169
Maximum	2,532	3,724	1,200	509	3,724	3,724
Median	339	186	185	102	218	223
Mean	444	295	243	132	318	322
Std. Error	23	13	15	20	10	10
95% UCL	490	320	272	173	338	342
95% LCL	399	270	214	91	299	303

Thus, despite substantial improvements attained since the 1989–1999 sampling period addressed by the 2001 risk assessment, underground M/NM miners are still faced with an unacceptable risk of lung cancer due to their occupational exposure to DPM. The reader is referred to part D of this section, Significance of Risk, for further discussion of excess risk.

Personal exposure samples taken after October 2003 are collected according to our enforcement sampling policy. These enforcement samples collected after the end of the Baseline Sampling period are not representative of the *average* M/NM miner's exposure to DPM because we collect samples to target the highest risk miner, not the average miner. Therefore, this exposure information is not used to characterize the average miner's exposure to DPM. See section V.B, Economic Feasibility, for a summary of enforcement sampling results. However, our enforcement activities from November 1, 2003 through January 31, 2006 continue to show some miners have experienced exposures substantially greater than 308_{EC} μg/m³. During the time period from November 1, 2003 to January 31, 2006, 1,798 valid personal compliance samples from all mines covered by the regulation were collected. From these samples collected, 18% (324) of samples exceeded 308_{EC} μg/m³, 22% (396) exceeded 350_{TC} μg/m³, and 64% (1,151) exceeded 160_{TC} μg/m³. These percentages show that miners are still being exposed to high levels of DPM.

C. Health Effects

A key conclusion of the 2001 risk assessment was:

Exposure to DPM can materially impair miner health or functional capacity. These material impairments include acute sensory irritations and respiratory symptoms (including allergenic responses); premature death from cardiovascular, cardiopulmonary, or respiratory causes; and lung cancer. [66 FR 5854–5855]

We have reviewed scientific literature pertaining to health effects of fine particulates in general and DPM in particular published later than what was considered in the 2001 risk assessment. This scientific evidence supports the 2001 risk assessment, and nothing in our review suggests that it should be altered.

A number of commenters endorsed the 2001 risk assessment, and suggested that the latest evidence strengthens its conclusions. Some other commenters responding to our 2003 NPRM jointly stated that ''[t]he scientific evidence for the [adverse] health effects of DPM is overwhelming'' and that ''evidence for the carcinogenicity and non-cancer health effects of DPM has grown since 1998.''

A number of commenters contended that all of the evidence to date is insufficient to support limitation of occupational exposure to DPM. We believe that these commenters did not appreciate evidence presented in the 2001 risk assessment and/or mischaracterized its conclusions. For example, a few commenters erroneously stated that promulgation of the 2001 rule was based on only ''two principal health concerns: (1) The transitory, reversible health effects of exposure to DPM; and, (2) the long-term impacts that may result in an excess risk of lung cancer for exposed workers.'' Actually, as shown in the conclusion cited above, the 2001 risk assessment identified three different kinds of material health impairment associated with DPM exposure: (1) Acute sensory irritations and respiratory symptoms (including allergenic responses); (2) premature death from cardiovascular, cardiopulmonary, or respiratory causes; and (3) lung cancer. Although the cardiovascular, cardiopulmonary, and respiratory effects were associated with acute exposure to DPM, commenters presented no evidence that any such effects were ''transitory'' or ''reversible.'' Nor did commenters present evidence that immunological responses associated with either short-term or long-term DPM exposure were ''transitory'' or ''reversible.''

In addition, some commenters erroneously stated that ''no [quantitative] dose/response relationship related to the PELs could be demonstrated by MSHA.'' These commenters apparently did not appreciate the discussion of exposure-response relationships in the 2001 risk assessment (66 FR 5847–54) and failed, specifically, to note the quantitative exposure-response relationships shown for lung cancer in the two tables provided (66 FR 5852–53). Relevant exposure-response relationships were also demonstrated in articles by Pope et al. cited in the 2003 NPRM, which will be discussed further below.

Some commenters objected that the exposure-response relationships presented in the 2001 risk assessment did not justify adoption of the specific DPM exposure limits promulgated. These commenters mistakenly assume the limits set forth in the 2001 final rule were derived from an exposure-response relationship. As explained in 66 FR at 5710–14, the choice of exposure limits, while justified by quantifiable adverse health effects, was actually driven by feasibility concerns. The exposure-response relationships provided clear evidence of significant adverse human health effects (both cancer and non-cancer) at exposure levels far below those determined to be feasible for mining.

The additional scientific literature cited in the 2003 NPRM, the 2005 final rule and this 2006 final rule is meant only to update and supplement the evidence of health effects cited in the 2001 risk assessment. Although the

2001 risk assessment presented ample evidence to justify its conclusions, additional supplemental DPM health effects literature is reviewed in this document that became available after the 2001 risk assessment was published.

The following section summarizes additional studies submitted to the record. Our review focuses on the implications of these study results for the characterization of risk presented in MSHA's 2001 assessment. These study summaries are presented in three tables that correspond to the material health impairments identified in the 2001 risk assessment: (1) Respiratory and immunological effects, including asthma, (2) cardiovascular and cardiopulmonary effects, and (3) cancer. A fourth table focuses on a recent study about potential mechanisms of action for DPM. These tables describe the studies that some commenters and the agency felt were representative of the type of new information available since the completion of the 2001 assessment and the updated 2001 risk assessment, however, these tables are not to represent a comprehensive review of all information published about particulate matter.

(1) Respiratory and Immunological Effects, Including Allergenic Responses

In the 2001 risk assessment, acute sensory irritations with respiratory symptoms, including immunological or allergenic effects such as asthmatic responses, were grouped together. Similar material health impairments likely to be caused or exacerbated by excessive exposures to DPM were identified. This finding was based on human experimental and epidemiological studies and was supported by experimental toxicology. (For an explanation of what type of health effects are considered by us to be material impairments of health, the reader is referred to the 2001 risk assessment (See 66 FR 5766.)

Table IV–3 summarizes five studies dealing with respiratory and immunological effects of DPM and/or fine particulates in general that have been submitted to the record since the 2005 literature update to the 2001 risk assessment. The epidemiological studies by Hoppin (2004) and Pourazar (2004) provide additional support for the association between diesel exhaust exposure and development of asthma. Three of the studies, Gluck (2003), Stenfors (2004), and Behndig (2006), have also shown that exposures of human volunteers to diesel exhaust at levels below 160_{TC} μg/m³ cause inflammation of the human respiratory tract.

TABLE IV–3.—STUDIES OF HUMAN RESPIRATORY AND IMMUNOLOGICAL EFFECTS

Authors, year	Description	Key results
Behndig et al., 2006	15 healthy volunteers exposed to diesel exhaust or air (2 hours, diesel concentration measured as PM_{10}: 100 μg/m³) Eighteen hours after exposure, the volunteers were assessed using bronchoscopy with bronchoalveolar lavage and endobronchial mucosal biopsy.	Exposure to diesel exhaust at this concentration is sufficient to cause airway inflammation.
Gluck et al., 2003	Comparison of nasal cytological examinations of 136 customs officers involved solely in clearance of heavy-goods vehicles using diesel engines with examinations of 58 officers working only in offices. Examinations were performed twice a year over a period of 5 years. Measured diesel engine emission concentrations for the exposed group varied between 31 and 60 μg/m³.	The exposed group was found to have chronic inflammatory changes of the nasal mucosa, including goblet cell hyperplasia, increased metaplastic and dysplastic epithelia, and increased leukocytes while the unexposed group did not.
Hoppin et al., 2004	An association between diesel exhaust exposure and development of asthma is explored. The study evaluated the odds of wheeze associated with nonpesticide occupational exposures in a cohort of approximately 21,000 farmers in Iowa and North Carolina. Logistic regression models controlling for age, state, smoking, and history of asthma or atopy were applied to evaluate odds of wheeze in the past year.	Driving diesel tractors was significantly associated with elevated odds of wheeze (odds ratio = 1.31; 95% confidence interval = 1.13, 1.52). The odds ratio for driving gasoline tractors was lower but significant at 1.11 (95% confidence interval = 1.02, 1.21). A duration-response relationship was observed for driving diesel tractors but not for driving gasoline tractors.
Pourazar et al., 2004	15 healthy volunteers were exposed to diesel exhaust or air for 1 hour. Diesel concentration was measured as PM10 at 300 μg/m³).	This level of diesel exposure caused a significant increase in expression of the cytokine interleukin-13 in the airways of these volunteers. Interleukin-13 is known to play a key role in the pathogenesis of asthma.
Stenfors et al., 2004	25 healthy volunteers and 15 mild asthmatics were exposed to diesel exhaust or air alone for two hours (diesel concentration measured as PM_{10} at 108 μg/m³). At six hours after exposure, subjects underwent bronchoscopy with bronchoalveolar lavage and mucosal biopsies.	Diesel exhaust exposure was documented to cause airways inflammation in healthy volunteers. Diesel exhaust exposure did not significantly worsen existing airways inflammation in the asthmatics, but did significantly increase airways expression of the important allergy-associated cytokine, interleukin-10.

Review Article on Respiratory and Immunological Effects Considered after the 2005 Final Rule

There is a progressive accumulation of evidence showing the inflammatory and immunologic effects of diesel exhaust particulate exposure plays a role in the development of allergies and asthma. The 2001 risk assessment and the update to the risk assessment describe in detail review articles addressing these effects. The most recent review by Riedl and Diaz-Sanchez (2005), summarized in Table IV–4, provides an overview of observational and experimental studies that link DPM and asthma.

TABLE IV–4.—REVIEW ARTICLES ON RESPIRATORY AND IMMUNOLOGICAL EFFECTS

Authors, year	Description	Key results
Riedl and Diaz-Sanchez, 2005.	Review of evidence-based studies of the health effects of air pollutants on asthma, focusing on diesel exhaust particles (DEP).	Intact DEP and extracts of DEP induce reactive oxygen species production. DEP and particulate matter induce release of Granulocyte Macrophage-Colony Stimulating Factor and increase intracellular peroxide production. The ultrafine particle fraction of diesel exhaust might also exert biologic effects independent of chemical composition through penetration of cellular components, such as mitochondria.

In its 2002 ''Health Assessment Document for Diesel Engine Exhaust,'' the Environmental Protection Agency (EPA) reached the following conclusion with respect to immunological effects of diesel exhaust:

> Recent human and animal studies show that acute DE [diesel exhaust] exposure episodes can exacerbate immunological reactions to other allergens or initiate a DE-specific allergenic reaction. The effects seem to be associated with both the organic and carbon core fraction of DPM. In human subjects, intranasal administration of DPM has resulted in measurable increases of IgE antibody production and increased nasal mRNA for some proinflammatory cytokines. These types of responses also are markers typical of asthma, though for DE, evidence has not been produced in humans that DE exposure results in asthma. The ability of DPM to act as an adjuvant to other allergens also has been demonstrated in human subjects. (EPA, 2002)

Submissions to the rulemaking record since the 2005 final rule support our previous position that exposure to DPM is associated with the development of adverse respiratory and immunological effects.

(2) Cardiovascular and Cardiopulmonary Effects

In the 2001 risk assessment, the evidence presented for DPM's adverse cardiovascular and cardiopulmonary effects relied on data from air pollution studies in the ambient air. This evidence identifies premature death from cardiovascular, cardiopulmonary, or respiratory causes as an endpoint significantly associated with exposures to fine particulates. The 2001 risk assessment found that ''[t]he mortality effects of acute exposures appear to be primarily attributable to combustion-related particles in $PM_{2.5}$ [*i.e.*, fine Particulate Matter] (such as DPM) * * *.''

There are difficulties involved in utilizing the evidence from such studies in assessing risks to miners from occupational exposure to DPM. As noted in the 2001 risk assessment,

> First, although DPM is a fine particulate, ambient air also contains fine particulates other than DPM. Therefore, health effects associated with exposures to fine particulate matter in air pollution studies are not associated specifically with exposures to DPM or any other one kind of fine particulate matter. Second, observations of adverse health effects in segments of the general population do not necessarily apply to the population of miners. Since, due to age and selection factors, the health of miners differs from that of the public as a whole, it is possible that fine particles might not affect miners, as a group, to the same degree as the general population (66 FR 5767).

However,

> Since DPM is a type of respirable particle, information about health effects associated with exposures to respirable particles, and especially to fine particulate matter, is certainly relevant, even if difficult to apply directly to DPM exposures (66 FR 5767).

One new study on cardiovascular and cardiopulmonary effects was added to the record. See Toxicological Effects in this section for a summary of this article.

The EPA concluded in its 2002 Health Assessment Document for Diesel Engine Exhaust that diesel exhaust (as measured by DPM) is ''likely to be a human carcinogen.'' Furthermore, the assessment concluded that ''[s]trong evidence exists for a causal relationship between risk for lung cancer and occupational exposure to D[iesel]E[xhaust] in certain occupational workers'' (Health Assessment Document for Diesel Engine Exhaust, EPA, 2002, Sec. 9, p. 20). The EPA's 2004 Air Quality Criteria Document for particulate matter (EPA, 2004b) describes a number of additional studies related to the cardiopulmonary and cardiovascular effects of $PM_{2.5}$, including work published later than that cited in MSHA's 2003 NPRM (68 FR 48668). One of the summary conclusions presented in that document is:

> Overall, there is strong epidemiological evidence linking (a) short-term (hours, days) exposures to $PM_{2.5}$ with cardiovascular and respiratory mortality and morbidity, and (b) long-term (years, decades) $PM_{2.5}$ exposure with cardiovascular and lung cancer mortality and respiratory morbidity. The associations between $PM_{2.5}$ and these various health endpoints are positive and often statistically significant. [EPA, 2004b, Sec. 9 p. 46]

Submissions to the rulemaking record since the 2001 final rule support our previous position that exposure to DPM is associated with the development of adverse cardiovascular and cardiopulmonary effects.

(3) Cancer Effects

The 2001 risk assessment concluded that DPM exposure, at occupational levels encountered in mining, was likely to increase the risk of lung cancer. The assessment also found that there was insufficient evidence to establish a causal relationship between DPM and other forms of cancer. This update contains a description of three human research studies and a literature review relating DPM and/or other fine particulate exposures to lung cancer.

Lung Cancer

Table IV–5 presents three human studies pertaining to the association between lung cancer and exposures to DPM or fine particulates submitted to the record after the 2005 update of the 2001 risk assessment was done.

TABLE IV–5.—STUDIES ON LUNG CANCER EFFECTS

Authors, year	Description	Key results
Garshick et al., 2004	An evaluation of lung cancer mortality in 54,793 railroad workers ages 40–64 with 10–20 years of service in 1959. Based on evaluation of death certificates, subsequent mortality was assessed through 1996. Diesel-exposed workers such as engineers and conductors were compared to a referent group of less exposed workers such as ticket agents, station agents, signal-maintainers, and clerks.	Railroad workers in jobs associated with operating trains had a relative risk of lung cancer mortality of 1.4 (95% confidence limits = 1.30–1.51). The authors did not think this association was due to uncontrolled confounding. No relationship was found between years of exposure and lung cancer risk. The authors discussed the potential for this to be due to factors such as a healthy worker survivor effect, lack of information on historical changes in exposure, and the potential contribution of coal combustion product before the transition to diesel locomotives.
Guo et al., 2004	Evaluation of lung cancer mortality in all working Finns born between 1906 and 1945 and participating in the national census of December 1970. Based on the reported occupation held for longest time and a national database of exposures for various occupations, a variety of exposures including diesel exhaust were estimated. Information about subsequent diagnosis of lung cancer during the period 1971 to 1995 was obtained from the Finnish Cancer Registry.	After controlling for other exposures such as asbestos and quartz dust, only a slight excess of lung cancer was found in men aged 20–59 associated with diesel exhaust exposure. A parallel, but weaker, association was documented in women. The authors concluded that risk associated with diesel exhaust ''was not consistently elevated'' and speculated that this was the result of factors such as low exposures or confounding from unmeasured non occupational exposures.
Jarvholm et al., 2003	Mortality study of Swedish construction workers. Information about occupation and smoking was taken from computerized health records available for the period 1971–1992. Workers in two occupations exposed to diesel exhaust, 6,364 truck drivers and 14,364 drivers of heavy construction vehicles were compared to a reference group of 119,984 carpenters and electricians.	Truck drivers had significantly increased risk for cancer of the lung, while heavy construction vehicle operators did not. In heavy construction operators, a significant trend of decreased risk for lung cancer was associated with increasing use of vehicle cabins. The authors explained that there was a difference between truck and heavy equipment operators, but no conclusion could be reached without more detailed information about the duration and concentration of diesel exhaust exposures and smoking habits.

A Cohort Mortality Study With a Nested Case-Control Study of Lung Cancer and Diesel Exhaust Among Nonmetal Miners [NIOSH/NCI 1997]

A number of commenters expressed opinions on the unpublished document authored by Dr. Gerald Chase (2004) entitled *Characterizations of Lung Cancer in Cohort Studies and a NIOSH Study on Health Effects of Diesel Exhaust in Miners*. This document presents an analysis of some very preliminary data provided by NIOSH and the National Cancer Institute at a public stakeholder meeting held on Nov. 5, 2003. These data were taken from unpublished charts that NIOSH and NCI used to inform the public of the status and progress of their ongoing project, *A Cohort Mortality Study with a Nested Case-Control Study of Lung Cancer and Diesel Exhaust Among Nonmetal Miners* (NIOSH/NCI Study 1997). We previously addressed Dr. Chase's analysis in our 2005 final rule (70 FR 32906). NIOSH and NCI researchers involved in that project have not yet published their analyses or conclusions based on these data. When the study is concluded, we will assess the results and their association to our updated 2001 risk assessment findings. Therefore, the Agency believes that the opinions expressed by commenters on Dr. Chase's unpublished analysis of preliminary data are inappropriate for identifying or assessing the relationship between occupational DPM exposure and excess lung cancer mortality in that data set.

Bladder Cancer and Pancreatic Cancer

No additional information was submitted to the rulemaking record that would change our position that bladder cancer is associated with exposure to DPM. The Agency has not received additional information that would change our position that there is insufficient evidence to support a link between exposure to DPM and pancreatic cancer.

(4) Toxicological Effects of DPM Exposure

Table IV–6 presents one new particulate matter toxicity study (Sun et al., 2005) obtained since the 2005 final rule. The table identifies the agent(s) of toxicity investigated and indicates how the results support the risk assessment by categorizing the toxic effects and/or markers of toxicity found in each study.

TABLE IV–6.—STUDY ON TOXICOLOGICAL EFFECTS OF DPM EXPOSURE

Authors, year	Description	Key results	Agent(s) of toxicity	Toxic effect(s)*	Limitations
Sun et al., 2005	Assessment of effects of subchronic exposure to environmentally relevant particulate matter on atherosclerosis and vasomotor tone in a mouse disease model.	Long-term exposure to low concentration of $PM_{2.5}$ altered vasomotor tone, induced vascular inflammation, and potentiated atherosclerosis.	Concentrated $PM_{2.5}$ from northeastern regional background particulate.	Inflammation, Adverse cardiovascular effects.	Exposure not specific to DPM.

No new review articles on various aspects of the scientific literature related to mechanisms of DPM toxicity were submitted to the record since the 2005 final rule. In summary, the peer-reviewed publications submitted to the rulemaking record addressing the health effects of exposure to diesel exhaust support our 2001 risk assessment (66 FR 5526; 30 CFR Part 2005) and nothing in our review suggests that it should be altered.

D. Significance of Risk

Adverse Health Effects

The first principal conclusion of the 2001 risk assessment was:

> Exposure to DPM can materially impair miner health or functional capacity. These material impairments include acute sensory irritations and respiratory symptoms (including allergenic responses); premature death from cardiovascular, cardiopulmonary, or respiratory causes; and lung cancer (66 FR 5854).

We agree with commenters who characterized the weight of evidence from the most recent scientific literature and the comprehensive scientific literature reviews carried out by other institutions and government agencies as supporting and potentially strengthening this conclusion.

In 2002, for example, the U.S. EPA, with the concurrence of its Clean Air Scientific Advisory Committee (CASAC), published its Health Assessment Document for Diesel Engine Exhaust (EPA, 2002). With respect to sensory irritations, respiratory symptoms, and immunological effects, this document concluded that:

> At relatively high acute exposures, DE [diesel exhaust] can cause acute irritation to the eye and upper respiratory airways and symptoms of respiratory irritation which may be temporarily debilitating. Evidence also shows that DE has immunological toxicity that can induce allergic responses (some of which are also typical of asthma) and/or exacerbate existing respiratory allergies. [EPA, 2002]

In 2003, the World Health Organization (WHO) issued a review report on particulate matter air pollution and health. WHO concluded that ''fine particles (commonly measured as $PM_{2.5}$) are strongly associated with mortality and other endpoints such as hospitalization for cardiopulmonary disease, so that it is recommended that air quality guidelines for $PM_{2.5}$ be further developed.'' (WHO, 2003)

In the 10th edition of its Report on Carcinogens, the National Toxicology Program (NTP) of the National Institutes of Health formally retained its designation of diesel exhaust particulates as ''reasonably anticipated to be a human carcinogen.'' (U.S. Dept. of Health and Human Services, 2002) The report noted that:

> Diesel exhaust contains identified mutagens and carcinogens both in the vapor phase and associated with respirable particles. Diesel exhaust particles are considered likely to account for the human lung cancer findings because they are almost all of a size small enough to penetrate to the alveolar region.
>
> * * * Because of their high surface area, diesel exhaust particulates are capable of adsorbing relatively large amounts of organic material * * * A variety of mutagens and carcinogens such as PAH and nitro-PAH * * * are adsorbed by the particulates. There is sufficient evidence for the carcinogenicity for 15 PAHs (a number of these PAHs are found in diesel exhaust particulate emissions) in experimental animals. The nitroarenes (five listed) meet the established criteria for listing as ''reasonably anticipated to be a human carcinogen'' based on carcinogenicity experiments with laboratory animals. [U.S. Dept. of Health and Human Services, 2002]

Although many commenters agreed that the adverse health effects associated with miners' exposure to DPM warranted an exposure limit, commenters from trade associations and industry continued to challenge the conclusions of the 2001 risk assessment. Discussions addressing this issue were summarized in the 2001 risk assessment and the 2005 update. As referenced in this section, the U.S. Environmental Protection Agency, World Health Organization, and the National Toxicology Program regard DPM exposure as adversely affecting human health.

Statement of Excess Lung Cancer Risk

In our 2001 risk assessment, we explained why we focused our quantification of health effects on lung cancer only. We estimated lower bounds on the significance of risks faced by miners occupationally exposed to DPM with respect to (1) acute sensory irritations and respiratory symptoms or (2) premature death from cardiovascular, cardiopulmonary, or respiratory causes. We expect the final rule to significantly and substantially reduce these two kinds of risk as well as (3) lung cancer. However, we were unable, based on available data, to quantify with confidence the reductions expected for the first two kinds and are still unable to do so. Therefore, MSHA's quantitative assessment of the rule's impact on risk is restricted to its expected impact on the third kind of risk—the risk of lung cancer (66 FR 5854).

In the 2001 risk assessment, MSHA assumed that, in the absence of this rule, underground M/NM miners would be occupationally exposed to DPM for 45 years at a mean level of 808 $\mu g/m^3$, and estimated reductions in lifetime risk expected to result from full implementation of the rule, based on the various exposure-response relationships obtained from Säverin *et al.* (1999), Steenland *et al.* (1998), and Johnston *et al.* (1997).

Miner's exposures to DPM levels have declined since 1989–1999. We expect that further improvements will continue to significantly reduce the health risks identified for miners. There is clear evidence of adverse health effects due to exposure to DPM in the rulemaking record, not only at pre-2001 exposure levels but also at the generally lower levels currently observed at many underground mines. The adverse health

effects associated with exposure to DPM are material health impairments as specified under section 101(a)(6)(A) of the Mine Act.

Because the exposure-response relationships used in the risk assessment are monotonic, we expect that industry-wide implementation of each final limit will significantly reduce the risk of lung cancer and other adverse health effects among miners. The 2001 risk assessment used the best available data on DPM exposures at underground M/NM mines to quantify excess lung cancer risk. ''Excess risk'' refers to the lifetime probability of dying from lung cancer during or after a 45 year occupational DPM exposure. This probability is expressed as the expected excess number of lung cancer deaths per thousand miners occupationally exposed to DPM at a specified mean DPM concentration. The excess is calculated relative to baseline, age-specific lung cancer mortality rates taken from standard mortality tables. In order to properly estimate this excess, it is necessary to calculate, at each year of life after occupational exposure begins, the expected number of persons surviving to that age with and without DPM exposure at the specified level. At each age, standard actuarial adjustments must be made in the number of survivors to account for the risk of dying from causes other than lung cancer. Occupational exposure is assumed to begin at age 20 and to continue, for surviving miners, until retirement at age 65. The accumulation of lifetime excess risk continues after retirement through the age of 85 years.

Table IV–7, taken from the 2001 risk assessment, shows excess lung cancer estimates at mean exposures equal to the final limit equivalent to 200 micrograms of DPM per cubic meter of air for eight hour shift weighted average. The eight exposure-response models for lung cancer used in the 2001 risk assessment were based on studies by Säverin *et al.* (1999), Johnston *et al.* (1997), and Steenland *et al.* (1998). Assuming that TC is 80 percent of whole DPM, and that the mean ratio of TC to EC is 1.3, the DPM limit of 200 μg/m^3 shown in Table IV–7 corresponds to the 160 μg/m^3 TC limit adopted under the present rulemaking.

TABLE IV–7.—EXCESS LUNG CANCER RISK EXPECTED AT SPECIFIED DPM EXPOSURE LEVELS OVER AN OCCUPATIONAL LIFETIME

[Extracted from Table III–7 of the 2001 risk assessment]

Study and statistical model	Excess lung cancer deaths per 1,000 occupationally exposed workers† Final DPM Limit 200 μg/m^3 (160 μg/m^3 TC)
Säverin et al. (1999):	
Poisson, full cohort	15
Cox, full cohort	70
Poisson, subcohort	93
Cox, subcohort	182
Steenland et al. (1998):	
5-year lag, log of cumulative exposure	67
5-year lag, simple cumulative exposure	159
Johnston et al. (1997):	
15-year lag, mine-adjusted	313
15-year lag, mine-unadjusted	513

† Assumes 45-year occupational exposure at 1,920 hours per year from age 20 to retirement at age 65. Lifetime risk of lung cancer adjusted for competing risk of death from other causes and calculated through age 85. Baseline lung cancer and overall mortality rates from NCHS (1996).

As explained in the 2005 final rule, the exposure-response models shown are monotonic (i.e., increased exposure yields increased excess risk, though not proportionately so). Therefore, using our estimates of mean exposure levels, they all predict excess lung cancer risks somewhere above the final whole DPM limit of 200 μg/m^3, or equivalently, 160_{TC} μg/m^3. Thus, despite substantial improvements apparently attained since the 1989–1999 sampling period addressed by the 2001 risk assessment, underground M/NM miners are still faced with an unacceptable risk of lung cancer due to their occupational exposure to DPM.

V. Feasibility

Section 101(a)(6)(A) of the Mine Act requires the Secretary of Labor, in establishing health standards, to most adequately assure, on the basis of the best available evidence, that no miner will suffer material impairment of health or functional capacity over his or her working life. Standards promulgated under this section must be based upon research, demonstrations, experiments, and such other information as may be appropriate. MSHA, in setting health standards, is required to achieve the highest degree of health and safety protection for the miner, and as stated in the legislative history of the Mine Act, MSHA must consider the latest available scientific data in the field, the feasibility of the standards, and experience gained under this or other health and safety laws.

Though the Mine Act and its legislative history are not specific in defining feasibility, the Supreme Court has clarified the meaning of feasibility in the context of OSHA health standards in *American Textile Manufacturers' Institute* v. *Donovan* (OSHA Cotton Dust), 452 U.S. 490, 508–09 (1981), as ''capable of being done, executed, or effected,'' both technologically and economically.

The legislative history to the Mine Act indicates Congress' intent for MSHA when considering feasibility and states:

> While feasibility of the standard may be taken into consideration with respect to engineering controls, this factor should have a substantially less significant role. Thus, the

Secretary may appropriately consider the state of the engineering art in industry at the time the standard is promulgated. However, as the circuit courts of appeals have recognized, occupational safety and health statutes should be viewed as ''technology forcing'' legislation, and a proposed health standard should not be rejected as infeasible ''when the necessary technology looms on today's horizon''. *AFL–CIO* v. *Brennan*, 530 F.2d 109 (3d Cir. 1975); *Society of Plastics Industry* v. *OSHA,* 509 F.2d 1301 (2d Cir. 1975), *cert. denied* 427 U.S. 992 (1975).

Similarly, information on the economic impact of a health standard, which is provided to the Secretary of Labor at a [public] hearing or during the public comment period, may be given weight by the Secretary. In adopting the language of [this section], the Committee wishes to emphasize that it rejects the view that cost benefit ratios alone may be the basis for depriving miners of the health protection which the law was intended to insure. The Committee concurs with the judicial constitution that standards may be economically feasible even though from the standpoint of employers, they are ''financially burdensome and affect profit margins adversely'' (*I.U.D.* v. *Hodgson*, 499 F.2d 6a47 (D.C. Cir. 1974)). Where substantial financial outlays are needed in order to allow industry to reach the permissible limits necessary to protect miners, other regulatory strategies are available to accommodate economic feasibility and health considerations. These strategies could include delaying implementation of certain provisions or requirements of standards in order to allow sufficient time for engineering controls to be put in place or a delay in the effective date of the standard. S. Rep. No. 95–181, 95th Cong. 1st Sess. 21 (1977).

The ''arbitrary and capricious test'' is usually applied to judicial review of rules issued in accordance with the Administrative Procedure Act. The legislative history of the Mine Act further indicates that Congress explicitly intended the ''arbitrary and capricious test'' be applied to judicial review of mandatory MSHA standards. ''This test would require the reviewing court to scrutinize the Secretary's action to determine whether it was rational in light of the evidence before him and reasonably related to the law's purposes.'' S. Rep. No. 95–181, 95th Cong., 1st Sess. 21 (1977). In achieving the Congressional intent of feasibility under the Mine Act, MSHA may also consider reasonable time periods of implementation. *Ibid.* at 21.

In order to establish the economic and technological feasibility of a new rule, an agency is required to produce a reasonable assessment of the likely range of costs that a new standard will have on an industry, and an agency must show that a reasonable probability exists that the typical firm in an industry will be able to develop and install controls that will meet the standard. *United Steelworkers of America, AFL–CIO–CLC* v. *Marshall,* (OSHA Lead) 647 F.2d 1189, 1273 (D.C. Cir. 1980).

Like, the Mine Act, the OSH Act contains the term ''technology-forcing'' with respect to standards setting. The D.C. Circuit Court also determined with respect to technological feasibility under the OSH Act that:

* * * ''technology-forcing'' under the OSH Act, means, at the very least, that OSHA can impose a standard which only the most technologically advanced plants in an industry have been able to achieve-even if only in some of their operations some of the time. *American Iron & Steel Institute* v. *OSHA, supra,* 577 F.2d at 832–835.

Since ''technology-forcing'' assumes that ''an agency will make highly speculative projections about future technology, a standard is obviously not infeasible solely because OSHA has no hard evidence to show that the standard has been met. More to the point here, we cannot require OSHA to prove with any certainty that industry will be able to develop the necessary technology, or even to identify the single technological means by which it expects industry to meet the PEL. OSHA can force employers to invest all reasonable faith in their own capacity for technological innovation. *Society of Plastics Industries, Inc.* v. *OSHA, supra* 509 F.2d at 1309, and can thereby shift to industry some of the burden of choosing the best strategy for compliance. *United Steelworkers of America,* 647 F.2d at 1266.

This same court found that proving economic feasibility presented different issues from that of technological feasibility, where it stated:

But when the agency has proved technological feasibility by making reasonable predictions about experimental means of compliance, the court probably cannot expect hard and precise estimates of costs. Nevertheless, the agency must of course provide a reasonable assessment of the likely range of costs of its standard, and the likely effects of those costs on the industry. *Ibid. at 1266.*

A. Technological Feasibility

Courts have ruled that in order for a standard to be technologically feasible an agency must show that modern technology has at least conceived some industrial strategies or devices that are likely to be capable of meeting the standard, and which industry is generally capable of adopting. *Ibid.* (citing *American Iron and Steel Institute* v. *OSHA,* (AISI–I) 577 F.2d 825 (3d Cir. 1978) at 832–35; and, *Industrial Union Dep't., AFL–CIO* v. *Hodgson,* 499 F.2d 467 (DC Cir.1974)); *American Iron and Steel Institute* v. *OSHA,* (AISI–II) 939 F.2d 975, 980 (DC Cir. 1991). A control may be technologically feasible when ''if through reasonable application of existing products, devices or work methods with human skills and abilities, a workable engineering control can be applied'' to the source of the hazard. It need not be an ''off-the-shelf'' product, but ''it must have a realistic basis in present technical capabilities.'' (*Secretary of Labor* v. *Callanan Industries, Inc.* (Noise), 5 FMSHRC 1900, 1908 (1983)). The Secretary may also impose a standard that requires protective equipment, such as respirators, if technology does not exist to lower exposures to safe levels. See *United Steelworkers of America,* 647 F.2d at 1269.

We have established that it is technologically feasible for the underground M/NM mining industry to reduce miners' exposures to the DPM final limits as prescribed in the final rule. Unlike the 2005 NPRM, we are phasing in the final limit of 160 Total Carbon micrograms per cubic meter of air (160_{TC} μg/m^3) over a two-year period, due to the updated feasibility information in the rulemaking record. This updated feasibility information relates primarily to the wider availability of alternative fuels, and in particular biodiesel, improved filter technology, and the impending availability of EPA compliant 2007 on-road diesel engines. Consequently, on May 20, 2006, the initial final limit will be 308 micrograms of EC per cubic meter of air (308_{EC} μg/m^3), which is the same as the existing interim limit; on January 20, 2007, the final limit will be reduced by 50 micrograms and will be a TC limit of 350_{TC} μg/m^3; and on May 20, 2008, the final limit of 160_{TC} μg/m^3 will become effective. Note that the 350_{TC} μg/m^3 final limit and the 160_{TC} μg/m^3 final limit are established as TC-based limits in this final rule. It is our intention to convert these TC limits to comparable EC limits; however, developing appropriate conversion factors for these limits was beyond the scope of the current rulemaking. These TC limits will be converted to comparable EC limits through a separate rulemaking.

To meet the final DPM limits, mine operators will be able to continue to use existing available engineering control technology and various administrative control methods used in meeting the interim DPM limit. However, we are affording the mining industry the additional time from that provided under the 2001 final rule to work through their remaining implementation issues with DPM control technology and to gain access to alternative fuels and DPFs. The additional time will also allow mine operators, especially small mine operators, time to find effective approaches to utilizing available DPM

control technology so that they will be capable of meeting the standard. Altogether, the mining industry will have been afforded over seven years to institute control technology to reduce miners' exposures to the final DPM limit of 160_{TC} μg/m³. Our decisions in the final rule are based on our enforcement experience, along with information and data in the updated DPM rulemaking record, which includes the 2001 and 2005 DPM rulemaking records. The final rulemaking record lacks feasibility documentation to justify lowering the final DPM limit to 160_{TC} μg/m³ at this time.

The existing requirement for methods of compliance will continue to be applicable to the final limits. To attain the final limits, mine operators are required to install, use, and maintain engineering and administrative controls to the extent feasible. When engineering and administrative controls do not reduce a miner's exposure to the DPM limit, the controls are infeasible, or controls do not produce significant reductions (defined in the 2005 rule (70 FR 32868, 32916) as at least 25% reduction in the affected miners' DPM exposures), operators must continue to use all feasible engineering and administrative controls and supplement them with respiratory protection. Though mine operators may choose to use an engineering control or an administrative control to reduce a miner's exposure, or a combination thereof, existing § 57.5060(d) prohibits a mine operator from using respiratory protection in lieu of feasible controls. When respiratory protection is required under the final standard, mine operators must establish a respiratory protection program that meets the specified requirements under existing § 57.5060(d) of the DPM standard.

MSHA emphasizes that DPM engineering and administrative controls may be feasible, and therefore be required by MSHA, even if controls do not reduce a miner's exposure to the DPM limit.

Under this rule, MSHA intends that feasible DPM controls must be capable of achieving a significant reduction in DPM. We also note that most of the practical and effective controls that are currently available, such as DPM filters, enclosed cabs with filtered breathing air, and low-emission engines will achieve at least a 25% reduction. Other controls such as ventilation upgrades or alternative fuel blends may achieve a 25% reduction, depending on exposure circumstances and the specific nature of the subject control. It should also be noted that reductions of less than 25% could be due to normal day-to-day variations in mining operations as opposed to reductions due to implementing a control technology. Thus, for mines that are out of compliance with the DPM final limits, controls would be required that attain compliance, or that achieve at least a 25% reduction in DPM exposure if it is not possible to attain compliance by implementing feasible controls. If engineering and administrative controls are not capable of reducing exposure to the limits in this final rule, and cannot reduce DPM exposures by at least 25%, we would not require the implementation of those controls. In such cases, we will require miners to be protected using appropriate respiratory protective equipment.

If a particular DPM control were capable of achieving at least a 25% reduction all by itself, we would continue to evaluate the costs of that individual control to determine its economic feasibility. If a number of controls could together achieve at least a 25% reduction, but no individual control, if implemented by itself, could achieve a 25% reduction, we will evaluate the total costs of all controls added together to determine their economic feasibility as a group. In determining whether a combination of controls is economically feasible, we will consider whether the total cost of the combination of controls is wholly out of proportion to the expected results. We will not cost the controls individually, but will combine their expected results to determine if the 25% significant reduction criterion can be satisfied. The concept of significant reduction is not new to the M/NM mining industry. MSHA's 2005 Compliance Guide includes the 25% significant reduction for determining feasibility.

At this time, we believe that this compliance approach coupled with the phased-in final limits provides mine operators with flexibility necessary to assure feasible compliance. This current enforcement approach results in feasibility of compliance for the industry as a whole with each of the phased-in limits contained in this final rule while protecting miners' health. However, we continue to acknowledge that compliance difficulties may be encountered at some individual mines, but on a much smaller scale than what we project if the final limit of 160_{TC} μg/m³ became effective in May 2006. This primarily will be due to implementation issues and the cost of purchasing and installing certain types of controls at these mines.

Moreover, pursuant to existing § 57.5060(c), mine operators can apply to the District Manager for a special extension for additional time in which to meet the final limits, including the initial final limit of 308_{EC} μg/m³. Although we anticipate that special extensions and our traditional hierarchy of controls in enforcement will address some compliance issues, we envision that some miners will have to wear respiratory protection under the final limit of 160_{TC} μg/m³.

Based upon a review of enforcement data, we believe that a large portion of the mining industry will initially encounter implementation issues as they attempt to attain compliance with the final limits using engineering and administrative controls. However, we believe that most mine operators will be able to overcome these issues within the two-year period during which the final limits will be phased-in. For example, the wider use of high biodiesel content fuel blends, which can reduce DPM emissions by up to 80% or more, will be greatly facilitated by the significant increases in biodiesel fuel production that will occur in the United States over the next two years. The National Biodiesel Board reports that annual biodiesel production rose from 25 million gallons in 2004 to 75 million gallons in 2005. They also report that biodiesel plants that are either under construction at the present time or in the pre-construction phase will add another 847 million gallons of annual production capacity. A large portion of this added capacity will be on-line by 2008.

Another example of a recent development that will help enable mine operators attain our final DPM limit of 160_{TC} μg/m³ by May 2008 is the impending availability of U.S. EPA 2007 on-road diesel engines. U.S. EPA 2007 on-road diesel engine standards have DPM emission limits that are about 90% lower than the current EPA limits allow. The DPM reduction will be attained through the use of DPFs. The DPFs will be part of the engine and vehicle when sold. For example, a new 2007 on-road pickup truck will have a DPF installed on the vehicle at the time of purchase. The 2007 on-road engines will be commercially available starting in early 2007.

In addition to the EPA 2007 on-road DPM standards, EPA also has new Tier 4 off-road standards that will reduce DPM about 90%. Tier 4 will be phased-in beginning in 2008. Similar to the 2007 on-road engines, a DPF will be installed on the engine and vehicle when purchased. Even though the EPA implementation dates of Tier 4 is after the date of the final limit, the DPF technology is being developed at this

time by the engine and filter manufacturers in order to be ready for the tier 4 standards. This current work will enhance the developments and availability of DPF systems that can be retrofitted to mining vehicles.

Although the emission limits for 2007 on-road engines were established some time ago, we had very little insight as to the strategies and technologies that the engine manufacturers would use to meet these limits. For competitive reasons, the engine manufacturers did not publicize their strategies or designs for complying with these EPA regulations. We were therefore uncertain as to whether any 2007 on-road compliant engines would be compatible with typical underground M/NM mine operational and production requirements, duty cycles, and maintenance practices, and thus, whether they could be readily used or adapted for use in underground M/NM mines.

With the first 2007 on-road engines scheduled for release in early 2007, however, we now have a much clearer picture of the technologies that will be incorporated into these engines. The predominant technology will be DPM filters which incorporate some form of active regeneration to accommodate any duty cycle, ranging from constant high-speed over-the-road trucks to light duty delivery vehicles and pickup trucks and SUVs in stop-and-go traffic conditions. As noted later in this section of the preamble, we are confident that such filter technology is suitable for application in underground M/NM mines. Therefore, we expect appropriate 2007 on-road engines to be readily usable or adaptable for use in underground M/NM mining equipment. These engines will begin to become available in early 2007, with more and varied models becoming available in subsequent months and years.

In the future, we project that the number of miners who will need to wear respiratory protection will decrease as mine operators learn more about effectively selecting, retrofitting, and maintaining DPFs, as they begin to use EPA compliant 2007 on-road engines with integral DPFs, and as mine operators in remote locations are able to gain easier access to alternative fuels, primarily biodiesel.

1. MSHA's 2001 Assumptions Regarding Compliance With the Final Concentration Limit

We stated in the proposed rule that the assumptions that we used in 2001 in support of our cost estimates included:

(a) Fifty percent of the fleet will have new engines (these new engines do not impact cost of the rule) * * * Moreover, due to EPA [Environmental Protection Agency] regulations, which will limit DPM emissions from engines used in surface construction, surface mining, and over-the-road trucks (the major markets for heavy duty diesel engines), the market for low tech ''dirtier'' engines will dry up * * *; (b) one hundred percent of the production equipment and about fifty percent of the support equipment will be equipped with filters; (c) about thirty percent of all equipment will need to be equipped with environmentally controlled cabs; (d) twenty three percent of the mines would need new ventilation systems (fans and motors); (e) forty percent of the mines will need new motors on these fans; and (f) thirty two percent of the mines will need major ventilation upgrades (66 FR 5889–90).

Furthermore, we concluded that it would not be feasible to require the metal and nonmetal sector, as a whole, to lower DPM concentrations further, or to implement the required controls more swiftly (66 FR 5888).

2. Reasons Why the 2001 Assumptions Were Questioned

Over the five years since the 2001 final rule was promulgated, both MSHA and the mining industry have gained considerable experience with the implementation, use, and cost of DPM control technology. We have reviewed this experience, and our own enforcement data, and other relevant information, and conclude that effective DPM controls sufficient to attain compliance with the DPM limits specified in this final rule will be feasible and commercially available to mine operators by May 2008. For example, in addition to currently available DPM controls such as environmental cabs with filtered breathing air, a variety of DPF systems, low-emission engines, upgraded ventilation, and alternative fuels, by May 2008, we believe mine operators will benefit from wider availability of alternative fuels, particularly biodiesel, improved filter technology, and the availability of EPA compliant 2007 on-road diesel engines and diesel powered equipment. As implementation issues are resolved, the most successful implementation strategies will be adopted by other mine operators, thereby speeding up compliance by the industry as a whole. For example, in 2004, we were aware of only one mine operator that was using a high biodiesel content fuel blend as a DPM compliance method. DPM levels measured in this mine were consistently greater than 200_{EC} μg/m^3 prior to the change to biodiesel fuel, compared to levels less than 100_{EC} μg/m^3 after the change-over. In the most recent enforcement sampling at this mine, all samples were less than 50_{EC} μg/m^3. By late 2005, we were aware of at least four other mine operators that had learned from this experience and adopted this compliance strategy. Another example is the recently developed Diesel Particulate Reactor™ (described later in this section of the preamble). This new technology has been successfully implemented by a large nonmetal mine operator. Reactors are currently installed on about 80% of the mine's fleet of roughly 50 pieces of diesel equipment with no installation, operation, or maintenance problems reported. These experiences demonstrate that even the more complex DPM control technologies can be successfully implemented by mine operators. As these successful experiences are shared throughout the mining industry, compliance by the underground M/NM mining industry as a whole by May 2008 will be greatly facilitated. The extended time specified in this final rule is necessary to address the implementation issues that the industry as a whole must overcome. However, as noted above, we believe these issues can be resolved within the extended compliance timeframes established in the final rule.

Several commenters quoted previous MSHA statements from the rulemaking record they believe support their position that the final DPM limit is technologically infeasible. A few quoted a passage from the 2005 final rule: ''MSHA acknowledges that the current DPM rulemaking record lacks sufficient feasibility documentation to justify lowering the DPM limit below 308_{EC} μg/m^3 at this time'' (70 FR 32916). However, these commenters did not include the statements that followed, which explained that we believed it was feasible for the industry as a whole to fully comply with the interim limit, but that at that time—June of 2005—attaining levels lower than 308_{EC} μg/m^3 was not feasible for the entire industry. In our 2005 NPRM, we indicated that a DPM limit lower than 308_{EC} μg/m^3 should not become effective before January 2007, at the earliest, due to concerns about implementation difficulties. It was our intention that mine operators would use the period of nearly 20 months from June 2005 through January 2007 and the subsequent phased-in timeframes proposed in the NPRM to overcome implementation challenges and attain compliance with the reduced limit.

Some commenters stated that any delay in the effective date for the final DPM limit was unjustified on either technological or economic grounds. A number of commenters said that our 2005 NPRM makes it clear that several technologies are available which, alone or in combination, would permit mines to meet the final limit. Doubts about whether all mines can do so in all operations, or doubts about whether current distribution networks for alternative fuels are as complete as may be necessary under the final rule, do not in these commenters' views detract from the conclusion that the final limit is feasible. According to these commenters, MSHA's search for certainty that all mines can comply at all times in all circumstances is a violation of its technology-forcing mandate. In response, the Mine Act does not mandate that MSHA standards must be technology-forcing.

Another commenter stated that no technological reason exists for granting industry an additional five years, on top of the five years they have already had, to install existing technology to protect workers.

Although technology currently exists for compliance with both the interim and final DPM limits, we conclude that implementation challenges and difficulties with this technology and the costs of implementing it in the M/NM mining industry affect feasibility. We have observed the difficult applications engineering challenges faced by a substantial number of mine operators in implementing these technologies. Consequently, these challenges have led us to determine that additional time is needed by the industry as a whole to feasibly meet the final limit.

Another passage that several commenters in opposition to the 2005 NPRM quoted, stated that:

> When we established the 2001 final limit, we were expecting some mine operators to encounter difficulties implementing control technology because the rule was technology forcing. We projected that by this time, practical and effective filter technology would be available that could be retrofitted onto most underground diesel powered equipment. However, as a result of our compliance assistance efforts and through our enforcement of the interim limit, we have become aware that this assumption may not be valid. The applications engineering and related technological implementation issues that we believed would have been easily solved by now are more complex and extensive than previously thought (70 FR 53283).

Although we have evidence of successful applications of DPM controls in the rulemaking record and the proven effectiveness of various products, systems, and strategies for controlling DPM emissions and exposures, we believe that the implementation challenges presented by the industry warrant granting some additional time to attain full compliance with the final limit. We intend, however, for the mining industry to utilize this extra time to diligently move forward in achieving compliance with the final limits.

Some commenters quoted the decision of *Secretary of Labor* v. *Callanan Industries, Inc.* (Noise), 5 FMSHRC 1900, 1908 (1983)), which addresses feasibility of an individual mine operator to comply with an MSHA exposure-based health standard. These commenters concluded that based on the current existence of alternative fuels and DPFs, that no delay in the final limit was justified. However, as noted above, based on present implementation issues, we have determined that additional time is needed by the mining industry, as a whole, to meet the final limits.

Some other commenters stated that they do not believe there is a ''realistic basis in present technical capabilities,'' [quoting *Callanan*]. These commenters believe that there is not an adequate array of mine worthy, technically feasible solutions that are readily available for implementation in underground metal and nonmetal mines. They believe that their conclusion is confirmed by MSHA's statement in the 2005 NPRM that, ''effective control technology that will reduce exposures to the final limit is speculative at this time'' (70 FR 53285).

We find these arguments made by some commenters not persuasive, because in the 2005 NPRM, we acknowledged that full compliance with the final DPM limit by the industry as a whole by the original effective date of January 2006 was unlikely to be feasible. Over the past five years, we have been working with all members of the M/NM mining community affected by this final rule. We believe that the industry has made tremendous progress and will continue to work through these feasibility challenges and that it will be feasible for the industry to comply by the dates established in this final rule.

We continue to conclude, based on experience gained under the existing DPM rule, that the applications engineering required to adapt advanced DPM control devices and systems to new and existing mining equipment, to introduce alternative fuels, to train miners on their proper installation, operation, inspection, maintenance, and repair, and to integrate new methods and work practices into complex mining processes will take more time than we originally anticipated. However, we find one commenter's position that suitable DPM controls are not readily available to not be persuasive. The rulemaking record contains evidence that mine worthy control technology is available, and includes a number of examples of the successful implementation of such controls in all types of M/NM underground mines. The preamble to this final rule expands on those available technologies, indicating as we have suggested previously, that as demand for these technologies grows, manufacturers will respond by increasing the availability of feasible control systems for use at underground M/NM mines.

We know that, when properly implemented, DPFs, environmental cabs, alternative diesel fuels, ventilation, and modern low emission engines are effective engineering controls for reducing DPM exposures in underground M/NM mines. They have all been successfully implemented at numerous mining operations to comply with the current interim limit. We know that when properly implemented, various administrative and work practice controls can also effectively reduce DPM exposures. Effective control technology, however, cannot be successful if mine operators are not diligent in resolving their unique implementation issues. Implementation issues vary from mine to mine, and what accounts for some mine operators being successful while others have had only limited success attaining DPM compliance primarily depends on the particular choices of controls selected, and the corresponding implementation strategies employed. Clearly, it is easier and cheaper to obtain compliance at some mines than at other mines, due to factors such as mine size, mining conditions, the amount, type, and age of diesel equipment in use, height and width of roadways, grades that must be traversed, elevation of the workings, remoteness of the mine, and so on.

A commenter expressed the need for DPM controls that are, ''readily available for implementation in underground metal and nonmetal mines.'' Although we believe the rulemaking record supports the conclusion that the required DPM controls are commercially available, as noted above, the additional time offered by this final rule to meet the final limit is necessary for the mining community as a whole to implement these DPM controls.

A commenter observed that ''The 'put a filter on it' solution, suggested in prior MSHA analysis as the primary mode of

compliance, is now acknowledged to be a very goal that is not often achievable.'' This commenter goes on to say ''Therefore, by implication, the compliance model used to estimate compliance feasibility, and costs in the PREA and FREA is suspect.''

Several other commenters also claimed that our technological feasibility determinations were based on predictions that retrofitting diesel equipment with exhaust filters would be the primary means of compliance, but that no such filters were commercially available at the time. We believe these commenters may not fully appreciate our position on technological feasibility in at least two key respects. First, we have never advised the industry that full compliance with either DPM limit would be a simple process of ''[putting] a filter on it.'' Rather, our feasibility determinations were based on the assumption that mine operators would choose the control or combination of controls that best suited the unique circumstances and conditions at their mine. In the preamble to the 2001 final rule (66 FR 5713), we said, ''the best actions for an individual operator to take to come into compliance with the interim and final concentration limits will depend upon an analysis of the unique conditions of the mine.'' In the same preamble (66 FR at 5859), we indicated that,

> The final rule contemplates that an operator of an underground metal or nonmetal mine have considerable discretion over the controls utilized to bring down dpm concentrations to the interim and final concentration limits. For example, an operator could filter the emissions from diesel-powered equipment, install cleaner-burning engines, increase ventilation, improve fleet management, use traffic controls, or use a variety of other readily available controls. A combination of several control measures, including both engineering controls and work practices, may be necessary, depending on site specific conditions.

We expected mine operators would have had less difficulty in appropriately selecting and experimenting with technology applications than we had observed at many mines. Also, we expected mine operators to be able to more effectively address their maintenance and regeneration issues with DPFs, and would have had better access to alternative fuels. Our experience revealed that many mine operators did not fully resolve all the complex implementation issues that were encountered. Some operators simply removed the controls instead of working through these implementation issues.

The other aspect of our position on technological feasibility that these commenters may not fully appreciate is our position on current technological feasibility versus feasibility at a future date. They have assumed that because we acknowledged that it was infeasible to meet the final limit by May 20, 2006, that it is also infeasible to meet the final limit at a future date as required in the final rule. Again, our position is that we believe that additional time will be required for certain key technologies to become sufficiently diffused and available, and that the industry as a whole will require additional time under this final rule to successfully implement the necessary controls to attain compliance with the final phased-in limits.

We believe it will be feasible for the industry as a whole to implement the required controls and attain compliance with the phased-in DPM limits within the timeframes established in the final rule. For example, biodiesel production in the U.S. will increase dramatically over the next two years, making it increasingly easier for mine operators to gain access to a reliable supply of this alternative fuel. Also, EPA compliant 2007 on-road diesel engines will begin to become available in early 2007, and their availability will grow in the months and years to follow. We believe that the industry as a whole will be capable of attaining compliance with the final limits using these and other existing DPM control methods. We also believe that industry-wide compliance within the timeframes established in the final rule will not require the development of new technologies.

We believe that the three-step phase-in approach for establishing the DPM limits and the wider use of alternative fuels, improved filter technology, and EPA compliant 2007 on-road engines along with other engineering and administrative controls, will enable the underground M/NM mining industry as a whole to resolve lingering implementation challenges and difficulties relating to the 160_{TC} μg/m³ final limit.

In our 2005 NPRM, we proposed that the final DPM limit be phased-in in five steps over a five-year period. The choice of five-years for the length of the phase-in period was based on our compliance assistance and enforcement experience that indicated that mine operators were encountering more significant implementation issues than originally anticipated. These issues affected a greater portion of the industry and presented greater challenges to resolve than we anticipated in the 2001 final rule. The five-year phase-in period was proposed based on the rate at which we observed these implementation issues being successfully addressed at that time by the industry as a whole. We believed this five-year timetable for phasing-in the final limit was reasonable, providing for feasible compliance by the industry as a whole while insuring substantial annual reductions in DPM exposure of miners. However, we asked for comments on whether this proposed five-year phase-in would be the appropriate timeframe for mine operators to attain the final DPM limit of 160_{TC} μg/m³. Some commenters provided information opposing the five-year phase-in, saying any delay was unjustified. Other commenters supported the five-year phase-in as an improvement from the original January 2006 deadline, but suggested that due to feasibility concerns, even more time would be needed to attain compliance. Other commenters have consistently maintained that controls sufficient to attain the final limit do not exist, so the timeframe for compliance is irrelevant. Other commenters provided information supporting a shorter phase-in of the final limit.

We now believe that the three step phase-in of the final limit over two years that is incorporated into this final rule is the most appropriate approach and phase-in time period that both provides for maximum protection of miners and is also technologically and economically feasible for the industry to achieve. This determination was based on our enforcement experience, the comments in the rulemaking record addressing feasibility, and other relevant technical information we have obtained since we issued the 2005 NPRM.

The key information that we relied on to reduce the timeframe from the originally proposed five-year phase-in of the final limit to the two-year phase-in incorporated into the final rule included wider availability of alternative fuels, particularly biodiesel, improved filter technology, and the impending availability of EPA compliant 2007 on-road diesel engines. As previously discussed, we were also encouraged by the accelerating rate at which effective DPM control technologies were being implemented by mine operators, for example, high temperature disposable diesel particulate filter (HTDPF) systems. We believed the development of these systems would fill a critical gap in available filter technology, as they are particularly well suited to filter the exhaust from small and mid-sized equipment having low to medium duty cycles that were not good candidates for passive regeneration filter systems, and

on which mine operators did not wish to implement active filter systems. These systems demonstrated high filtration efficiency for EC, and did not increase NO_2 emissions. However, when used in underground M/NM mines, these systems were subject to filter element damage due to occasional high temperature exhaust exposures. We are now confident that these systems can be used successfully in mining applications if a heat exchanger is placed upstream from the filter element in the vehicle's exhaust system. We have recently learned that purpose-built heat exchangers are now commercially available, either as separate units that can be retrofitted to an existing HTDPF system or as an integrated unit that combines a heat exchanger with a filter.

Another example is the impending availability of EPA compliant 2007 on-road diesel engines. As noted earlier in this section, these engines must reduce DPM emissions by about 90% compared to current models, and also must meet strict NOX standards. As recently as the fall of 2005, we could not be certain these new engines would be fully compatible with underground M/NM mine operational and production requirements, duty cycles, and maintenance practices. With the introduction of EPA compliant 2007 on-road engines less than 8 months away, we are now aware that the predominant technology that will be used by the engine manufacturers to comply with these requirements will be DPFs with provision for continuous or automatic active filter regeneration regardless of equipment duty cycle. As noted later in this section of the preamble, we are confident such DPFs can be implemented by mine operators. These DPFs typically have very high EC filtration efficiency approaching 99% or more, and the method of filter regeneration eliminates implementation issues relating to whether a particular machine's duty cycle is sufficiently severe to enable passive regeneration and the perceived logistical complications associated with active on-board or active off-board filter regeneration.

These recent developments and technologies, along with increased utilization of the other engineering and administrative controls that we have discussed throughout the remaking record, such as environmental cabs with filtered breathing air, ventilation upgrades, and a host of administrative control options, will enable the underground M/NM mining industry as a whole to resolve lingering implementation challenges and difficulties relating to compliance with the 160_{TC} μg/m³ final limit by May 2008. We are confident compliance under the final rule can be attained by most mines regardless of size or the commodity produced, because none of these technologies are mine size or commodity dependent.

Regarding biodiesel, the National Biodiesel Board noted in their comments that the domestic annual production capacity of biodiesel fuel would increase by at least 100 million gallons between May 2005 and May 2006. Based on production statistics released on November 8, 2005 by the National Biodiesel Board (*http://www.nbb.org/resources/pressreleases/gen/20051108_ productionvolumes 05nr.pdf*) we also learned that biodiesel production and consumption in the United States grew 300% in one year, from 25 million gallons per year in 2004 to an estimated 75 million gallons per year by the end of 2005. Biodiesel plants currently under construction will add 329 million gallons of annual production capacity (*http://www.nbb.org/buyingbiodiesel/producers_marketers/ProducersMap-Construction.pdf*), and plants in the pre-construction phase will add another 518 million gallons of annual production capacity (*http://www.nbb.org/buyingbiodiesel/producers_marketers/ProducersMap-Pre-Construction.pdf*). Much of this added production capacity is expected to be on-line by 2008, and some of these plants are being, or will be built in areas of the country that are currently underserved by biodiesel production facilities, such as Wyoming, Montana, Washington, California, Colorado, and Texas in the west, and Tennessee, Kentucky, Pennsylvania, Virginia, North Carolina, and New York in the east. This expected increased availability of biodiesel fuel by 2008 supports our decision to phase-in the final DPM limits in three steps from 308_{EC} μg/m³ in May 2006 to 350_{TC} μg/m³ in January 2007 to 160_{TC} μg/m³ in May 2008.

Increased use of these fuels is consistent with and in support of recent U.S. initiatives towards greater energy independence. On October 22, 2004, President Bush approved a tax credit for blenders of biodiesel as part of H.R. 4520, also known as the American Jobs Creation Act of 2004 (Pub. L. 108–357). The tax credit for biodiesel produced from agricultural feedstocks is equal to $0.01 per gallon per percentage biodiesel in the blended product, essentially erasing the price difference between biodiesel and standard petroleum-based diesel fuel. In the late summer and fall of 2005 and again in the spring of 2006, due to price swings in the market, the net cost of biodiesel, when the tax credit is applied, was less than the cost of standard #2 diesel fuel in many parts of the country. As noted in more detail later in this section of the preamble, biodiesel consumption is expected to grow as more product is produced, as its availability increases in presently underserved parts of the country, and as the price gap between biodiesel and standard diesel closes, or as has recently occurred, when biodiesel becomes cheaper than standard diesel.

Retrofit options for self-cleaning DPFs should increase as the manufacturers of these filter systems become assured of a reliable market both in underground mining and on diesel-powered equipment intended for surface applications. In addition, two manufacturers of synthetic high temperature disposable filters have updated their specification sheets (discussed further in this section) to advise mine operators of the exhaust gas temperature limitations when using these filters. In order to meet these exhaust gas temperature limits, mine operators can purchase commercially available heat exchanger systems that can lower the exhaust gas temperature before contact with the filter. This can allow application of this type filter to be expanded to a wider variety of machines, especially ones that have low to medium duty cycle.

The more stringent EPA 2007 on-road exhaust emission standards (*http://yosemite.epa. gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/f20d2478833ea3bd85256e91004d8f90?OpenDocument*) that begin in 2007 for on-road diesel engines (*http://www.epa.gov/otaq/diesel.htm*) will lead to an additional 90 percent reduction in particulate emissions when fully implemented. In addition, the EPA is mandating a reduction of the sulfur content of diesel fuel to no more than 15 ppm beginning in mid year of 2006 for on highway diesel engines and 2010 for nonroad diesel engines. Use of this fuel will enable advanced DPM control technology that would otherwise have been inhibited by the use of higher sulfur content fuel. Note that biodiesel fuel already meets this 15 ppm sulfur content requirement. Use of newer equipment with cleaner engines will also increase as older equipment is retired from service.

We anticipate that the three-step two year phased-in approach to establishing the final DPM limit that is incorporated in this final rule will provide the needed time to resolve the logistical, operational, and market-based factors that make implementation of the final limit infeasible at this time for the

industry as a whole. In addition, this delay may decrease our 2001 projection of the cost of compliance with the rule. During this phase-in, we will continue to work with the Diesel Partnership (discussed below) and the mining industry to help facilitate resolution of DPF selection and implementation problems for the diverse metal and nonmetal mining environment.

3. Diversity of Underground Mines Affected by the 2001 Final DPM Concentration Limit

The M/NM mining industry has approximately 168 underground mines that use numerous pieces of diesel powered equipment, widely distributed throughout each mining operation. These mines employ an array of mining methods to produce commodities including metals such as lead, zinc, platinum, gold, silver, etc. Also, there are different types of nonmetal mines that produce stone products such as limestone, dolomite, sandstone, and marble. Other underground nonmetal mines produce clay, potash, trona, and salt. Not only do these mines vary in the commodities that they produce, but they also use different mine designs and mining techniques such as room and pillar mining and stope mining. Some of these mines are large, complex multilevel mines, while others are small adit-type mines.

Ventilation levels in these mines also vary widely. Many limestone mines have only natural ventilation with variable air movement, whereas trona mines have high ventilation rates to dilute and remove methane gas released during the mining process. There are also deep metal mines with multiple levels that have far less ventilation than that found in underground trona mines. Furthermore, many metal and nonmetal mines are located in remote areas of the country, at high altitudes, or are subject to extremely hot or cold environments.

Considering these factors as a whole, we have found that there is no *single* control technology that would be suitable and effective for all M/NM mines in significantly reducing current DPM levels to or below the 2001 final DPM concentration limit of 160_{TC} μg/m³ by May 2006.

4. Work of the M/NM Diesel Partnership (The Partnership)

Since promulgation of the 2005 final rule, the Partnership has been engaged in on-going NIOSH diesel research. One project involves a contract issued to Johnson Matthey Catalyst to develop a system to control nitrogen dioxide (NO_2) emissions from diesel-powered underground mining vehicles equipped with Johnson Matthey's Continuously Regenerating Trap (CRT®) system. This system promotes regeneration at lower temperatures and is widely used in urban bus applications. If the results of laboratory evaluations show that a system is suitable for use in underground mining, NIOSH would continue studying this control technology with a long-term field evaluation in an underground mine. The M/NM Diesel Partnership is continuing to investigate this and other DPF applications.

5. Remaining Technological Feasibility Issues

In January 2001, we concluded that technology existed to accurately sample for DPM with a TC method and to reduce DPM levels to the 160_{TC} μg/m³ limit by January 2006 (66 FR 5889). In June 2005, we concluded that it was technologically feasible to reduce M/NM underground miners' exposures to the interim PEL of 308_{EC} μg/m³ by using available engineering control technology and various administrative control methods. However, we acknowledged that compliance difficulties may be encountered at some mines due to implementation issues and the cost of purchasing and installing certain types of controls. Specifically, we indicated that implementation issues may adversely affect the use of DPFs to reduce exposures despite the results reported in NIOSH's Phase I Isozone Study.

A number of commenters expressed the view that our enforcement sampling experience demonstrates that both the interim DPM limit, and especially the final DPM limit are technologically infeasible. Some of these commenters stated that our sampling data published in our June final rule and on our web site demonstrates that 90% or more of the regulated industry cannot comply with the January 19, 2006 limit of 160_{TC} μg/m³.

We have carefully examined these comments, the data in the June final rule, and our more recent enforcement sampling data. We note first that the commenters were not questioning the validity of the sampling method or whether our sampling data are complete and representative. Our sampling and analytical methods have been validated by NIOSH, and our longstanding sampling strategy that focuses on miners we believe will experience the greatest exposures is fully consistent with good industrial hygiene practice. Second, in evaluating the sampling data we recognize that current DPM levels at many mines exceed the final limit. In the 2005 NPRM, we pointed out that, "* * * in 2002 and 2003, we found that over 75% of the underground mines covered by the 2001 final rule have levels that would exceed the final concentration limit of 160_{TC} μg/m³." We are encouraged, nevertheless, that DPM levels across the industry have been steadily and significantly reduced from the levels observed prior to the promulgation of the 2001 rule, and they are continuing to go down. As we stated in the 2005 NPRM (70 FR 53283), DPM exposures in affected mines have declined from a mean of 808 DPM μg/m³ (646_{TC} μg/m³ equivalent) prior to the implementation of the standard, to a mean of 233_{TC} μg/m³ based on current enforcement sampling. During the time period from November 1, 2003 to January 31, 2006, 1798 valid personal compliance samples from all mines covered by the regulation were collected. From these samples collected, 18% of samples exceeded the 308_{EC} μg/m³ interim limit, and 64% exceeded the 160_{TC} μg/m³ final limit. The fact that 64% of the enforcement samples collected from November 1, 2003 to January 31, 2006 are above 160TC μg/m³ does not establish infeasibility of the standard. We expect that overexposures will continue to decline as operators install new equipment, address implementation issues with DPFs, make use of biodiesel fuel, and install cleaner engines. Thus by May 2008, we would expect operators to achieve full compliance.

Our experience reveals that little progress was made in reducing DPM levels across the industry until the interim DPM limit became effective. Once the interim limit became effective, mine operators implemented the controls they believed were necessary to attain compliance. Based on our experience with other health standards, we would not have expected the industry as a whole to have achieved compliance with the final limit before the compliance deadline. Further, as discussed throughout this section of the preamble, we believe sufficient technologically feasible DPM controls exist for the industry as a whole to comply with the final DPM limit within the prescribed regulatory timeframe in this final rule.

Commenters, acknowledging that some DPM levels at some mines currently exceed both the interim and final DPM limits, indicated that the existence of such overexposures was the primary justification for the rule. These commenters observed that the rulemaking process is long, cumbersome and costly and that there "would be little point in invoking it to require the

industry to do something it is already doing on its own.''

These commenters continued, ''It is settled law that MSHA 'can impose a standard which only the most technologically advanced [mines] have been able to achieve even if only in some of their operations some of the time.' '' *United Steelworkers,* 647 F.2d at 1264.

We realize that some commenters will disagree with our decision not to presently implement the final limit. However, we have carefully reviewed all comments and data and believe that a number of mines have made good faith attempts to implement control technology but need more time to make such technology work. It is not our intent to have a majority of the mining industry apply for special extensions, or for a significant number of miners to be overexposed to DPM and have to wear respirators. We stated in the 2005 NPRM that a significant number of overexposures may:

> * * * lead to another problem by requiring a large number of miners to wear respirators until feasible controls are fully implemented. We have never had a standard that resulted in a significant percentage of the workforce being required to wear respiratory protection, and we are concerned about the impact on worker acceptance of the rule and about mine operators' ability to remain productive. We are interested in public comment on how many miners would need to wear respirators to comply with the 2001 final limit and proposed multi-year phase-in of the final limit, and whether in each case they would need to wear respirators for their entire work shift, whether this amount of respirator usage is practical, and any other comments or observations concerning this issue (70 FR 53285)

The commenters that referenced the OSHA *Lead* decision also presented the results of an extensive analysis of our DPM sampling and enforcement actions at 11 selected mines. According to these commenters, these data show that we are not adequately enforcing the interim DPM limit because there were 56 sample results that exceeded the interim DPM limit, but we issued only 24 DPM citations. These commenters further assert that our failure to enforce the interim limit provides encouragement for mine operators who have delayed the implementation of controls that are necessary to attain both the interim and final DPM limit.

These commenters did not provide information that indicated which mines were included in the commenter's analysis. However, assuming the commenters' numbers are accurate, there are three plausible reasons for the discrepancy between the number of samples exceeding the enforceable limit and the number of citations. First, the commenters indicate that the data for their analysis were gathered from the MSHA Data Retrieval System, which can be accessed from a link on the MSHA internet home page. The DPM sampling data contained in this database includes DPM samples obtained by our inspectors during the ''baseline'' sampling period prior to July 20, 2003. In accordance with provisions of the Second Partial Settlement Agreement, samples that exceeded the enforceable limit during the baseline sampling period were not subject to citation as long as the subject mine operator was exercising good faith efforts toward developing a DPM compliance strategy. Thus, the Data Retrieval System includes numerous overexposure sample results that were not citable because they pre-dated our full enforcement of the interim limit.

Second, our enforcement policy for DPM, which is posted on our M/NM DPM Single Source page, identifies certain situations where a normally citable overexposure to DPM will not prompt a citation. In one case, a citation will not be issued if the mine operator can demonstrate that controls that would normally be effective in attaining compliance with the limit have been ordered, and the affected miner is wearing a suitable respirator in the context of a compliant respiratory protection program. This situation is covered in question 24 in the enforcement policy:

> 24. If MSHA finds a miner overexposed to DPM and I have a valid purchase order for controls that have not been delivered to my mine site, will I be cited for a violation? No. If you can demonstrate to MSHA, through appropriate documentation such as purchase orders, that you are making reasonable progress toward implementing feasible engineering and/or administrative controls that have a reasonable likelihood of achieving compliance with the interim DPM limit within a reasonable timeframe, and you have implemented a respiratory protection program meeting the requirements of ANSI Z88.2–1969 that covers all affected miners, MSHA will not conduct compliance sampling of affected miners at that time. The inspector will return to the mine to verify that adequate progress is being made toward full implementation of controls and/or to conduct DPM sampling based on the completion timeframe established by the mine operator.

In the other case, if the mine operator has fully implemented all feasible engineering and administrative controls and the affected miner is wearing a suitable respirator in the context of a compliant respiratory protection program, no citation will be issued even if an exposure exceeding the limit is measured. This situation is covered in question 29 in the enforcement policy:

> 29. How will MSHA determine if a citation is warranted when evaluating whether I have implemented all feasible controls? Once you use and maintain all feasible engineering and administrative controls to reduce a miner's exposure, implement the required respiratory protection program and require the miner to use a respirator, you will be in compliance with § 57.5060(a), even though a miner's DPM exposure may continue to exceed the limit and a citation will not be issued. Keep in mind that feasibility is an MSHA determination. If the agency finds that you failed to install, use and maintain all feasible controls, or you failed to establish an appropriate respiratory protection program, you will be out of compliance.

Third, some samples that exceed the interim DPM limit may be resamples of previously cited overexposures. Our enforcement sampling practice requires that after an overexposure is cited, the mine operator is given the opportunity to implement engineering and/or administrative controls to reduce the subject miner's exposure to or below the enforceable limit. Once these steps have been taken, we resample the miner to confirm that controls have been successful in lowering the miner's exposure to or below the limit. On occasion, the resample is still over the limit, in which case, if the operator has made good faith efforts to apply normally effective controls, the citation will be extended so that additional controls can be implemented, followed by another resample.

Thus, due either to controls being on order, to issues relating to feasibility, or to resample that continues to exceed the DPM limit, and depending on other factors, we may not issue a citation even though a sample result represents a DPM overexposure. We intend to continue this enforcement practice under this final rule and will issue necessary compliance guidance.

Several commenters repeated earlier public comments regarding their views that previous technological and economic feasibility determinations are invalid because they were based partially on analyses conducted using a ''flawed'' computer simulation program. The economic feasibility issues are addressed latter in this section. The computer program in question, referred to as the DPM Estimator, is a Microsoft® Excel spreadsheet program that calculates the reduction in DPM concentration that can be obtained within an area of a mine by implementing individual, or combinations of engineering controls. This program was the subject of a Preprint published for the 1998 Society of Mining Engineers Annual Meeting

(Preprint 98–146, March 1998), and it was fully described in a peer reviewed article in a professional journal (Haney and Saseen, Mining Engineering, April 2000). Its algorithm is accurate, and we have not received comments that challenged the mathematical basis for its calculation.

Although this program was criticized as ''flawed'' by several commenters, few specific errors in the design or utilization of the program were offered. One commenter indicated that the

> * * * computer model was based on invalid assumptions of the availability of filters that would fit the entire fleet of equipment in use, and assumptions of perfect ventilation conditions throughout the industry.

This commenter continues,

> * * * no such filters were available commercially at the time of the MSHA prediction, nor when the 2001 rule was published, nor had any undergone testing.''

Regarding the issue of ventilation, this commenter stated that,

> * * * the assumption of 'The Estimator' of perfect ventilation in mines did not exist in reality and the rule could not be declared feasible based on these incorrect assumptions.

This same commenter goes on to say that our technological feasibility determinations for all of our DPM rulemakings, from the original 2001 final rule to this rulemaking, are invalid because they are founded on analytical results obtained from the Estimator.

We have responded previously to both of these comments, and to many other criticisms of the Estimator. Regarding the availability of DPFs, we must emphasize that our DPM rules have always been performance oriented, and that mine operators have been given wide latitude to select DPM controls that were best suited to their unique circumstances and conditions. Neither the original 2001 rule nor this current final rule requires DPFs as the exclusive means of compliance with the DPM limit. The Estimator contains provisions for estimating the effect of applying DPFs, ventilation upgrades, low DPM engines, and other DPM controls on DPM levels in an area of a mine. At the time that we promulgated our 2001 final rule, however, we acknowledged our limited in-mine documentation on implementation of DPM control technology with issues such as retrofitting and regeneration of filters. Consequently, we committed to continue to consult with NIOSH, industry and labor representatives on the availability of practical mine worthy filter technology.

Regarding the same commenter's concerns that ventilation issues were handled inappropriately in the 31 Mine Study, we believe the commenter used the term ''perfect ventilation,'' when they may have meant perfect mixing of ventilation airflows. ''Perfect ventilation'' is a term with which we are unfamiliar. We have never used this term in this or any other rulemaking, and are unfamiliar with it in the context of mine ventilation engineering. ''Perfect mixing,'' in the context of ventilation systems, is a common technical term that refers to an idealized process in which two or more airflows of dissimilar composition join, and in which the composition of the composite airflow is an instant and homogonous mix of the input airflows. The issue of perfect mixing was raised by one of the same commenters in their public comments on the August 14, 2003 proposed rule on the interim DPM limit, and we responded in detail to these comments in the preamble to the 2005 final rule (70 FR 32920–32921).

The commenters believe that the Estimator's computations of DPM concentrations are valid only if engine emissions are perfectly mixed with the air flow, which they suggest does not occur in an actual mine. As discussed in the 2005 final rule preamble, these commenters make an erroneous assumption with respect to our utilization of the Estimator. The Estimator actually incorporates two independent means of calculating DPM levels: one based on DPM sampling data for the subject mine, and one based on the absence of such sampling data. Where no sampling data exist, the Estimator calculates DPM levels based on a straightforward mathematical ratio of DPM emitted from the tailpipe (or DPF, in the case of filtered exhaust) per volume of ventilation air flow over that piece of equipment. This is referred to in the Estimator as the ''Column B'' option for calculating DPM concentrations. The commenters'' observation that the Estimator fails to account for imperfect mixing between DPM emissions and ventilating air flows is a valid criticism of the ''Column B'' option. For this and other reasons, the Estimator's instructions urge users to utilize the ''Column A'' option whenever sampling data are available.

In the ''Column A'' option, the Estimator's calculations are ''calibrated'' to actual sampling data. Whatever complex mixing between DPM emissions and ventilating air flows existed when DPM samples were obtained, are assumed to prevail after implementation of a DPM control. This is an entirely reasonable assumption, and in fact, there is no engineering basis to assume otherwise. Indeed, comparisons of ''Column A'' Estimator calculations and actual DPM measurements taken in mines before and after implementation of DPM controls have shown good agreement, indicating that Estimator calculations do adequately incorporate consideration for complex mixing of DPM and air flows when the ''Column A'' option is used.

The Estimator was originally developed with both the Column A and Column B options because at the time it was developed (1997), the specialized equipment required for reliable and accurate in-mine DPM sampling, such as the submicron impactor, was not widely available. Consequently, few mine operators were able to obtain the in-mine DPM sample data required for utilizing the Column A option. Though mine operators may continue to use the Estimator, we rely more on our in-mine documentation and enforcement experience on the feasibility of DPFs.

This background and detailed explanation on perfect mixing was provided in the preamble to the 2005 final rule (70 FR 32920). However, the comments we received on this subject for the instant rulemaking do not acknowledge or respond to the background and explanation we provided in the earlier preamble. The commenters simply restate their previous assertion that the Estimator is flawed because it assumes perfect ventilation, which as noted above, we believe was meant to refer to perfect mixing.

As we have maintained throughout this rulemaking, mine operators should determine the control or combination of controls that will be best suited to their mine-specific circumstances and conditions, and that controls need to be evaluated, selected, and implemented on a case-by-case and application-by-application basis. Nonetheless, based on our experience, observations, and the comments received from mine operators, we believe to attain the final DPM limit, many mine operators that are not yet using DPFs will have to start using them, and most mine operators that are already using DPFs to attain the interim limit will have to continue or increase their use to attain the final limit. The mining industry maintains that while some operators are using DPFs to control miners' exposures to the interim PEL, it is infeasible for them to further reduce miners' exposures through expanded use of DPFs. However, we maintain that feasibility difficulties encountered with the use of DPFs can be resolved within the prescribed timeframe offered in this

final rule, and that the greatest impediment to more widespread use of DPFs throughout the industry is the need to overcome implementation challenges and difficulties relating to specific pieces of mining equipment. For example, as the final limits become effective, some mines that were possibly using one or two DPFs on large horsepower haul trucks may have to install more DPF systems on other types of machines, such as loaders or support and utility equipment, in order to attain the final limit.

As discussed extensively throughout the rulemaking record and as we explained in detail in the 2005 NPRM, mine operators continue to prefer passive DPF regeneration systems over active regeneration systems. Passive regeneration is the process where the temperature of the exhaust gas produced by the engine is sufficiently high for a sufficient percentage of the working shift to burn off the collected DPM on the DPF. In order for passive regeneration to be a viable option, filter regeneration has to occur frequently enough to prevent the DPM that accumulates in the filter from causing backpressure on the engine that exceeds the engine manufacturer's backpressure specification. Passive regeneration is normally preferred by mine operators because the DPF will regenerate in the normal course of equipment operation, with no interruption to mine production activities and no equipment downtime required for filter regeneration. Also, passive regeneration occurs without the need for intervention by the equipment operator, and it does not require any special external equipment or facilities. However, many pieces of mining equipment do not have engine duty cycles that will presently support consistent passive regeneration. This problem will take more time for individual mine operators to resolve.

If a passive DPF loads up with DPM, but the exhaust temperature is not sufficient to ignite and burn off the accumulated DPM, the backpressure on the engine will increase. Prolonged engine operation in excess of the manufacturer's backpressure specifications can cause engine and DPF damage. Therefore, it is strongly recommended that when passive regeneration DPF systems are installed, a means for the machine operator to monitor the engine's exhaust backpressure should be included. Such a provision is important even on equipment where the normal duty cycle easily supports passive regeneration. For example, if a piece of equipment on which a filter normally passively regenerates is used temporarily for some other activity having a less severe duty cycle, the filter may not passively regenerate, and backpressure could build up. Likewise, if the subject equipment experiences a maintenance related problem that causes an increase in the level of ''engine out'' DPM emissions, the rate of DPM buildup in the filter could exceed the capacity of the filter to passively regenerate. In such cases, excessive engine backpressure could build up in less than a working shift. If the equipment is provided with a means for monitoring backpressure, and the equipment operator observes engine backpressure rising to excessive levels, corrective action can be taken before engine or filter damage occurs. Successful implementation of passive DPF systems has been reported where the mine operators have determined that a machine has sufficient exhaust gas temperature for passive regeneration and exhaust backpressure is being monitored.

If passive regeneration is infeasible due to an insufficient duty cycle, active regeneration may be a feasible alternative. Active regeneration depends on an external heat source for burning off the DPM collected in a filter. Some mine operators commented that it is not feasible for them to utilize active regeneration due to the physical size of filters, machine downtime, and/or the cost associated with building and equipping underground regeneration stations required for active DPF regeneration. We disagree that these factors render active regenerating DPF systems infeasible. As discussed throughout the rulemaking record, and later in this section of the preamble, filter size and machine downtime issues relate to implementation challenges and difficulties which can impact feasibility of compliance with the final limits. We believe these factors can usually be effectively addressed through proper system selection and deployment, as described below, which take time to effect. We also believe the deployment of an active DPF system is economically feasible under the prescribed time frames for the final limit. Economic feasibility is discussed in detail later in this section in this preamble.

Engine emissions and exhaust flows affect the size of the DPF that needs to be installed. These factors are important considerations for both passive and active regeneration. If the DPF is undersized for a particular application due to high DPM emissions or high exhaust flows, a passive or active DPF system may become overloaded, requiring the filter to be removed from service for regeneration. If such an interruption occurred mid-shift, it would typically have a greater negative effect on production than if it occurred at the end of a shift. Active regeneration DPF systems are normally sized so that the filter has sufficient capacity for the host vehicle to operate over its normal duty cycle for at least a full shift or longer. In some cases, especially when a machine with an older, high emission engine needs to be filtered, a filter having sufficient capacity to allow for a full shift of machine operation may be too large to fit in the available space on the machine. For this reason, most DPF manufacturers do not recommend DPF installation on older high emission engines. Some mine operators who have faced this dilemma have opted to compromise by installing a smaller filter. The result is DPM overloading. DPM overloading leading to excessive backpressure on the engine is the main problem that mine operators experience when the DPF installation is not correct for the application and duty cycle. Possible feasible corrective actions include utilizing a larger DPF or a lower DPM emission engine, or both. As noted later in this section of the preamble, installation of a new, low-emission engine, in addition to facilitating use of a reasonably sized DPF, can cut DPM emissions by up to 90% or more, and their greater operating efficiencies can reduce maintenance costs and lower fuel usage by 10% to 15% compared to older technology high emission engines.

Regarding commenters' concern about the physical size of DPFs, if the DPF for a particular piece of equipment is too large to handle or too large to fit in the space available on the equipment, the exhaust could be divided into two branches fitted with smaller sized filters on each branch, or as noted above, the engine could be replaced by one with lower DPM emissions that can be effectively filtered by a correspondingly smaller DPF.

Since 2001, a number of older, high DPM emitting engines have been replaced with new, low DPM emitting engines, either through direct engine replacement into existing equipment or through the acquisition of new equipment, but not as many as we predicted in 2001. From our enforcement experience, we believe this has occurred in mostly the larger horsepower engines, greater than 150 hp, in production equipment. This equipment is typically turned over more frequently because it has more severe duty cycles, is worked harder, and typically has a shorter life than smaller, lower horsepower support equipment. High horsepower production equipment also typically accounts for the greatest proportion of DPM produced in the

mine, so replacing these engines was the highest priority at most mines. Thus, the smaller engines normally found in support equipment often have older engines with higher DPM emissions per horsepower than the newer and larger production equipment.

We estimated in the 2001 final rule that 50% of the support equipment would probably need DPFs for compliance with the final limit (66 FR 5889–90). The higher DPM emissions from these engines, however, can complicate the expanded use of DPFs on this equipment. It is our belief that the mining industry will need additional time to further evaluate the proper sizing of both passive and active regeneration DPF systems on this equipment. Consequently, we expect the implementation issues relating to DPFs, particularly the selection of appropriate DPFs for a given application, regeneration issues, filter maintenance, etc. may extend over a larger portion of the mining industry as operators work toward compliance with the final limit.

Although we believe these implementation issues are sufficient to warrant the additional time offered in this final rule, we are nonetheless confident these issues can be effectively resolved within the compliance timeframes established in the final rule. For example, EPA compliant 2007 on-road engines will be provided with engine manufacturer supplied DPF systems that will regenerate continuously or automatically regardless of duty cycle, thereby greatly reducing implementation issues for the owner. Another example is the HTDPF with integral heat exchanger. This recently commercialized technology will enable filtering the exhaust from small to mid-size equipment with low to medium duty cycles. In addition to these and other new developments, competitive pressures will force the manufacturers of existing DPF systems to make incremental product improvements over time.

Note that high engine exhaust temperatures are an implementation issue only for disposal particulate filter element type DPFs. Ceramic and metallic filter element type DPFs can tolerate the normal range of exhaust temperatures from any diesel engine. In fact, passive regenerating DPFs depend on high exhaust temperatures to initiate the regeneration process. Where high exhaust temperatures could potentially occur, but where the user wishes to implement a disposal particulate filter element system, the use of a heat exchanger upstream from the filter element is required to lower the exhaust gas temperature and prevent filter element damage. For ceramic and metallic filter element type DPFs, heat exchangers are neither required nor desired.

Several commenters stated that we admitted to implementation problems with DPF systems in the preamble to the proposed rule. We agree with these commenters that we did express concerns about implementation issues with DPFs, and that these concerns, along with concerns about implementation issues with other DPM engineering controls led to our decision to propose delaying the effective date of the final limit of 160_{TC} μg/m^3 until January 2011. We continue to believe that a delay to the effective date for the final limit is necessary due to feasibility considerations. However, as we explained earlier in this section of the preamble, based on our enforcement experience and comments and other data in the rulemaking record addressing feasibility since we issued the 2005 NPRM, we have subsequently determined that delaying the final limit until 2011 is not justified. Primarily due to wider availability of alternative fuels, particularly biodiesel, improved filter technology, and the impending availability of EPA compliant 2007 on-road diesel engines, we believe the rulemaking record supports the three step phase-in of the final limit over two years, with the final limit of 160_{TC} μg/m^3 becoming effective in May 2008. This is the approach that is incorporated into this final rule, and we believe it provides for the maximum protection of miners that is technologically and economically feasible for the industry to achieve.

As discussed earlier in this section of the preamble, recent developments in the three key areas of biodiesel, improved filters, and EPA compliant 2007 engines, along with the application of a variety of other existing DPM controls, will enable compliance by the industry as a whole significantly sooner than was proposed in the September 2005 NPRM. Biodiesel, improved filters, and EPA compliant 2007 engines can be used by any size mine producing any M/NM commodity, and these technologies are not subject to many of the difficult implementation issues that have slowed the adoption of some DPM controls. For example, biodiesel can be used in any diesel engine with elastomeric fuel system components that are biodiesel compatible, and any non-compatible components can be easily replaced. No other engine or equipment modifications of any kind are required. Improved diesel particulate filters are commercially available for retrofit to any size diesel engine, and systems like the HTDPF and diesel particulate Reactor™ are particularly well suited to installation on small and medium sized production and support equipment that had been problematic for some mine operators. No implementation issues in regards to selection of the DPF media, sizing, or regeneration type are expected for EPA compliant 2007 on-road engines. As discussed previously in this section, the engine will have a DPF installed in the vehicle when purchased by the mine operator.

DPF systems are a more effective control technology for reducing EC than TC. In order to comply with the final limit, we expected that most mine operators would need to add to the DPM controls they had previously implemented for compliance with the interim limit. We also anticipated that many mine operators that had successfully attained compliance with the interim limit without DPFs would need to utilize DPFs to obtain compliance with the final limit.

We acknowledged in previous preambles that DPFs may not be the optimal solution for all machines, especially machines equipped with dirtier engines. But we have also advised that machines with older, dirtier engines should be replaced or re-powered with cleaner engines, and then if necessary, be equipped with DPF systems.

We continue to emphasize to the mining industry to utilize our DPM Single Source Page to obtain information to assist with installation of DPF systems. This information stresses that DPFs require the engine to be maintained through a good maintenance program and to monitor the exhaust backpressure in order to prevent the DPF system from becoming overloaded with DPM. Minimizing these problems can help prevent premature DPF or engine failure, which affect feasibility.

NIOSH commented that

> Although adverse health effects occur at the proposed concentration limits and below, NIOSH recognizes that all factors, including technical and economic feasibility must be considered by MSHA in developing an exposure standard. NIOSH is aware of the 'implementation and operational difficulties' currently facing the metal and nonmetal mining industry presented in MSHA's preamble, Section IV. Technological Feasibility (page 53282). A phase-in period may provide time to resolve such issues. Requiring control technologies before mine operators have had sufficient time to work through selection and implementation problems may create hazards and adverse health effects, such as the elevated levels of NO2 experienced when some PT-catalyzed

diesel particulate filters (DPFs) have been used in poorly or marginally ventilated areas.

NIOSH also recognizes that the mines covered by this proposed standard have unique designs and operational differences presenting unique challenges in controlling and reducing diesel emissions. For some metal and nonmetal mines, targeted reductions in exposures of underground miners to DPM below the 400 μg/m³ TC or 308 μg/m³ elemental carbon (EC) current limit may be achieved only through implementation of complex, integrated strategies and state-of-the-art control technologies.

The first steps to control diesel emissions are fundamental changes to improve mine ventilation and diesel engine maintenance practices, along with the introduction of cleaner engines or the use of alternative fuels, such as biodiesel, when practical. When these are insufficient to achieve compliance, more advanced diesel emission control technologies, such as DPF systems, may be necessary to achieve compliance.

We have considered the technological and economic feasibility of achieving the final limits specified in this final rule as discussed throughout this preamble. The three step phase-in approach allows mine operators more time to work towards implementation of DPM control technologies. We agree with NIOSH that the first steps that the mine operators took to lower DPM levels were changes to engines, maintenance practices, ventilation systems, and to a lesser extent, alternative fuels. As we have discussed in this preamble, these efforts have lowered miners' exposure to DPM as our enforcement sampling has shown.

Even though NIOSH refers to DPFs as ''more advanced diesel emission control technologies,'' some mines have already implemented DPFs in order to comply with the interim standard. These same mines will most likely continue using DPFs, plus add additional DPFs or other DPM controls such as biodiesel, to meet the final limits. However, we agree that the final limits will require a larger segment of the mining industry to implement DPFs and alternative fuels. We agree that underground metal and nonmetal mines present unique designs and operational differences which affect the application of DPM controls. This three step phase-in approach provides the time for mine operators to learn more about advanced control technologies with regards to implementation issues.

NIOSH further referenced a June 25, 2003 letter to the Assistant Secretary from Dr. John Howard, Director, NIOSH, relating to DPFs. NIOSH stated that although DPFs ''* * * are commercially available, the successful application of these systems is predicated on solving technical and operational issues associated with the circumstances unique to each mine.'' This three step phase-in of the final limits will provide the necessary time for mine operators to overcome these technical and operational issues, since we believe that DPFs are now more readily available and DPF implementation issues can be resolved.

This commenter also agreed with us that mine ventilation, maintenance, cleaner engines or use of alternative fuels, such as biodiesel were effective DPM control measures. However, the commenter stated that when these methods are insufficient to achieve compliance, more advanced control technologies would be needed, such as DPF systems. Gaining extensive experience with implementation and operation of DPF systems on production vehicles would greatly assist in resolving some of these issues. The commenter further stated that to ensure success of the phase-in period, individual mine operators or a consortium of mine operators or other partnerships should have compliance plans detailing their integrated approach to reducing DPM levels in terms of maintenance, ventilation, fuels, control technologies, retrofitting, and monitoring.

We agree with the commenter that the final limit does require mine operators to continue implementing the current controls needed to meet the interim concentration limit, however, in order to meet the final limit, more controls may need to be implemented. If DPF systems are needed, then the mine operator will need to continue work to properly install and maintain DPF systems to manufacturers' specifications.

Some commenters referred to the NIOSH Phase I and II studies, stating that they were successful in showing that the DPM controls, especially DPF systems, work in reducing DPM. However, these commenters believed that NIOSH did not provide reliable data to indicate that the selected filter technology would provide the necessary reductions of DPM in actual mining applications. We responded to the NIOSH Phase I and II studies in the 2005 final rule. We noted the successful DPM reductions that were achieved from the DPM controls, especially DPF, in the Isozone study of Phase I. We further reviewed the work done by NIOSH in the production area of the mine in Phase II. We maintain as we did in the preamble to the 2005 final rule that ''the Phase II study helped to confirm existing agency data that shows that it is technologically feasible to reduce miners' exposures to DPM to 308 μg/m³ interim PEL.'' (70 FR 32928) The NIOSH work confirmed that DPFs can reduce DPM to MSHA's DPM limits. As stated previously, as the final limit is reduced over the time frame specified in this final rule, the mine operator can implement additional DPF systems (or other DPM control technologies) to further reduce the DPM exposure. The NIOSH Phase II study and MSHA's Greens Creek study as discussed in the June 6 preamble (70 FR 32928—32929) showed reductions in EC.

The same commenters stated that the Phase II study showed that the efficiencies of the DPF did not always agree with laboratory studies. However, the commenters failed to acknowledge that the comment was directed towards the DPF systems performing better than laboratory data, especially for EC reductions. We highlighted this finding from NIOSH's Phase II study in the preamble to our 2005 final rule (70 FR 32928).

Several commenters continued to state concerns with the use of catalyzed ceramic DPF systems due to increased NO_2 levels. We discussed this issue thoroughly in the preamble to the 2005 final rule (70 FR 32928–32929). We concluded then, and we believe the evidence is still persuasive, that the NO_2 issues discussed in the NIOSH Phase II studies were related to deficient ventilation in the areas where the testing occurred. The results of the Greens Creek study, which also evaluated heavily platinum catalyzed DPFs, showed a possible rise in NO_2; however the small increase detected made it unclear as to the cause (preamble to the 2005 final rule, (70 FR 32884 and 32921)). Even if the NO_2 increases at Greens Creek were caused entirely by the catalyzed DPFs, the rise, which was about 1 ppm downstream from stopping operations involving one loader and two or three haulage trucks totaling over 1,000 horsepower, was manageable due to effective auxiliary ventilation. We continue to acknowledge that highly catalyzed platinum ceramic DPFs have the potential to generate higher levels of NO_2 than the baseline emissions from the subject diesel engine. However, when such DPFs are used in conjunction with proper ventilation, NO_2 has not increased to hazardous levels. As discussed previously in this section, NIOSH commented that increased NO_2 levels occurred in poorly or marginally ventilated areas with the use of some catalyzed DPFs.

Several commenters agree that progress has been made with the application of ceramic DPF systems that regenerate passively on larger

horsepower production machines. The DPF systems have been shown to be highly efficient in collecting DPM and mine operators have reported that they do passively regenerate on the larger horsepower, production machines. The production machines operate at a heavy duty cycle that corresponds to high exhaust gas temperatures for a sufficient portion of the shift. This allows the DPF to regenerate passively and burn off the collected DPM, thus keeping the DPF below the engine manufacturers' maximum allowable exhaust backpressure.

One mine operator provided a list of their DPF systems that have been in operation up to 9000 hours. The DPF systems were supplied by two different DPF manufacturers, but were both designed for passive regeneration. This commenter stated that 13 of their 17 haul trucks were equipped with passive regeneration DPFs and they are currently evaluating 4 more units on their haul trucks. According to the information submitted by this commenter, they have plans for installation of DPFs on 6 of their loaders. The commenter stated that the process of achieving DPF reliability has been arduous, and required much discussion and work with the DPF manufacturer.

Another mine operator also stated that 32 passive regeneration DPF systems have been installed with an average life of the DPF system from 3000–4000 hours. The operator stated that the success has been with haul trucks and they are working on evaluating the installation of this type DPF on LHD's.

Yet another mine reported installing four passive DPF systems on machines and the exhaust backpressure quickly exceeded the manufacturer's specification for exhaust backpressure. The commenter stated that the DPF would not passively regenerate, requiring the mine to remove them for cleaning.

The experiences described by these three mine operators continue to show that DPF system selection and installation must be carefully evaluated. However, overall it appears that a number of mine operators have been successful in installing passive regeneration DPF systems on machines that have high duty cycles and are therefore acceptable for passive regeneration, particularly haulage trucks and some loaders. We continue to advise mine operators that DPF systems that utilize passive regeneration must be carefully evaluated and well-maintained for their successful operation. Both MSHA and NIOSH continue to post extensive information on DPF systems on our respective Web sites. The Filter Selection Guide (detailed in the preamble to the 2005 final rule (70 FR 32922)) that was designed by NIOSH and MSHA continues to be an important tool for understanding the steps that must be taken to evaluate, select, and install a DPF system, especially one that depends on passive regeneration.

The same commenters also stated that when passive DPF systems were not feasible for some types of machines, especially those with medium to low duty cycles, they began evaluating active regeneration systems. In contrast to passive regeneration systems that depend on the high temperature of the engine's exhaust for burning off the DPM collected in the DPF, active systems use an external heat source to initiate the burning process for DPM. These commenters stated they have purchased some active systems for evaluation. However, they question the feasibility of utilizing active DPF systems in their mines due to a variety of logistical and operational concerns. For example, they point out that the mining production cycle at many mines does not provide for sufficient machine downtime to stop the machine and take it out of service in order to ''plug'' the machine into a regeneration station for regeneration of the DPF to occur. These commenters also stated that if they tried to change out DPFs, then the number of DPFs they would need to maintain on hand to store and rotate would be both cost prohibitive and storage space consuming. These commenters indicated that machines that return to the surface at the end of the shift would be candidates for active regeneration.

We agree that using active systems that require prolonged machine downtime for regeneration may not be feasible at all mines. However, at mines that only operate for a single shift or have a gap between shifts for blasting gases to clear, for example, regenerating active filters between shifts would be more feasible. For mines that operate around the clock, shutting down a key piece of production equipment for filter regeneration may present a problem. While such an implementation scheme would undoubtedly adversely affect mine production, the commenters did not provide information or data sufficient to establish the significance of the effect to determine the feasibility of the method.

More importantly, however, we have continued to recommend alternatives to this implementation scheme for active DPFs. For example, the fuel burner system regenerates the filter during normal equipment operations, without intervention by the equipment operator, and regardless of equipment duty cycle. Another option is to swap out filters instead of regenerating them on-board the equipment. Between shifts, a used filter can be removed from a piece of equipment and swapped for a regenerated filter. The used filter can then be placed in a regenerating appliance so it will be ready by the beginning of the next shift, and the equipment can be returned to duty without further delay. Using this implementation method, equipment downtime to accommodate DPF regeneration is measured in minutes rather than hours.

The technology for a variety of active systems continues to be commercially available. Implementation of active regeneration systems does require the mine operator to look at the logistics of time, place, and manpower to successfully perform the task. Those logistical decisions have been outlined in the NIOSH Filter Selection Guide. However, the mechanism for installation of a DPF system with active regeneration is less complex than passive regeneration because the location of the DPF on the machine, distance of the DPF from the exhaust manifold or turbocharger, and the orientation of the DPF are less important. On passive regeneration systems, the DPF must be as close as possible to the outlet of the exhaust manifold or turbocharger to utilize the maximum exhaust gas temperature. On active regeneration systems, this is not an installation requirement.

We continue to believe that for installation of either type of regeneration system, engine maintenance is vital. The engine must be maintained in good working condition. The engine must be maintained to limit excess DPM being emitted from unburned fuels or oil. Intake filters must be maintained and the engine's intake air restrictions and exhaust backpressure must be maintained to the manufacturer's specifications.

In addition, the exhaust gas backpressure measurement provides critical information on the amount of DPM loading on the DPF. Engine manufacturers and DPF manufacturers provide maximum limits that should not be exceeded to ensure proper engine and DPF operation. The exhaust backpressure ports and devices must be maintained. This has become a special concern in the underground coal sector, prompting the Coal DPM Partnership to form a Subcommittee to investigate the proper procedures to monitor backpressure and the proper type of equipment to use. MSHA and NIOSH

are working with labor and industry on this issue. Recommendations from this subcommittee will be shared with both coal and M/NM industry personnel since the information will be pertinent to both mining sectors involved with DPF systems. These recommendations will cover all types of DPF systems.

We believe that in place of ceramic DPF systems that require passive or active regeneration, machines could be installed with disposal DPF technology. These systems are commercially available and include exhaust heat exchangers to limit the exhaust gas temperature at the DPM media. These systems are available for all horsepower ranges typically found in M/NM mines.

From the comments received to the proposed rule, mine operators have installed synthetic high temperature disposable particulate filters (HTDPFs) as a means for DPM control. HTDPFs were initially used on permissible machines in underground coal mines to further reduce the chance of a filter fire that could occur more easily with paper filter media. Since that first introduction on permissible machines, manufacturers have developed systems to use HTDPFs on non-permissible machines in underground coal mines and on machines in underground M/NM mines. The HTDPFs were tested by NIOSH in the Isozone studies and shown to be effective in DPM EC reductions.

One commenter stated that they estimated the DPM reduction to be about 60–65% with the use of HTDPFs. We would consider that reduction estimate to be low (assuming the data the commenter was referring to was EC) when compared to our laboratory test that showed up to 80–83% percent reduction of whole DPM and higher efficiencies for EC.

However, several commenters stated that the synthetic HTDPF systems were removed from the machines that they were originally installed on when the DPF ''burned out'' and melted. The commenters stated that the backpressure would rise quickly when the DPF loading exceeded the specified loading capacity of the DPF media size. When this occurred, there was the potential for a DPF ignition.

One of these commenters also stated that the use of HTDPF was discouraging because the DPFs were only lasting 4–10 hours, requiring filters to be discarded and replaced every two shifts or less. It is well known that the operating life of a disposable DPF is mainly due to the size of the DPF installed, the amount of DPM that the engine emits, and the condition of the engine. Any one of these parameters can affect DPF life. The size of the DPF should be evaluated and engineered into the machine prior to installation. The DPM output of the engine should also be known prior to installation, and the condition of the engine is an important factor that can change and can severely affect DPF life. However, the engine DPM output and the condition of the engine can be altered. If DPF life is too short due to an older engine, then an engine replacement with a newer, cleaner engine can usually be done. Engine maintenance can increase DPF life by minimizing burning oil or unburned fuels.

Underground coal mine operators faced these same implementation issues when they began using disposable DPFs to comply with the coal DPM rule. They resolved these issues by replacing high DPM emitting engines and improving engine maintenance procedures. The same methods for extending DPF operating life are applicable to M/NM machines and are discussed in the DPF Selection Guide.

The DPM overloading issue also led to DPF ignition events. These concerns were raised by the underground coal mine operators. In response to this, we performed an extensive investigation on the causes of DPF ignitions. We determined that when the DPF collected the DPM, oils and unburned fuels were also collected on the media. When the DPF was exposed to exhaust gas temperatures that were in excess of 650 °F, the DPM, oils, and unburned fuels ignited, but not the DPF media. However, when the burning occurred, temperatures were high enough to melt the DPF media. When paper filter media was involved, the paper filter media also caught fire.

To help resolve this issue and to provide the mine operators with more awareness of the potential for an ignition of a DPF, we worked with DPF manufacturers that produce synthetic HTDPF systems. The DPF manufacturers agreed with us to update their DPF system specifications to specifically advise their customers that the synthetic HTDPF cannot be used where the exhaust gas temperature at the filter media exceeds 650 °F. We posted on the internet links to these updated specification sheets from the manufacturers.

To help further resolve this issue, manufacturers have developed exhaust gas heat exchangers, both air to air and air to water type heat exchangers that can either be installed in the exhaust prior to the DPF media or be built in as part of the DPF canister to maintain the exhaust gas temperature at or below 650 °F. The addition of a heat exchanger makes the use of the HTDPF feasible on a wider variety of vehicles that have duty cycles that could create exhaust gas temperatures at the DPF media in excess of 650 °F. Instead of the machine manufacturer or mine operator being concerned that the engine's duty cycle does not exceed 650 °F, a heat exchanger system can be built in to the exhaust system prior to the DPF to limit the exhaust gas temperature at the filter media to 650 °F.

Several commenters made reference to a joint NIOSH Partnership study at the Stillwater Mine. This study did a paper analysis of the equipment and based on some basic information, assigned each piece of equipment into a category to describe the potential for DPF application. The rulemaking record does not include the results of this study, and it is our understanding from NIOSH that this study is incomplete at this time. Therefore, this study was not considered by us in reaching our determination in this final rule.

However, we do believe that the type of approach used by NIOSH is a good beginning step that each mine should take when considering the use of DPF control technology. Once a mine operator categorizes its equipment based on general assumptions, they could then begin a more in-depth study of each piece of equipment that may need a DPF system installed, and finally, determine which system or systems could be feasible. Again, the NIOSH Filter Selection Guide provides mine operators with a step by step approach to determine the best ''fit'' for a machine to reduce the DPM emissions.

One commenter discussed feasibility issues with applying DPF systems to their mine's equipment which included Schedule 31 equipment. The commenter stated

> FMC's fleet falls into the category that does not support DPF's due to duty-cycle and manufacturers specifications. To date, FMC has found only one filter manufacturer that is willing to try their disposable filters on our fleet. Specific challenges/concerns include flammability of disposable filters, low engine duty cycle, and Schedule 31 hurdles that have yet to be addressed.

The commenter referenced the NIOSH work conducted at the Stillwater Mine where NIOSH categorized equipment for DPF application as was discussed above.

We believe that the issues raised by the commenter have been fully addressed in this preamble and in previous preambles which include flammability of disposable filters and the types of DPFs that can be used based on an engine's duty cycle.

The commenter references his Schedule 31 equipment. Schedule 31 is

terminology used to refer to permissible equipment approved by us for use in gassy mines. Similar types of diesel powered equipment that are used in this mine are also used in underground coal mines in areas where methane gas may be present. We do not agree with the commenter that DPF systems are not available for permissible equipment. Underground coal mines have been retrofitting similar permissible equipment since 2001 to reduce DPM emissions from this type of equipment. To date, approximately 300–400 disposable type DPF systems have been installed on permissible equipment in coal underground. We believe that the equipment referred to by the commenter can be installed with a DPF system. We have information posted on our Web site on retrofitting permissible equipment. Companies such as Dry Systems Technologies (DST), DBT Australia Pty Limited, and EJC Mining Equipment have been supplying this type of DPF system to the underground coal permissible fleet. In addition, mine operators can contact our Technical Support Approval and Certification Center for information related to retrofitting permissible equipment.

One manufacturer testified at the public hearings that the DPF systems that they supply to the underground coal permissible machines are available in non-permissible (non explosion proof) configurations for machines in M/NM mines. They stated that the technology can be configured for all horsepower machines and be designed for numerous machine configurations.

Another area of DPF systems that we have been investigating is the use of on-board regeneration. On-board regeneration normally operates in principle between a passive system and an active system. In this type of DPF system, some passive regeneration occurs depending on duty cycle, however there is a mechanism for active regeneration when the duty cycles are not sufficient. The active regeneration may be in the form of catalyst, electrical system, or fuel burner type system. Several of these systems were discussed in the preamble to the 2005 NPRM such as the ArvinMeritor. Other systems are discussed below that we have become aware of since the preamble to the proposed rule.

DPF systems using this type of technology are becoming more readily available and feasible due to the upcoming EPA 2007 on-highway emission standards. We are aware the EPA emission standards are more stringent for reducing both DPM and NO_X. Information on systems being designed for 2007 on-highway machines will include DPF filters and NO_X catalysts. These systems will most likely require some type of active regeneration systems to account for low duty cycle on-highway vehicles. However, at this time, most engine manufacturers have not released the technical details of their systems since they are still in on-going developments to prepare for the 2007 model year. A combination of passive and active regeneration will most likely be used to account for the various duty cycles of non-road equipment. The EPA DPM standards will be forcing more DPF technologies to the commercial market starting in 2007 which will be available to the mine operators during the extension of time allowed for in this final rule.

Recently, MSHA and NIOSH have been in discussions with an automotive manufacturer of a commercial pickup truck and the diesel engine manufacturer that supplies the diesel engine for the pickup truck. Currently, many underground coal mines and some M/NM mines use commercially available automotive type pickup trucks. In 2007 model year, the new trucks will be sold with DPF systems in order to comply with the EPA on-highway standards. However, some underground coal operators became concerned with the new DPF systems on these pickup trucks. The concern relates to regeneration based on a mining duty cycle. The manufacturers also have not yet released all the details on the DPF systems. Engine and machine manufacturers are doing extensive testing for on-highway applications. MSHA and NIOSH have agreed with the manufacturers to perform laboratory and field test on the new pickup trucks once the trucks are available for mining. This work will be done during the extension of time allowed for in this final rule.

This type of technology will become more widespread, even in the mining industry, as the EPA DPM emission standards become effective. In addition, the California Air Resources Board (CARB) continues work with their ''Verification Procedure, Warranty and In-Use Compliance Requirements for In-Use Strategies to Control Emissions from Diesel Engines''. This program verifies DPF systems for installation on machines in California. CARB maintains a Web site at: *http://arb.ca.gov/diesel/verdev/home/home.htm.*

Most of the systems being developed for EPA have also been developed for California's program. Some commenters stated that we should wait till the EPA standards and technology becomes available. However, we believe that the delayed timeframe of the final limit will permit the DPF technology to become more universal in the mining industry. The mining industry should use its resources during this delay to resolve implementation issues on mining vehicles to meet the final limit.

We are aware of the following DPF technologies that are either commercially available or being further investigated by MSHA and NIOSH. Many of these systems have been discussed by us in preambles for the 2005 Final Rule (70 FR 32935) and the 2005 NPRM (70 FR 53284) and we are updating the discussions to include the new information that we have. The extension of time offered by this final rule will allow for more work to be done on these promising systems for implementation into the mining industry market.

a. *ArvinMeritor System.* In the 2005 proposed rule, we noted that the ArvinMeritor system, which utilizes active regeneration of the DPF, offers great potential for underground mines in further reducing DPM exposures. The ArvinMeritor system utilizes an on-board fuel burner system to regenerate DPFs. This system actively regenerates the filter media during normal equipment operations by causing the fuel to ignite the burner and thereby increase the exhaust temperature in the filter system. Consequently, this system does not require the host vehicle to travel to a regeneration station to regenerate the DPF. The condition of the DPF is monitored via sensors. We also stated that while this product was successfully evaluated at Stillwater's Nye Mine, we recently learned that the manufacturer had decided to concentrate on working with Original Equipment Manufacturers (OEMs) where they would be selling 50 units or more to one customer rather than selling one or two units to individual customers for retrofit application. It is our current understanding that this system is still commercially available for purchase in smaller quantities from ArvinMeritor distributors and local dealers.

b. *Johnson Matthey's CRT System. The Johnson Matthey CRT System is a DPF utilizing passive regeneration.* As stated above, passive regeneration works by using the exhaust gas generated by the engine to burn the DPM. Normally, DPF manufacturers utilize catalyst technology to lower the temperature needed for successful passive regeneration. By lowering the exhaust gas temperature needed for passive regeneration, a broader range of machines will have the necessary duty cycle to generate the exhaust gas temperature needed to burn the DPM. However, when a platinum coating is

used as the catalyst, it can also increase the nitrogen dioxide (NO_2) emissions from the engine exhaust. In mines with low ventilation rates, the increased NO_2 emissions can also result in increased NO_2 exposures to potentially dangerous levels for miners. We discussed this issue in the 2005 final rule (70 FR 32924–26).

In 2004, the NIOSH Pittsburgh Research Laboratory issued a contract to Johnson Matthey to develop a system that can regenerate at lower exhaust gas temperatures and control NO_2 emissions. The system is based on Johnson Matthey's CRT system and promotes regeneration at lower temperatures. Such DPFs are widely used in urban bus applications and are capable of passively regenerating DPFs at the temperatures commonly seen in the exhausts of underground mining equipment (above 250 °C for at least 40% of the operation time).

The laboratory evaluation of the systems continues under NIOSH contract by the Center for Diesel Research (CDR) at the University of Minnesota. The objective is to examine performance and suitability of the systems relative to heavy-duty diesel engines in underground mining applications, with specific focus on the effectiveness of controlling NO_2. If the results of laboratory evaluations show that the system is suitable for use in underground applications, NIOSH would continue to study this DPM control with a field evaluation in an underground mine. However, at this time the laboratory data is still incomplete, and NIOSH continues to work with the lab and Johnson Matthey on this promising technology.

c. *Diesel Particulate Reactor*™. We have begun testing in our diesel laboratory a high performance DOC that contains a substrate which is a catalyst treated, woven stainless steel alloy fabric cartridge. This Reactor is being tested as a stand alone unit, in combination with a HTDPF, and with a synthetic fuel called Synpar 200. Our preliminary laboratory data using the Reactor and the Synpar 200 synthetic diesel fuel has shown an effective whole DPM removal efficiency approaching 50 percent without any adverse changes in other engine emissions. We are aware that several mines are planning on trying one or several of the combinations listed. One underground nonmetal mine has equipped about 80% of its fleet of about 50 pieces of diesel equipment with the Reactor, and reports no operational or maintenance problems. We will include on our DPM Single Source Page our efficiency numbers for DPM removal when they become available. NIOSH has also contracted with the Center for Diesel Research to do additional testing on the Reactor and the Synpar 200 synthetic diesel fuel at this time.

d. *Fleetguard*. This company has partnered with other DPF companies that market such products as a Longview Lean NO_X Catalyst DPF. The Longview Lean NO_X Catalyst combines NO_X reduction plus a DPM reduction system.

One underground coal mine operator is planning on receiving a unit to investigate and install on a piece of mobile equipment. The system specifies a minimum exhaust gas temperature of 260°C at least 25 percent of operating time in order for regeneration to occur. We also understand that this device may have the ability for active regeneration. MSHA and NIOSH plan to work with the coal mine operator to monitor the device once it is installed.

Since the system utilizes NO_X reduction, we are planning on testing this device in our diesel laboratory to determine the amount of NO_X reduction and to determine if there would be any adverse effects on engine emissions from this control scheme. NIOSH is also planning on testing this device at a M/NM mine, that is, if the work at the underground coal mine proves promising for application in the mining industry.

e. *Rypos*. Rypos utilizes a sintered metal filter media for DPM filtration. The system uses electrical current for active regeneration. Initially, the system was used on stationary generator systems. Rypos has successfully tested a prototype system on a surface grader. Electrical power for filter regeneration was obtained from a second alternator on the grader that was dedicated exclusively to the DPF. At this time, Rypos is discussing with us and NIOSH development of a system for mobile mining equipment. We will update the mining community on our work with this device.

f. *Huss*. We are aware that a M/NM mine operator has purchased a Huss system with a ceramic DPF using active regeneration. However, we have not received any information on the application of this DPF to the machine at the mine or its performance. If and when we do, we will inform the mining community through the DPM Single Source Page.

g. *Other DPF Systems*. We continue to work with DPF manufacturers that are listed on our Web site at: *http://www.msha.gov/01-995/Coal/DPM-FilterEfflist.pdf*. The DPF manufacturers that have submitted data to us and are listed on our Web site are: CleanAir Systems, DCL International, Engine Control Systems, Catalytic Exhaust Products, Nett Technologies, Donaldson Company, and Filter Services and Testing Corporation. We understand that there are other DPM control technologies that could be available but the other manufacturers have not contacted us. We continue to discuss and evaluate the latest DPM control technologies for applicability with the mining market through this Technical Support Directorate.

h. *Diesel Engine Replacements*. Several commenters stated that the mines have been replacing older, dirtier engines with newer, EPA Tier engines. The EPA Tier engine requirements force engine manufacturers to build engines that comply with more stringent emission standards for NO_X, DPM, and CO over a time period. The Tier schedule normally requires the larger horsepower engines to meet more stringent emission standards first, then the smaller horsepower engines. At this time, all new engines being sold in the United States in all horsepower ranges are meeting a minimum of a Tier 2 EPA emission standard.

We agree that this trend which the mine operators are following to replace older engines has been a feasible approach to reduce DPM exposure to meet the interim limit. However, in order to meet the final limit, mine operators must continue to evaluate their engine inventories to determine which engines need to be replaced as they become older, and new cleaner engines are available.

In addition, if mine operators are considering adding a DPF system to a machine that is equipped with a high DPM emitting engine, they may first need to repower the machine with an engine having lower DPM emissions. In some cases, a Tier 1 engine may need to be replaced with a Tier 2 engine to allow for a successful application of the DPF. A lower DPM emitting engine would enable the machine to operate for a longer period between regenerations, or before a disposable DPF would need to be replaced. Interruptions to mine production activities to accommodate regeneration or to replace a disposable filter can be avoided when the engine and DPF are properly matched to each other.

To further emphasize this point, one commenter discussed the application of installing disposable DPF systems on Toyota pickup trucks. The mine operator stated that the cost of replacing the disposable DPF is cost prohibitive. However, we are aware that the engine model used in that Toyota truck is an old model that may be out of production

at this time. The truck engine described is a 128 hp engine. Based on information gathered by us, we believe that this engine may have a DPM emissions output of between 0.8 and 0.9 g/bhp-hr. This is considered a dirty engine and is higher than a Tier 2 engine standard. This would require more frequent DPF replacements when using disposable filters, or more frequent active regenerations, or the use of two DPFs as was discussed by the commenter, thus increasing the cost. A current Tier 2 engine in this horsepower range has a maximum DPM emission rate of 0.22 g/bhp-hr. An engine replacement or vehicle replacement could reduce the DPM output from each engine by up to 90 percent.

We believe that there are engines that could be used to repower the truck. As further discussed later in this section on Economic Feasibility, based on the cost estimates that the commenter presented, the cost savings of switching engines or even purchasing newer pickup trucks with cleaner engines could pay for the engine or truck in a minimal time frame.

In addition, more stringent EPA on-highway emission standards come into effect with on-highway vehicle models starting in 2007. The more stringent standards will require engine manufacturers to install a DPF system on all on-highway diesel powered vehicles. The 2007 model pickups that will be sold in the United States will then have DPF systems installed at the factory.

As discussed previously in this section, we are working with an engine manufacturer and a pickup manufacturer, NIOSH, and a coal mine operator to evaluate the technology being incorporated. We plan on testing the new engine/DPF system in our Diesel laboratory as soon as an engine/DPF system can be made available. The coal mine operator is concerned about the ability of the DPF system to regenerate. MSHA and NIOSH will be conducting in-mine studies to determine the feasibility of the regeneration process on the pickup trucks in both coal and M/NM mines. The extended period of time allowed for in this final rule should provide the additional time needed for this evaluation.

i. *Alternative Fuels and Ultra Low-Sulfur Fuels*. In our 2005 NPRM, we stated that during our compliance assistance efforts, we observed several mines using alternative fuels, including water emulsion fuels and biodiesel fuels, both of which are EPA approved fuels. We subsequently tested these alternative fuels to determine if they could decrease tailpipe DPM emissions. In each application the change to an alternative fuel had a positive impact on reducing engine emissions and miners' exposures to DPM. In some cases, reductions of 50 to 80+ percent were measured. While we found notable benefits, the use of alternative fuels can also cause equipment operation issues for mine operators. These operational issues have included initial clogging of the fuel filters when biodiesel is used, reduction of horsepower with the use of water emulsion fuels, and management of proper fueling of the correct fuel into specific machines. While these operational issues could be overcome, we believe that the mining industry needs the additional time offered by this final rule to work through implementation issues on a case-by-case basis.

The most common problem with alternative fuels is lack of geographic proximity of most mines to a fuel distributor. There are only three cities that are served by a water-emulsion fuel blender/distributor: Cleveland, Ohio, Houston, Texas, and Los Angeles, California. Biodiesel fuel is more widely available throughout the country than water-emulsion fuel, but some mines, particularly in the intermountain west and the west coast, may be 200 miles or more from the nearest biodiesel producer or distributor. Thus, mine operators in these isolated areas could incur significantly increased fuel transportation costs if they utilized biodiesel fuel at their mines.

Fuel manufacturers are building distribution centers near mining areas to reduce the transportation costs, but these centers will take some additional time to complete. Limited distribution is also a feasibility issue for metal and nonmetal mine operators who seek to obtain ultra low sulfur fuel. However, as discussed elsewhere in this preamble, the commercial availability of ultra low sulfur fuel (less than 15 ppm sulfur content) will increase during 2006 and beyond when on-road vehicles, and shortly after that, nonroad diesel engines in the United States will be required by the EPA to use only this type of diesel fuel. For these reasons, we believe the additional time provided in this final rule will allow mine operators the additional time they will need to comply is warranted.

j. *Water Emulsion Fuels*. In the 2005 NPRM, we explained that water emulsion fuels, such as PuriNox®, are blends of diesel fuels and water. The water is held in suspension with a surfactant. The water in the fuel reduces the engine combustion temperature resulting in reduced NO_2 and reduced DPM emissions. However, the added water also reduces the engine's horsepower. While the per gallon price of the water emulsion fuel is the same as standard fuel, we are aware of increases in engine consumption of these fuels by as much as 15 percent. However, continued increased use in mines is currently limited due to lack of fuel availability in most mining regions. Manufacturers of this fuel must install centralized blender facilities in order to make the fuel more available and economically feasible for use by the metal and nonmetal mining industry.

We also stated that we had observed some engines using water emulsion fuels. One issue appears to be with the use of very efficient water separators used on engine fuel systems to remove water from the fuel lines. We advised that a very efficient water separator will actually remove the water from the emulsion, thus affecting the engine's performance. An engine manufacturer that has experienced this with its engines has recommended replacing the more efficient water separator with a less efficient one.

Another issue identified by some mine operators is that some small machines cannot run, or run poorly, on this fuel. We are not aware of any testing that has been done to prove or disprove this. This may or may not be due to less complex fuel systems that cannot handle a change in fuel properties.

Since water emulsion fuels have been associated with horsepower loss, mines will have to determine through their own in-mine testing if their machines can continue to operate efficiently even with the power loss. Some situations where the power loss could affect a machine's productivity occur at multilevel underground mines at high elevations. Also, mines that require the use of permissible engines with pre-chamber combustion, such as the metal and nonmetal gassy mines, may need to determine any additional effects on these types of engines.

Several commenters noted that PuriNox®, a proprietary diesel fuel water emulsion product manufactured by the Lubrizol Corporation, will no longer be available in North America after calendar 2006. We regret this decision by Lubrizol, as we have documented very significant DPM reductions at mines that have experimented with, or permanently switched to PuriNox® fuel. Since most mines have been successful in attaining the interim limit using low DPM emission engines, environmental cabs, and upgraded ventilation, very few mines have switched to PuriNox® fuel, thus limiting demand for this product.

It's very limited geographic available in the three cities identified above also limited demand. It is possible that more mines might have switched to PuriNox® to attain the final DPM limit, if it were still available when the final limit becomes effective. However, as noted below, many of the DPM reduction benefits we have observed at mines using a water-emulsion fuel can also be achieved using high biodiesel content fuel blends.

k. *Biodiesel Fuels.* As noted above, the use of high biodiesel content fuel blends has resulted in significant DPM reductions of up to 80% or more at mines that have experimented with or switched entirely to such fuel blends. Even in blends as low as 20%, DPM reductions of nearly 40% have been documented. Actual DPM reductions depend on engines, duty cycles, etc., but reductions of at least 60% would be expected when fuel blends of B90 to B100 are used.

Biodiesel fuels are more readily available than water emulsion fuels. As noted below, biodiesel is currently available in every state except Alaska. The costs and therefore the demand for biodiesel have been related primarily to federal excise tax credits that have been available since 2004 to blenders of this fuel. The tax credits are passed along from the fuel blender to the purchaser in the form of reduced fuel costs. With current tax credits, biodiesel can be an attractive fuel alternative for the mining industry. In the late summer and fall of 2005, and again in the spring of 2006, due to market induced price swings for standard #2 diesel fuel, the price of biodiesel in many parts of the country, with the tax credit applied, was lower than standard diesel.

Several commenters expressed general agreement with our statements in the 2005 NPRM regarding the use of biodiesel fuel as an effective means of reducing DPM emissions (70 FR 53287). One commenter listed various other advantages of biodiesel, including reduced emissions of carbon monoxide, carbon dioxide, polycyclic aromatic hydrocarbon (PAH) compounds, oxides of sulfur, and total hydrocarbons, as well as better lubricity, higher flash point for increased fuel handling safety, and higher cetane number for better cold starts. However, some commenters asserted that biodiesel fuel is not a technologically feasible engineering control because it is not widely available in the eastern and western states, it causes unacceptable power loss, it is subject to gelling in cold weather, and it causes engine maintenance problems. These commenters also mentioned higher fuel costs as an impediment to increased usage of biodiesel. Technological feasibility issues relating to biodiesel fuel and economic feasibility issues are discussed in this section.

Examples of the specific concerns expressed by commenters who doubt the technological feasibility of biodiesel fuel included a mining industry organization that stated, ''While the use of biodiesel showed some promise in reducing EC at some mines, biodiesel caused reduced horsepower problems described by mine operators and is not widely distributed nor accessible at a reasonable cost to many mining operations.'' This commenter went on to say, ''* * * there is very little availability of biodiesel in the Eastern or Western United States, where many of the mining operations are located that will be impacted by the proposed rule.'' A large Montana platinum mining company that consumes about 1,000,000 gallons of diesel fuel per year commented that, ''* * * cold weather concerns were evaluated to determine the necessary storage requirements to reduce the potential for the fuel to gel.'' This commenter continued by stating that biodiesel cold flow properties in 100% form is not good below 45 degrees and would require some type of heating to make it flow. The regional supplier does not have the infrastructure to support this product due to the current low demand and newness of the product. This mine operator also evaluated the requirements for storing biodiesel on-site at the mine, and indicated that a 10,000 gallon tank would be needed for diesel, a 15,000 gallon tank would be needed for biodiesel, and a 10,000 gallon tank would be needed for the blended product, at a combined cost of over $250,000.

Another commenter stated that, ''There may be adverse effects on engine performance and maintenance that need careful consideration before selecting biodiesel as an alternative technology.'' Another commenter stated that, ''Cummins recommends a biodiesel fuel mix of no greater than 5%, but that mixture does not result in a significant DPM reduction.''

We agree that these commenters have concerns based on their current assessments of the biodiesel fuel. The extension of time allowed for in this final rule for meeting the final limit will assist mine operators in working through these operational issues if they decide to use biodiesel. Many of the biodiesel issues when resolved will apply to the entire mining industry. One example of this would be the logistics for transferring biodiesel fuel during the winter. Once the logistics for transferring the biodiesel in winter are resolved, all mines can use the information. This may be as simple as locating one or more companies that can ship biodiesel using insulated rail cars or tankers, or provide a service for warming up the fuel prior to delivery at the mine. We can provide these vendors on our Web site for the entire mining community for their use.

We are aware of several mines that are using very high biodiesel content blended fuels (near 100% biodiesel), and they have reported no operational or maintenance issues that were unanticipated or presented any difficulty for the respective mine. B100 has approximately 5%–7% less energy content than standard #2 petroleum diesel, and this difference is reflected in correspondingly lower horsepower output of an engine running on B100. Mine operators that are using high biodiesel fuel blends report that this horsepower loss is noticeable on some equipment, but manageable, and the power difference has not impacted production.

Biodiesel fuel acts as a solvent, and can loosen sediment in the fuel tanks and fueling systems of equipment that has run previously on standard diesel. This sediment can clog fuel filters for a period of time until the fuel system is fully cleaned, which typically takes a few weeks. During this period, fuel filters need to be changed more frequently than normal to avoid loss of engine power or stalling. This solvent effect has a long lasting benefit, however, in that the fuel system and injectors run cleaner as long as biodiesel fuel is used. One mine operator reported that their diesel engines have never run as well as they are now that the mine switched to a high biodiesel content blended fuel. He attributed the better performance to the higher lubricity of biodiesel and the cleaning effect on the fuel injectors.

The solvent properties of high biodiesel content fuel blends may adversely affect certain elastomeric components associated with an engine's fueling system, such as hoses and gaskets. Users need to contact the respective engine manufacturer to find out which components, if any, need to be replaced with their biodiesel-compatible counterparts. The extension of time allowed for under this final rule will provide the necessary time to make these contacts.

The solvent properties of the fuel may also remove certain types of paint if the fuel remains in contact with a painted surface for a prolonged period. This property of biodiesel does not render

the fuel infeasible. It is simply an attribute of the fuel of which users need to be aware and take appropriate precautions. Likewise, because of its somewhat higher viscosity, a property related to its better lubricity, high biodiesel fuel blends may tend to more easily pass over the rings and dilute the engine oil. For this reason, it may be advisable when using high biodiesel fuel blends to shorten engine oil change intervals.

Biodiesel is subject to oxidation, microbial growth, and other conditions during long term storage. Manufacturers typically recommend precautions be taken such as fuel turnover, tank mixing, and anti-oxidant treatments if fuel is to be stored for longer than 6 months. Prior to use, biodiesel fuels stored for longer than 6 months should also be tested for acid number, sediment, and viscosity to insure it remains within specifications. In its publication, ''Biodiesel Handling and Use Guidelines, DOE–GO–102006–2288. Second Edition, March 2006,'' the U.S. Department of Energy indicates that, ''the least stable B100 could be stored for up to 8 months, while the most stable could be stored for a year or more.'' Nonetheless, the National Biodiesel Board recommends biodiesel fuels be used within 6 months of purchase. Instituting these precautions in using biodiesel may take mine operators some additional time to implement thus justifying the delay allowed for in this final rule. For mining operations that consume large amounts of diesel fuel and receive fresh fuel shipments from reputable suppliers on a frequent basis, long term storage issues are not a major concern.

We agree with the comments regarding the cold flow properties of biodiesel presenting storage and handling challenges. Neat soy-diesel (a 100% biodiesel fuel made from soybean feedstock) has a cloud point of 32 degrees Fahrenheit, and a pour point of 28 degrees Fahrenheit. The cloud point is the temperature at which crystals begin to form in the fuel, causing the potential for clogged fuel filters. The pour point is the temperature at which the fuel begins to gel and becomes difficult to pump. At temperatures approaching the cloud point, neat soy-diesel needs to be heated to prevent handling difficulties.

Many industrial chemicals have similar cold weather handling properties, and practical means have been developed to enable routine storage and transfer of these chemicals at any temperature. The most common method for off-loading such materials from transportation vessels is to heat the tank. For example, steam can be applied at the railhead to rail tank cars that are specially designed to facilitate this process. Transportation vessels, either rail or truck, can also be moved into a heated building for unloading. Fixed storage tanks can be heated, placed inside a heated building, or in the case of underground mines, storage tanks can be placed underground. To prevent fuel from gelling during equipment operations, the equipment's fuel tanks, fuel lines, and fuel filters can be heated, either using recycled engine heat, or using an external heating source, as might be required if equipment is parked outside the mine overnight. Such provisions are common in some parts of the world for all diesel equipment.

Although the properties of biodiesel may necessitate special transportation, storage, and handling procedures by mine operators, the precautions that would need to be taken to address these properties are straightforward and technologically unsophisticated, such as more frequent fuel filter changes during the initial change-over period, heating transportation and storage tanks, etc. The process of mixing standard diesel and biodiesel to achieve a particular biodiesel blend, such as B20, B35, or B50 (20%, 35%, and 50% biodiesel with the remainder standard diesel, respectively), though not technologically challenging, would normally be done by the fuel distributor.

It is also significant that biodiesel is a ''drop in'' replacement for standard diesel in any diesel engine. The only engine modification that may be necessary in some engines is to insure that all elastomeric fuel system components (hoses, gaskets) are biodiesel compatible, however, any components that are not compatible can be easily replaced. For these reasons, of the many DPM controls that are available to underground M/NM mine operators, switching to biodiesel fuel may involve the fewest difficult implementation issues. The consequences of failing to implement the precautions listed above could be quite significant. But information regarding these implementation issues is well defined and widely distributed (MSHA will include this important information on its DPM Single Source Page), and fully addressing them would be technologically and economically feasible for most, if not all mine operators.

We agree with comments that the availability of biodiesel fuel is more limited than standard diesel, especially in the eastern and western states. However, we believe that biodiesel will be more readily available in more areas of the country by the effective date of this final rule, even though its use may increase fuel transportation costs for some mines. Biodiesel is available from over 1,400 commercial petroleum distributors and over 750 retail stations across the country. The only state without in-state access to biodiesel is Alaska. The operator of a large underground metal mine in Alaska, however, reported that their fuel is shipped from Seattle, and their supplier has access to biodiesel.

Regarding the availability of biodiesel in the eastern and western states, we acknowledge that most biodiesel production is concentrated in the Midwest, however as noted above, it is available in the contiguous 48 states, and Hawaii and biodiesel production and availability nationally is growing rapidly. Production of biodiesel in the U.S. grew from about 25 millions gallons in 2004 to about 75 million gallons in 2005, and significant further production growth is expected in the future, including plants in currently underserved areas like Wyoming, Montana, Washington, California, Colorado, and Texas in the western part of the U.S., and Tennessee, Kentucky, Pennsylvania, Virginia, North Carolina, and New York in the east. This expected increased availability of biodiesel fuel by 2008 in currently underserved areas of the country supports our decision to phase-in the final DPM limits in three steps from 308_{EC} μg/m^3 in May 2006 to 350_{TC} μg/m^3 in January 2007 to 160_{TC} μg/m^3 in May 2008. Biodiesel plants currently under construction are rated at 329 million gallons of annual production capacity, and plants in the pre-construction phase will add an additional 518 million gallons of annual production capacity.

The Montana platinum mining company referenced above stated that, ''No manufacturers of biodiesel have been located in the proximity of the mine, making availability and delivery a significant concern.'' While there may be no biodiesel manufacturers in proximity to the mine at the present time, a 15,000,000 gallon annual capacity biodiesel plant is scheduled to go online in Culbertson, MT in March 2007, and there is currently a commercial biodiesel distributor about 140 miles from the mine site in Bozeman, MT. This distributor, which receives its supply of biodiesel via rail cars, has the capability to supply the mine's required 1,000,000 gallons per year, and it is equipped to use steam to heat the cars for off-loading during the winter months.

Another commenter that expressed concern about the lack of biodiesel availability was a gold mine operator in the Elko, Nevada area. This operator said, ''B20 is available in Salt Lake City, approximately 300 miles away.'' While this is undoubtedly true, there is also a commercial biodiesel distributor at Battle Mountain, Nevada, about 120 miles from the mine that can supply any grade of biodiesel from B2 to B100. This distributor also receives its biodiesel via rail cars. It does not currently have the capability to apply steam to cars in the winter months to facilitate cold weather off-loading. However, a representative for the distributor indicated that such a capability would be provided if a customer entered into a supply contract providing for sufficient fuel volumes; a requirement that this mine should be able to satisfy within the time prescribed for the effective date of the final limit.

A trona mine operator also expressed concern over the availability of biodiesel fuel near the mine in southwestern Wyoming. However, there is a commercial distributor of all grades of biodiesel fuel in Jackson, WY approximately 185 miles from the mine, and another commercial distributor in Richmond, UT approximately 180 miles from the mine. These fuel distributors are likely farther from the mine than the mine's current distributor, and shipments of fuel from these distributors would be subject to higher transportation costs. Although the mine operator would have to determine the feasibility of receiving biodiesel from such distance, we believe that the biodiesel industry will resolve these logistic problems in time for the effectiveness of the final limit in May 2008. The Biodiesel Board included comments to the 2005 NPRM stating how distribution of biodiesel fuel is expanding throughout the United States, which helps to make the final limit feasible as prescribed in the final rule.

In response to a commenter's concerns about engine warranties, the engine manufacturers do not warrant their engines against fuel related problems, either biodiesel or standard petroleum diesel. Regarding the commenter's concern relating to their Cummins engines, the Cummins on-line customer assistance fact sheet on biodiesel states that,

> Given the current understanding of bio fuels and blending with quality diesel fuel, it would be expected that blending up to a 5% volume concentration should not cause serious problems. For customer's intent on blending bio fuels above 5% volume concentration, the following concerns represent what is currently known in the industry.

This on-line fact sheet goes on to identify specific areas of concern, including possible adverse effects on engine performance and fuel system integrity/durability, low temperature operability, heat content, oil change intervals, effects on elastomeric fuel system components, and a variety of issues related to long term storage, such as fuel stability, oxidation, corrosion, microbial growth, and fuel acid content. These issues are potentially significant, and if not appropriately addressed, could result in serious operational problems and engine damage. However, as noted above, we believe that solutions to these issues could be implemented by the extension of time offered by this final rule, so mine operators should not be impeded from utilizing high biodiesel content fuel blends.

Regarding engine warranties, the Cummins on-line fact sheet states that,

> Cummins neither approves or disapproves of the use of biodiesel fuel. Cummins is not in a position to evaluate the many variations of biodiesel fuels or other additives, and their long-term effects on performance, durability or emissions compliance of Cummins products. The use of biodiesel fuel does not affect Cummins Material and Workmanship warranty. Failures caused by the use of biodiesel fuels or other fuel additives are NOT defects of workmanship and/or materials as supplied by Cummins Inc. and CANNOT be compensated under the Cummins' warranty.

With respect to engine warranties, Cummins treats biodiesel no differently than it treats standard petroleum-based diesel. Most of the engine manufacturers have similar warranty positions.

A trona mine operator reported that they had obtained DPM sample results for their mine that exceeded the 160_{TC} μg/m^3 final DPM limit despite using a B20 biodiesel fuel blend (20% biodiesel mixed with 80% standard petroleum diesel fuel). A stone mine operator reported similar results with B20 fuel. These commenters question whether biodiesel is a feasible control, since they were not able to attain compliance with the 160_{TC} μg/m^3 final DPM limit using this fuel.

Based on extensive in-mine testing and both personal and area sampling at mines that have either experimented with, or switched permanently to biodiesel fuel blends, we believe significant DPM reductions would not have been expected with biodiesel blends as low as B20. In our evaluations, we only began to see significant DPM reductions at B35 or higher, with higher biodiesel content producing lower DPM levels. The DPM reductions of 60% to 80% that we have documented were achieved with fuel blends of 98% to 99% biodiesel. Thus, we continue to believe that biodiesel is a feasible DPM control that is capable of achieving significant reductions (as defined in the 2005 rule (70 FR 32868, 32916)) in DPM exposure when this fuel is used in neat form (100% biodiesel) or in sufficiently high blends with standard petroleum diesel fuel.

Several commenters also mentioned that they were considering, or had switched to ultra low sulfur (15 ppm) diesel fuel. As expected, these commenters did not report significant DPM reductions after the switch to this fuel. The primary benefit of ultralow sulfur diesel is to enable advanced emission reduction technologies that utilize catalysts that would be poisoned by higher sulfur content fuel.

l. *Installation of Environmental Cabs.* Environmental cabs are a proven means to reduce worker exposure to DPM. While much of the construction-type equipment used in underground stone mines comes equipped with environmental cabs, the cabs on specialty mining equipment used in underground hard rock mining are less common, particularly in mines with narrow drifts or low seam heights. As mine operators realize the benefits of cabs, more and more pieces of equipment are being purchased or retrofitted with environmental cabs. These cabs provide protection for workers not only from diesel particulate but also from noise and dust.

Only a few comments were received on the subject of environmental cabs. These comments typically agree that environmental cabs can be effective in reducing the occupant's DPM exposures, but applications may be limited by three factors: retrofitting cabs is not always possible, especially on some older machines, there may not be adequate clearance for cabs in certain confined areas of some mines, and cabs offer no protection for miners who must work outside a cab. A comment received from a mining industry organization was typical:

> Environmental cabs are effective. However, they can not be retrofitted to all mining equipment. Further, there are some jobs in underground mines where miners work outside of equipment and cabs would provide them no protection.

Another industry organization stated,

> Simply put, fully enclosed environmental cabs provide superb protection to equipment operators from exposure to DPM. However, they provide no protection to miners working alongside such equipment. Furthermore, installation of fully enclosed environmental

cabs can only be accomplished where the resulting larger profile of the equipment fits properly within the heading size in the mine where such equipment is operated.

We agree in general with these comments and we believe that a cab's feasibility needs to be evaluated on a case-by-case basis as to exactly which equipment is suitable for retrofit of a cab, or whether space limitations in certain areas at a particular mine would prevent utilization of equipment with cabs. In these respects, questions regarding the feasibility of using cabs as an engineering control to prevent DPM exposure are no different than questions regarding the feasibility of using cabs for control of dust or noise exposures.

m. *Ventilation.* All underground M/NM mines rely on ventilation to dilute and carry away diesel particulate matter and toxic gases as well as to provide fresh air to the miners. Based on the comments received from mine operators and from our own observations during mine inspections and compliance assistance mine visits, it is clear that ventilation is a key component of nearly every mine's DPM control strategy.

However, the extent to which it is feasible for ventilation system performance to be improved or upgraded, either to obtain compliance with the final DPM limit or to obtain compliance in combination with other controls, is disputed by some commenters. One commenter from a gold mine in Nevada stated that, ''Ventilation is near its capacity. Further increases are likely to create fugitive dust problems from haulage vehicles.'' Another commenter addressing conditions at a different multilevel metal mine indicated that increasing airflows in that mine's small and widely distributed working places would be difficult. This commenter also disputed our observation in the preamble to the 2005 final rule that a major multi-million dollar ventilation upgrade at that mine was not a DPM compliance related expense (70 FR 32934–32936). Another commenter from a mining industry organization stated that a notable characteristic of underground stone mines is their large open spaces (room and pillar mining) that are ventilated naturally. To introduce forced ventilation in mines presently ventilated naturally would entail enormous costs in mine structures that would be needed to direct the ventilation inside the mine.

These comments represent the extremes in ventilation practice in the underground M/NM mining industry. Deep multilevel mines, due to a variety of factors, typically have complex, costly, and sophisticated ventilation systems, often designed by a professional mine ventilation engineer, and usually operated and managed by engineers with specific mine ventilation training and experience. These systems normally consist of a network of main, booster and auxiliary fans, and a complex array of interconnected shafts, raises, and ventilation control structures. In contrast, room and pillar stone mines typically have very simple ventilation systems which may not have been designed at all. Such systems may rely entirely on natural ventilation alone, and those that do incorporate forced ventilation are often simple blowing or exhausting systems, or may consist of nothing more than one or a few free standing booster fans underground. They are normally operated or managed by the mine foreman or manager, and it is rare for such individuals to have had any professional training in mine ventilation engineering.

At most multilevel metal mines, high ventilation system costs provide a major economic incentive to operators to optimize system design and performance, and therefore, there are typically few if any feasible upgrades to main ventilation system elements that these mines haven't already implemented, or would have implemented anyway, whether or not the DPM rule existed. Accordingly, and though it remains an option that might be attractive in new development, we expect very few mines of this type to implement major ventilation system upgrades to achieve compliance with this rule.

Despite the built-in incentives to design and operate efficient ventilation systems, however, we have observed aspects of ventilation system operation at such mines that can be improved, usually relating to auxiliary ventilation in stopes. Auxiliary fans are sometimes sized inappropriately for a given application, being either too small (not enough air flow) or too large (causing recirculation). Auxiliary fans are sometimes poorly positioned, so that they draw a mixture of fresh and recirculated air into a stope. Auxiliary fans are sometimes connected to multiple branching ventilation ducts, so that the air volume reaching a particular stope face may be considerably less than the fan is capable of delivering. Perhaps most often, the ventilation duct is in poor repair, was installed improperly, or has been damaged by blasting or passing equipment to the extent that the volume of air reaching the face is only a tiny fraction of that supplied by the fan. We believe that these and similar problems exist at many mines, even if the main ventilation system is well designed and efficiently operated.

Without extensive on-site study, we are unable to assess the validity of the commenter's assertion that the mine's ventilation is near its capacity, but such a condition would not be unusual, at least with respect to major ventilation system elements like shafts and main fans. Short of a major ventilation system upgrade such as a new shaft sinking or main fan installation or repowering, it would be more likely that auxiliary ventilation system performance could be improved.

Regarding the issue of fugitive dust, which is mineral dust that is entrained in and carried by the ventilation air stream, if ventilation increases are required to reduce DPM levels, but such increased ventilation would be so great as to pick up dust from the mine floor or muck piles, it may be necessary for the mine operator to apply water more frequently to haul roads and working places, or use dust control chemicals to manage corresponding fugitive dust levels. Mine operators frequently face trade-offs like this, and we are confident this problem can be successfully handled within the prescribed time frames of this final rule. For example, mines that currently water their haul roads once a shift, may need to water their haul roads twice a shift.

Regarding the comment relating to the difficulty of increasing ventilation in small and widely distributed working places, we conducted an extensive study of the auxiliary ventilation systems at this mine. The company ventilation engineer stated that the stope ventilation systems were designed to deliver a minimum of 12,000 cfm to the faces. The 12,000 cfm airflow would dilute emissions for a 100 hp loader (PI – 5000 cfm) to 321_{EC} μg/m^3. This value would increase by the level of DPM in the stope intake. During this survey, several of the stope ventilation systems failed to provide that level of airflow to the faces, and in fact, some systems lost over 90% of their air volume before reaching the end of the vent duct. This was primarily due to long ventilation tubing lines and poor maintenance of the ventilation tubing. Also, it was noted during the survey that improper fan placement at the mouth of the stopes allowed exhaust air to be recirculated back to the face before being diluted by the footwall lateral airflow.

This commenter also responded to our analysis of a major ventilation upgrade at this mine, characterizing it as ''suspect,'' but offering no specific comments or corrections. The mine in

question had instituted a major upgrade of the ventilation system including new aircourses, new vent raises, and new and redeployed main and booster ventilation fans. The $9,000,000 upgrade increased total mine airflow by 34% to 840,000 cfm while reducing total fan power requirements by 1,000 hp through more efficient deployment of booster fans.

As a result of further discussions with personnel at the mine, we had determined that the upgrade had several objectives in addition to DPM control, including greater system efficiency such as eliminating an excessive number of booster fans (some competing with each other for air), the need to accommodate increased production, the need to ventilate a ramp used by trucks to haul ore upgrade from the levels below the bottom of the shaft, and the desire to increase the number of ventilation intakes into the mine, thereby providing more fresh air emergency escape routes and reducing intake aircourse air velocities (for reduced dust entrainment and enhanced miner comfort). We were told that the mine had ''overreached'' the existing ventilation system, and that the upgrade was overdue, even without consideration for DPM levels in the mine. Based on this information, and in response to comments from this mine operator addressing the August 14, 2003 proposed rule on the interim DPM limit, we had suggested that the total cost of the ventilation upgrade should be only partially DPM-related. We also pointed out that the cost of the upgrade needed to be annualized because the asset had an expected useful life of many years, resulting in a yearly cost that was a small fraction of the $9,000,000 expense. We disagree with the characterization of our analysis as ''suspect,'' because we believe it is fully supported by the facts, and because the commenter provided no explanations or corrections regarding our data or methods.

Room and pillar stone mine ventilation is entirely different than multilevel metal mine ventilation. Ventilation at stone mines was addressed extensively in the preamble to the 2005 final rule (70 FR 32931–32932). We agree that ventilation system upgrades may not be the most cost effective DPM control for many mines, and for others, ventilation upgrades may be entirely impractical. However, at many other mines, perhaps the majority of mines affected by this rule, ventilation improvements would be an attractive DPM control option, either implemented by itself or in combination with other controls. The additional time provided under this final rule will provide mine operators more time to explore these options.

Indeed, during our DPM compliance assistance visits, we have observed that ventilation upgrades have been implemented at many mines in the stone sector for DPM control. Nearly every stone mine visited by us had completed, had begun, or was planning to implement ventilation system upgrades.

At many high-back room-and-pillar stone mines, we observed ventilation systems that were characterized by (1) inadequate main fan capacity (or no main fan at all), (2) ventilation control structures (air walls, stoppings, curtains, regulators, air doors, brattices, etc.) that are poorly positioned, in poor condition, or altogether absent, (3) free standing booster fans that are too few in number, too small in capacity, and located inappropriately, and (4) no auxiliary ventilation for development ends (working faces). At some mines, the ''piston effect'' of trucks traveling along haul roads underground, along with natural ventilation pressure, provide the primary or only driving forces to move air.

In naturally ventilated mines, temperature-induced differences in air density between the surface and underground result in natural air flows through mine openings at different elevations. Warmer and lighter mine air rises up out of a mine during the colder winter months, which draws in cooler and heavier air at lower elevation mine openings. In the summer, cooler and denser mine air flows out of lower elevation openings, which draws warmer less dense air into higher elevation openings. Under the right conditions, such air flows can be significant, but they are usually inadequate by themselves to dilute and carry away DPM sufficiently to reduce miners' exposures to the interim limit.

The other principal shortcoming of natural ventilation is the inherent lack of a method of controlling air flow quantity and direction. Ventilation air flows can slow or stop when temperature differences between the surface and underground are small (common in the spring and fall), and the flow direction reverses between summer and winter, and sometimes even between morning and afternoon.

Mine operators normally supplement natural ventilation with booster fans underground. However, if overall air flow is inadequate, as is usually the case with naturally ventilated mines, and when mine elevation differences or surface and underground temperature differences are small, booster fans are largely ineffective.

The all too frequent result of these deficiencies is a ventilation system that is plagued by insufficient dilution of airborne contaminants, short circuiting, recirculation, and airflow direction and volume that are not controllable by the mine operator. Mines experiencing these problems could benefit greatly from upgrading main, booster, and/or auxiliary fans, along with the construction and maintenance of effective ventilation control structures. Consequently, we have urged the mining industry to utilize mechanical ventilation to improve overall air flows and to enable better control of ventilating air.

Ventilation fan upgrades for the stone mining sector are usually relatively inexpensive due to the low mine resistance associated with large openings. In many of these mines, a 250,000 cfm air flow can be obtained at less than 1 inch of water gage pressure. This air flow can be provided by a 50 horsepower motor.

We agree with the commenter that the major cost in these applications is usually distribution of the air flow underground to insure that adequate air quantities reach the working faces rather than short-circuiting to a return or recirculating around free-standing booster fans. Good air flow distribution requires such practices as installing or repairing ventilation control structures (brattice line, air curtains, etc.) or changes in mine design to incorporate unmined pillars as air walls. Such ventilation control structures are not complex to install, and since they usually have a very long useful life, when the cost of such controls is annualized, the yearly cost is only a fraction of the initial acquisition and installation costs.

Despite the commenter's suggestion to the contrary, a great many underground stone mines are currently ventilated with main and booster fan systems. The necessary ventilation control structures have also been installed in a great many such mines to facilitate the efficient and effective distribution of ventilation air underground. One commenter, a stone producer with seven underground mines, reported that, ''All of [their] mines have performed major ventilation upgrades,'' including ventilation surveys by an outside contractor, installation of larger main fans, installation of new and larger portable fans that are used at active headings, use of larger booster fans, and the installation of ''new ventilation stoppings and curtains at various locations throughout the mine at all mines.'' Clearly, based on this company's experiences and our

observations at many other mines, the technological feasibility of this type of DPM engineering control is well established for the stone sector of the underground M/NM mining industry, although it may take some time for mines to make the necessary changes.

n. *DPM Sampling Issues.* A trona mine operator, in reporting their DPM sampling results in their comments, indicated that these samples were analyzed using the NIOSH 5040 method and calculated using the MSHA Sampling Method to determine exposure, which does not take into account significant IH factors such as shift length over 480 minutes, average pump flow rates using pre-sample calibration and post-sample calibration figures, and other environmental factors such as temperature and pressure. We disagree that the MSHA Sampling Method fails to account for these industrial hygiene (IH) factors.

Our DPM sampling procedures are posted on the M/NM DPM Single Source Page, which is linked to our internet home page. Exposures are determined from the sampling data in accordance with the formula on page T–7 of the sampling procedures, as shown below:

$$\text{Carbon Concentration } (\mu g/m^3) = \frac{C\ (\mu g/cm^2) * A\ (cm^2) * 1{,}000\ L/m^3}{1.7\ Lpm * 480\ min}$$

Where:

C is the mass of carbon, expressed in micrograms, deposited on the filter per square centimeter of filter surface

A is the area of the filter onto which DPM is deposited, expressed in square centimeters

1,000 L/m^3 is a unit conversion factor to convert liters to cubic meters (the pump flow rate is expressed in liters per minute, whereas the DPM concentration is expressed in micrograms per cubic meter)

1.7 Lpm is the pump flow rate, expressed in liters per minute

480 min is the number of minutes in an 8-hour work shift

We account for work shifts longer or shorter than 8 hours (480 minutes) by shift-weighting all sample results. The shift-weighting process is explained in the DPM Compliance Guide, which is also posted on the M/NM DPM Single Source Page and is summarized below:

''Average full shift airborne concentration'' means that a miner's exposure is determined by measuring the average concentration of airborne DPM to which the miner is exposed over a full work shift, regardless of shift length. Temporary excursions above a limit are permitted from time to time during the shift, as long as the average over the entire shift is within the limit. The term, ''average eight hour equivalent full shift airborne concentration,'' refers to our longstanding practice of ''shift-weighting'' when applying compliance limits for airborne contaminants to exposures that occur over a time period that is different from a standard 8-hour shift. Our compliance limits are normally based on 8 hours of workplace exposure to a contaminant and 16 hours of recovery time in the absence of the contaminant. The workplace 8-hour shift weighted average (SWA) exposure is computed as the mass of DPM on the filter divided by the 8-hour sample volume, which is 0.816 cubic meter for a sample flow rate of 1.7 liters per minute.

Thus, our DPM sampling and analytical procedures do account for work shifts that are longer than 8 hours. Regarding the other industrial hygiene factors which the commenter claims are not addressed, our sampling procedures on p. T–3 requires pre-sample calibration of the sampling pump, and on p. T–6, requires post-sample calibration of the sampling pump. The pre-sample and post-sample calibrations are required to be performed in accordance with the procedures outlined in Chapter C of the M/NM Health Inspection Procedures Handbook. Since our pump calibration devices measure true volumetric flow, day to day variations in atmospheric pressure due to weather changes are irrelevant. However, pressure effects from calibrating a pump at one elevation and sampling at a significantly different elevation can be important. Accordingly, among the many requirements relating to the use of sample pumps contained in the M/NM Health Inspection Procedures Handbook is one specifying that pump calibrations must be performed within 1,000 feet of the elevation where sampling will be conducted, or if not, that the specified procedures for adjusting pump flow rate for elevation must be followed. Our inspectors are also required to measure and record the temperature where sampling occurs. Our DPM sampling field notes form has a space for temperature that must be filled in for every sample taken.

B. Economic Feasibility

We have determined that phasing in the final DPM limit of 160_{TC} µg/m^3 as prescribed in the final rule is economically feasible for the M/NM mining industry. Economic feasibility does not guarantee the continued viability of individual employers, but instead, considers the industry in its entirety. In *United Steelworkers of America* v. *Marshall, 647 F.2d 1189, 1265 (1980)* regarding OSHA's statutory criteria for establishing economic feasibility, the Court recognized that:

The most useful general judicial criteria for economic feasibility comes from Judge McGowan's opinion in *Industrial Union Dep't, AFL–CIO* v. *Hodgson, supra.* A standard is not infeasible simply because it is financially burdensome, *499 F.2d at 478*, or even because it threatens the survival of some companies within an industry:

Nor does the concept of economic feasibility necessarily guarantee the continued existence of individual employers. It would appear to be consistent with the purposes of the Act to envisage the economic demise of an employer who has lagged behind the rest of the industry in protecting the health and safety of employees and is consequently financially unable to comply with new standards as quickly as other employers. * * *

Id. (footnote omitted). A standard is feasible if it does not threaten ''massive dislocation'' to, *AFL–CIO* v. *Brennan*, supra, *530 F.2d at 123*, or imperil the existence of, *American Iron & Steel Institute* v. *OSHA*, supra, *577 F.2d at 836*, the industry. No matter how initially frightening the projected total or annual costs of compliance appear, a court must examine those costs in relation to the financial health and profitability of the industry and the likely effect of such costs on unit consumer prices. Id. More specifically, *Industrial Union Dep't, AFL–CIO* v. *Hodgson*, supra, teaches us that the practical question is whether the standard threatens the competitive stability of an industry, *499 F.2d at 478*, or whether any intra-industry or inter-industry discrimination in the standard might wreck such stability or lead to undue concentration. *Id. at 478, 481*. Granting companies reasonable time to comply with new PEL's might not only enhance economic feasibility generally, but, where the agency makes compliance deadlines uniform for competing segments of industry, can also prevent such injury to competition. *Id. at 479–481. United Steelworkers of America, AFL–CIO–CLC* v. *Marshall*, (OSHA Lead) 647 F.2d 1189, 1265 (D.C. Cir. 1980). *To prove economic feasibility, ''OSHA must construct a reasonable estimate of compliance costs and demonstrate a reasonable likelihood that these costs will not threaten the existence or competitive structure of an industry, even if it does portend disaster for some marginal firms.'' Steelworkers, 647 F.2d at 1272. As with technological feasibility, OSHA is not*

*required to prove economic feasibility with certainty, but is *981 **153* required to use the best available evidence and to support its conclusions with substantial evidence. *See id. at 1267.*

In a separate case involving review of an OSHA standard, the D.C. Circuit Court stated that:

''Congress does not appear to have intended to protect employees by putting their employers out of business—either by requiring protective devices unavailable under existing technology or by making financial viability generally impossible.'' See *Industrial Union Dep't., 499 F.2d at 467 (D.C. Circuit 1974).*

A standard would not be considered economically feasible if an entire industry's competitive structure were threatened. *Id.* at 478; *See also, AISI–II, 939 F.2d 975, 980 (DC Cir. 1991); United Steelworkers, 647 F.2d at 1264–65; AISI–I, 577 F.2d 825, 835–36 (1978).* This would be of particular concern in the case of foreign competition, if American companies were unable to compete with imports or substitute products. The cost to government and the public, adequacy of supply, questions of employment, and utilization of energy may all be considered when analyzing feasibility.

In determining whether these factors might reasonably be significant in analyzing the economic feasibility of a rule, MSHA has relied on a 1% ''screen'' of the yearly costs industry is estimated to incur to comply with a rule relative to annual industry revenues. When yearly costs are less than 1% of annual revenues, MSHA views that the costs of the rule are below the threshold necessary to conclude that such an extensive analysis is necessary to establish the economic feasibility of the rule. In that case, MSHA presumptively concludes that the rule is economically feasible.

This final rule will continue to require mine operators to establish, use and maintain all feasible engineering and administrative control methods to reduce a miner's exposure to the applicable final limit. It affords mine operators the flexibility to choose engineering and administrative controls, or a combination of controls to reduce a miner's exposure to DPM. When engineering and administrative controls do not reduce a miner's exposure to the DPM limit, the controls are infeasible, or controls do not produce significant reductions (as defined in the 2005 rule (70 FR 32868, 32916)) in DPM exposures, operators must continue to use all feasible engineering and administrative controls and supplement them with respiratory protection. Though mine operators may choose to use an engineering control or an administrative control to reduce a miner's exposure, or a combination thereof, existing § 57.5060(d) prohibits a mine operator from using respiratory protection in lieu of feasible controls. Mine operators must establish a respiratory protection program when controls are infeasible. Section 57.5060(d), as promulgated under the 2005 rule, incorporates by reference MSHA's current respiratory protection program requirements for metal and nonmetal mines at §§ 56.5005(a) and (b) and 57.5005(a) and (b). These provisions include requirements for selection, fit-testing, and maintenance of respirators. In addition, mine operators must follow the requirements under paragraphs (d)(1) and (d)(2) of the 2005 rule for appropriate filters for respirators. If we confirm that mine operators have met all of the abovementioned requirements for addressing a miner's overexposure, and the miner's exposure continues to exceed the final limit (not counting respirators), we will not issue a citation for an overexposure. Instead, we will continue to monitor the circumstances leading to the miner's overexposure, and as controls become feasible, we will require the mine operator to install and maintain them to reduce the miner's exposure to the final limit. We believe that existing controls used to reduce miners' exposures to the current interim limit can be used in helping mine operators achieve compliance with the final limits. Therefore, in determining the economic feasibility of engineering and administrative controls that the M/NM underground industry will have to use under this final rule and using the 2001 REA as a basis, we compared the cost of controls that are used to comply with the existing DPM limit of 308_{EC} μg/m³ to that of the newly promulgated final limits. These controls include diesel particulate filters (DPFs), ventilation upgrades, oxidation catalytic converters, alternative fuels, fuel additives, enclosures such as cabs and booths, improved maintenance procedures, newer engines, various work practices and administrative controls. Our comparison included costs of retrofitting existing diesel-powered equipment and regeneration of DPFs.

On the basis of information in the rulemaking record, including our current enforcement experience, we have determined that the final rule is economically feasible for the underground M/NM mining industry as a whole, as was the 2005 final rule. In the 2005 final rule, we determined that the 308_{EC} μg/m³ interim limit is economically feasible. To determine whether this final rule is economically feasible, we analyze economic feasibility from two different perspectives. First, we analyze whether the new requirements of the final rule (medical evaluation and transfer) are economically feasible. Second, we analyze whether the additional cost of moving from the interim limit of 308_{EC} μg/m³ to the final limit of 160_{TC} μg/m³ is economically feasible.

Analyzed from the first perspective, the additional yearly costs of the final rule are $69,170. The derivation of the costs of medical evaluation and transfer provisions of the final rule are explained in Section IX.A of this preamble. The total yearly compliance cost of these new provisions for the underground M/NM mines that use diesel equipment is only 0.001% of the annual revenues for these mines, well below the 1% ''screen'' that we use as a presumptive benchmark of economic feasibility. Hence, we conclude that this final rule is economically feasible for underground M/NM mines that use diesel equipment. Table V–1 shows these calculations.

Table V-1. Estimated Yearly Costs of Final Rule Relative to Yearly Revenues For Underground M/NM Mines That Use Diesel-Powered Equipment

Mine Size	Yearly Costs of Final Rule[1]	Yearly Revenues[2]	Costs as Percentage of Revenues[3]
1-19 Employees	$9,968	$222,357,776	0.004%
20-500 Employees	$54,225	$3,653,028,457	0.001%
Over 500 Employees	$4,977	$960,859,144	0.001%
All Mines	$69,170	$4,836,245,377	0.001%

[1]Table IX-1, Total Yearly Costs of the final rule for given mine size categories.

[2]Yearly revenues for underground metal/nonmetal mines were obtained by multiplying price and production figures from Mining & Quarrying Trends, 2004 (Tables 1 and 3). These revenues were then prorated by hours of employment to obtain an estimate of revenues only for mines that use diesel equipment. Data for mine hours and employment are from MSHA's Directorate of Program Evaluation and Information Resources, 2004 calendar year data. Diesel mines are identified based on DPM sampling data.

[3](Costs as Percentage of Revenues) = (Yearly Costs of Final Rule) / (Yearly Revenues).

Analyzed from the second perspective, the additional yearly costs for underground M/NM mines to move from the interim limit to the final limit of 160_{TC} μg/m³ are $8,454,853. The derivation of these costs of achieving the 160_{TC} μg/m³ final limit, given that the 308_{EC} μg/m³ interim limit is in effect, are provided in Section IX.B of this preamble. The total yearly cost of meeting the final limit for the underground M/NM mines that use diesel equipment is only 0.175% of the annual revenues for these mines, well below the 1% ''screen'' that we use as a presumptive benchmark of economic feasibility. Hence, we conclude that the final limit is economically feasible for underground M/NM mines that use diesel equipment. Table V–2 shows these calculations.

Table V-2. Estimated Yearly Cost of Implementing the 160_{TC} µg/m^3 Final Limit Given 400_{TC} (308_{EC}) µg/m^3 Interim Limit in Effect Relative to Yearly Revenues For Underground M/NM Mines That Use Diesel-Powered Equipment

Mine Size	Yearly Cost of Implementing the 160_{TC} µg/m^3 Final Limit[1]	Yearly Revenues[2]	Costs as Percentage of Revenues[3]
1-19 Employees	$1,917,604	$222,357,776	0.862%
20-500 Employees	$6,019,259	$3,653,028,457	0.165%
Over 500 Employees	$517,991	$960,859,144	0.054%
All Mines	$8,454,853	$4,836,245,377	0.175%

[1]Table IX-5, Yearly Cost Adjusted for Several Factors of implementing the 160_{TC} µg/m^3 final limit for given mine size categories.

[2]Yearly revenues for underground metal/nonmetal mines were obtained by multiplying price and production figures from Mining & Quarrying Trends, 2004 (Tables 1 and 3). These revenues were then prorated by hours of employment to obtain an estimate of revenues only for mines that use diesel equipment. Data for mine hours and employment are from MSHA's Directorate of Program Evaluation and Information Resources, 2004 calendar year data. Diesel mines are identified based on DPM sampling data.

[3](Costs as Percentage of Revenues) = (Yearly Costs of Final Rule) / (Yearly Revenues).

In circumstances where the use of further controls may not be economically viable, the standard provides for a hierarchy of control strategy that allows specifically for the cost impact to be considered on a case-by-case basis. Our DPM enforcement policy, therefore, takes into account the financial hardship on a mine-by-mine basis, which we believe effectively accommodates mine operators' economic concerns, particularly those of small mine operators.

Whether controls are feasible for individual mine operators is based in part upon legal guidance from decisions of the independent Federal Mine Safety and Health Review Commission (Commission) involving enforcement of MSHA's noise standards for M/NM mines, 30 CFR 56.5–50 (revised and recodified at 30 CFR 62.130). According to the Commission, a control is feasible when it: (1) Reduces exposure; (2) is economically achievable; and (3) is technologically achievable. See *Secretary of Labor* v. *A.H. Smith,* 6 FMSHRC 199, 201–02 (1984); *Secretary of Labor* v. *Callanan Industries, Inc.,* 5 FMSHRC 1900, 1907–09 (1983).

In determining the economic feasibility of an engineering control, the Commission has ruled that we must assess whether the costs of the control are disproportionate to the ''expected benefits,'' and whether the costs are so great that it is irrational to require implementation of the control to achieve those results. The Commission has expressly stated that cost-benefit analysis is unnecessary to determine whether a control is feasible.

Consistent with Commission case law, we consider three factors in determining whether engineering controls are feasible at a particular mine: (1) The nature and extent of the overexposure; (2) the demonstrated effectiveness of available technology; and (3) whether the committed resources are wholly out of proportion to the expected results. A violation under the final standard will entail an agency determination that a miner was overexposed, that controls are feasible, and that the mine operator failed to install or maintain such controls. According to the Commission, an engineering control may be feasible even though it fails to reduce exposure to permissible levels contained in the standard, as long as there is a significant reduction in a miner's exposure. *Todilto Exploration and Development Corporation* v. *Secretary of Labor,* 5 FMSHRC 1894, 1897 (1983).

We will consistently utilize our longstanding enforcement procedures that we currently use for enforcement of our interim DPM limit and for our other exposure-based standards at M/NM mines. As a result, we will consider the total cost of the control or combination of controls relative to the expected benefits from implementation of the control or combination of controls when determining whether the costs are wholly out of proportion to results. If controls are capable of achieving a 25% reduction criterion, we will evaluate the cost of controls and determine whether their costs would be a rational expenditure to achieve the expected results.

We continue to emphasize that the concept of ''a combination of controls'' is not new to the mining industry. It is our consistent practice not to cost controls individually, but rather to combine their expected results to determine if the 25% significant reduction criterion, as discussed earlier in this section, can be satisfied. We heavily weigh the potential benefits to miners' health when considering economic feasibility and do not conclude economic infeasibility merely because controls are expensive. Mine operators have the responsibility for demonstrating to us that the costs of technologically feasible controls are wholly out of proportion to their expected benefits.

In situations where we find that the mine operator has not installed all feasible controls, we will issue a citation

and establish a reasonable abatement date. Based on a mine's technological or economic circumstances, the standard gives us the flexibility to extend the period within which a violation must be corrected. If a particular mine operator is cited for violating the DPM final limit, but that operator believes that the standard is technologically or economically infeasible for that operation, the operator ultimately can challenge the citation in an enforcement proceeding before the Commission.

We have found that most of the practical and effective DPM controls that are available, such as DPFs, ventilation upgrades, enclosed cabs with filtered breathing air, alternative diesel fuels, low-emission engines, and various work practice and administrative controls, have the potential to achieve a 25% reduction in DPM exposure. The actual percentage reduction obtained varies from application to application depending on the nature of the exposure and the specific choice of control or controls applied. For example, a DPF might reduce DPM tailpipe emissions from a piece of diesel-powered equipment by 95%. However, the equipment operator's actual exposure could be reduced by more than 95% if an enclosed cab with filtered breathing air is also provided, or the reduction could be less than 95% if other diesel-powered equipment without filtered exhaust is operated in the same area.

We have consistently advised the industry that DPM controls should be selected based on a thorough analysis of the circumstances and conditions at each mine. This final rule affords each mine operator the flexibility to select the DPM controls that are appropriate for their site-specific conditions. We have also advised that similar equipment may require different DPM controls due to different duty cycles or operating conditions. For example, a platinum-catalyzed passively-regenerating DPF might be successfully applied on one piece of equipment, but it may fail on a similar piece of equipment owing to different duty cycles. Even if applied on similar machines with similar duty cycles, such a DPF might be successfully applied on one machine but be unsuitable for the other because it is operated in an area of the mine having marginal ventilation, which could result in elevated NO_2 exposures.

Our compliance cost estimates from the 2001 final rule (not adjusted for inflation) ranged from $31,373 per year for the smallest nonmetal mines (based on fewer than 20 miners and 2.2 pieces of diesel-powered equipment per mine) to $659,987 for the largest precious metals mines (based on over 500 miners and 133 pieces of diesel-powered equipment per mine). Our average estimated compliance cost for the industry as a whole to achieve the interim and final limits was about $128,000 per year per mine in 1998 dollars, or about 0.68 percent of the mine's annual revenues, on average. Of that amount, about $90,000 per mine, on average, was our estimated yearly compliance cost to meet the interim limit of 400_{TC} μg/m³. These estimates were reduced by a negligible amount in the 2005 final rule, due largely to the elimination of the provisions on DPM control plan and required approval from the Secretary to use respiratory protection. As shown in Table IX.5 of this preamble, the estimated compliance cost to move from the interim limit to the final limit of 160_{TC} μg/m³ is about $50,000 per mine in 2004 dollars.

The 2001 final rule established DPM limits that were to be phased-in in two steps over five years, starting with 308_{EC} μg/m³, which is comparable to the 400_{TC} μg/m³ that became effective July 20, 2002, 18 months after promulgation, followed by a final limit of 160_{TC} μg/m³ that was to become effective three-and-one-half years later. Our intent with respect to the phased-in DPM limits in the 2001 rule and in subsequent rulemaking was to provide the industry with adequate time to familiarize itself with DPM control technology so mine operators could make informed decisions regarding selection and implementation of controls, train miners properly on the use and maintenance of the controls before the limits became effective, and spread the cost of controls over a multi-year period. As noted above, our Regulatory Economic Analysis (REA) for the 2001 final rule determined that total annual compliance costs would average $128,000 per mine for the industry as a whole, primarily for DPM controls. These costs represented about 0.68% of annual industry revenue. We believed that the multi-year phase-in of the DPM limits would serve to reduce the economic impact on affected mines by encouraging purchases of controls gradually over several years.

At the time the 2001 final rule was issued, based on the availability of controls we understood could be implemented by mine operators to attain compliance with the respective limits, we believed the phase-in schedule of 18 months to reach the interim limit and five years to reach the final limit would provide sufficient time for the entire industry to attain compliance. However, based on the comments received from the mining industry, other data in the DPM rulemaking record, information received from NIOSH, our compliance assistance reports and activities, and our experience with enforcing the interim limit, we began to question whether it was feasible for the industry to attain compliance with the final limit by January 20, 2006. As we discussed in the preamble to the 2005 NPRM, the applications engineering and related technological and economic implementation issues that we believed would have been easily resolved by then were more complex and extensive than previously thought. We still believed the mining industry could reach compliance with the 160_{TC} μg/m³ final limit; however, we had determined that the original schedule for attaining the final limit was too ambitious for a significant portion of this industry.

In the 2005 NPRM, we acknowledged the implementation issues and proposed modifying our phase-in schedule with the intention of establishing a more realistic regulatory timetable for reaching the final limit. Rather than requiring compliance with the 160_{TC} μg/m³ final limit by January 20, 2006, we proposed phasing-in the final limit in five steps over a five year period, and in 50_{TC} μg/m³ reductions for each year. The initial final limit would have been 308_{EC} μg/m³ on January 20, 2006; 350_{TC} μg/m³ on January 20, 2007; 300_{TC} μg/m³ on January 20, 2008; 250_{TC} μg/m³ on January 20, 2009; 200_{TC} μg/m³ on January 20, 2010; and finally 160_{TC} μg/m³ on January 20, 2011. Our goal in proposing this five-year phase in was to provide the additional time we believed the industry needed to attain the final 160_{TC} μg/m³ limit, while at the same time, assuring steady progress would be made during that period to reduce miner exposures to DPM. In the NPRM, we asked for comments on this schedule for phasing in the final limit, and on other issues.

After analyzing the information and data obtained from the comments we received on the 2005 NPRM, we have extended the amount of time we believe the industry will need to attain compliance with the 160_{TC} μg/m³ final limit beyond what was promulgated in the 2001 final rule. Based on this new information and data, we now believe that requiring compliance with the final limit in three steps over two years, namely 308_{EC} μg/m³ by May 20, 2006, 350_{TC} μg/m³ by January 20, 2007, and 160_{TC} μg/m³ by May 20, 2008, is feasible. This timeframe for implementing the final limits will produce the maximum degree of miner protection from DPM exposure that is

both technologically and economically feasible for the M/NM underground mining industry, as a whole, to achieve.

We continue to believe that establishing a final limit lower than 160_{TC} μg/m³ is not economically feasible for the industry. Reducing the final limit below 160_{TC} μg/m³ would require costly ventilation upgrades, replacement of most older mining equipment, and considerably increased use of DPFs on large numbers of, if not on all, underground diesel powered equipment.

In our 2005 NPRM, where we proposed our five-year phase in of the final limit, we tentatively concluded that the 2001 160_{TC} μg/m³ final concentration limit presented a significant challenge to a large portion of the underground M/NM mining industry and that compliance may not be feasible by January 2006. We also stated that:

> Our experience since January 2001 has raised questions on technological feasibility for the mining industry as a whole, rather than for a small number of individual mines, to meet the 160 TC concentration limit by January 20, 2006.

We specifically requested comments on the economic feasibility of the final concentration limit of 160_{TC} μg/m³ and our proposed phase-in approach.

We also acknowledged in the 2005 NPRM that significant compliance difficulties may be encountered at some mines due to implementation issues and the cost of purchasing and installing certain types of controls. We requested additional information regarding these technological difficulties and whether they would increase the cost to comply with the final concentration limit above that estimated in the 2001 final rule.

In addition, we proposed to eliminate § 57.5060(c)(3)(i) which prohibits new mines from applying for special extensions and requested comments on the benefits (including cost savings) of doing so. Lastly, we requested comments on the costs to mine operators for implementing a rule requiring medical evaluation and transfer of miners. In response to these requests, we received numerous comments on the economic feasibility of meeting a final limit of 160_{TC} μg/m³ within the proposed phase-in timeframes, as well as on other provisions of the proposed rule, which we discuss in detail below.

We believe that the reduction from 308_{EC} μg/m³ to 350_{TC} μg/m³ in January 2007 will provide necessary incentive and experience for mine operators to continue to work out their remaining feasibility issues and not to delay implementation of further engineering and administrative controls until the final 160_{TC} μg/m³ limit becomes effective in May 2008.

We believe that the current rulemaking record fully supports the economic feasibility of the initial phase-in final limit of 308_{EC} μg/m³, and the final limit of 160_{TC} μg/m³. We have no new data or information in the rulemaking record justifying change to our 2005 cost estimates for the interim limit of 308_{EC} μg/m³. We stated in our 2005 final rule that a PEL of 308_{EC} μg/m³ was economically feasible for the M/NM mining industry and provided considerable discussion in support of our position.

Regarding the 2001 final limit of 160_{TC} μg/m³, we stated in the 2005 final rule that the evidence in the current DPM rulemaking record was inadequate for us to make determinations regarding revision of the final DPM limit at that time. We requested comments on the feasibility of the mining industry to comply with a final limit of less than 308_{EC} μg/m³.

Although we did not revise the final limit in the 2005 final rule, we did revise the special extension requirement to provide one year, renewable, extensions of time for mine operators in which to comply with the final limit, based on either economic or technological constraints, but continued to prohibit newer mines from applying for extensions (70 FR 32966). Additionally, in this 2006 final rule, we have removed the prohibition on newer mines from applying for a special extension. Consequently, all mine operators will be able to apply for a one-year, renewable special extension of time to comply with each of the final limits, including the final limit of 308_{EC} μg/m³, 350_{TC} μg/m³, and 160_{TC} μg/m³.

The rulemaking record provides numerous examples of successful use of effective DPM controls. Our enforcement sampling record from November 2003 to January 2006 shows that 82% of the 1,798 samples we collected were below the 308_{EC} μg/m³ interim limit, 78% were below the January 2007 final limit of 350_{TC} μg/m³, and 46% were below the May 2008 final limit of 160_{TC} μg/m³. Additionally, 46% of the mines sampled had at least one sample over 308_{EC} μg/m³, 55% over 350_{TC} μg/m³, and 82% of the mines had at least one sample over 160_{TC} μg/m³. It should be noted that we do not consider these sample results to necessarily represent typical or average exposures for the industry as a whole because we do not randomly select the miners to be sampled. Following good industrial hygiene practice, our sampling procedures dictate that when we conduct enforcement sampling, we sample those miners whom we believe will have the highest exposures. Thus, typical or average exposures for the industry as a whole would likely be lower than these values. We have determined that the degree of compliance demonstrated in our enforcement sampling and the cost of available control technology support our conclusion that the final limits are economically feasible for the industry as a whole within the prescribed timeframes. Our enforcement sampling results also demonstrate the magnitude of the compliance difficulties the M/NM mining industry would have experienced in meeting the 160_{TC} μg/m³ final limit by the May 2006 effective date.

We provide for consideration of compliance difficulties on a mine-by-mine basis in our existing use of hierarchy of controls and provisions on special extensions, which apply to the final limits. We are satisfied that the rule itself and our DPM enforcement policy take into account the financial difficulties on an individualized basis, which we believe will effectively accommodate an individual mine operator's economic concerns, particularly those of small mine operators.

We further recognize that there currently are significant implementation issues, both economic and technological, that would make it infeasible for the industry to comply with the existing 160_{TC} μg/m³ final limit by May 2006. In our 2005 NPRM, we proposed a five-year phase in of the final limit to address the remaining feasibility issues and asked for comments on the technological and economic feasibility of this approach. Based on our analysis of the comments received, the entire rulemaking record, our current enforcement strategy for enforcing the final limits, and our experience with DPM control technology and costs, we believe that compliance with the 160_{TC} μg/m³ final limit can be achieved in a shorter timeframe than the five years that we proposed. We are encouraged by the considerable progress we have seen to date in reducing DPM levels and in the many successful implementations of DPM controls addressed in the following discussion.

As stated in our 2005 final rule, ''The trends in DPM control technology development, especially DPFs, indicate that manufacturers are creating more innovative designs. MSHA believes that more cost effective control methods are on the horizon.'' Another new

development that supports reducing the proposed five year phase-in of the final limit to the two year phase-in established in this rule is the significant DPM emission reductions achieved through the use of high biodiesel content fuel blends, coupled with the federal excise tax credit for biodiesel, and the rapidly growing availability of this alternative diesel fuel throughout the country. Although we acknowledge the high cost of some DPM controls, we do not believe they are significantly different from our estimated compliance costs in the 2001 final rule, and we have identified many lower cost options.

In the 2001 final rule, we estimated that the yearly cost of the rule would be about 0.68% of annual industry revenues, which was less than the 1% ''screen'' for costs relative to revenues that we use as a presumptive benchmark of economic feasibility (66 FR 5889). In the 2005 final rule, we determined that the 308_{EC} μg/m³ interim limit was economically feasible for the M/NM mining industry. In Table IX.5 of this preamble, we estimate that the total yearly costs for the underground M/NM mines using diesel equipment to move from the current 308_{EC} μg/m³ interim limit to the 350_{TC} μg/m³ and 160_{TC} μg/m³ final limits contained in this rule are $8,454,853. As previously shown in Table V–2 of this preamble, these yearly costs are less than 0.2% of annual industry revenues, well below our 1% ''screen'' that we use as a presumptive benchmark of economic feasibility.

In this rulemaking to consider a phased-in approach to the final exposure limit of 160_{TC} μg/m³, we used economic feasibility information from the entire rulemaking record supporting the 2001 final rule, the 2005 final rule, comments in response to the 2005 NPRM, and our experience gained with control technology since 2001. We also used information obtained subsequently and entered into the rulemaking record, including data from the published literature, data developed by us through MSHA Technical Support investigations, public comments and testimony, and our enforcement experience relating to the interim PEL of 308_{EC} μg/m³.

As stated above, we received numerous comments on the economic feasibility of the 2005 NPRM. Some commenters disagreed with our analytical method and the data we used to estimate compliance costs, and suggested that actual compliance costs will be much higher than our estimates. Consequently, they disputed our tentative conclusion that compliance with the phased-in final limits as proposed will be economically feasible for the industry as a whole. Other commenters stated that no delay is justified because there is strong evidence in the rulemaking record that full compliance with the 160_{TC} μg/m³ final limit is both technologically and economically feasible at this time for the industry as a whole. Still other commenters indicated that it was impossible to estimate the industry's compliance costs for attaining the final exposure limit at this time. This is because they contend that feasible technology for complying with this limit is not yet available and will not be available in the foreseeable future. Comments relating to our economic feasibility determinations regarding the final limit are discussed in this section. Comments addressing technological feasibility were discussed previously in this section.

A few commenters stated that compliance with the final DPM limit would be cost prohibitive for their mines, and that business failure could result from their attempt to comply. Our technological and economic feasibility assessments of the final rule lead us to a different conclusion with respect to the possibility that business failures will occur as a result of implementing the final DPM limit.

Several commenters suggested that our ''prior economic feasibility conclusion is based on improper sampling and analysis, inaccurate and incomplete data, and incorrect assumptions.'' Regarding the issue of sampling and analysis, our economic feasibility assessment for the 2001 final rule was based on personal, occupational, or area sampling using a respirable dust sampler equipped with a submicron impactor, and analysis of samples for TC (EC plus OC) in accordance with NIOSH Analytical Method 5040. The DPM rulemaking record contains evidence supporting the positions of both MSHA and NIOSH regarding the performance of the SKC sampler. Among the conclusions drawn from the 31-Mine Study and included in the preamble to the 2005 final rule were the following (70 FR 32871):

- The analytical method specified by the diesel standard gives an accurate measure of the TC content of a filter sample and the analytical method is appropriate for making compliance determinations of DPM exposures of underground metal and nonmetal miners.
- SKC satisfactorily addressed concerns over defects in the DPM sampling cassettes and availability of cassettes to both MSHA and mine operators * * *
- The submicron impactor was effective in removing the mineral dust, and therefore its potential interference, from DPM samples. Remaining interference from carbonate is removed by subtracting the 4th organic peak from the analysis. No reasonable method of sampling was found to eliminate interferences from oil mist or that would effectively measure DPM levels in the presence of environmental tobacco smoke (ETS) with TC as the surrogate * * *

MSHA has found that the use of EC eliminates potential sampling interference from drill oil mist, tobacco smoke, and organic solvents, and that EC consistently represents DPM. In comparison to using TC as the DPM surrogate, using EC would impose fewer restrictions or caveats on sampling strategy (locations and durations), would produce a measurement much less subject to questions, and inherently would be more precise. Furthermore, NIOSH, the scientific literature, and the MSHA laboratory tests indicate that DPM, on average, is approximately 60 to 80% elemental carbon, firmly establishing EC as a valid surrogate for DPM.

Some industry comments contained in Section VII of the 31-Mine Study final report state that, ''Fears about using Method 5040 have been allayed, but potential interference from ETS, oil mist, and ANFO are too great to permit using TC as a measure of DPM. Single samples and area samples are inappropriate.'' As noted below, our enforcement sampling procedures were subsequently changed to incorporate personal sampling only, and the DPM surrogate was changed to EC to eliminate potential non-DPM sources of OC from interfering with DPM determinations based on TC.

Regarding the effectiveness of the SKC DPM sampler with integral submicron impactor in the presence of ore dust, the industry comments contained in Section III–B of the 31-Mine Study final report state that, ''The impactor works in most applications.'' The industry comments on this section also stated that, ''The industry is perplexed about possible continued interference in gold mines with graphitic ores.'' However, the 31-Mine Study final report states that, ''For typical samples collected in gold mines, the interference from elemental carbon from gold ore would be less than 1.5 μg/m³.''

In the 2005 final rule, we modified our compliance sampling strategy to utilize personal sampling only, which is the sampling strategy used by us for determining compliance with our other full-shift exposure-based standards for airborne contaminants, and we changed the DPM surrogate from TC to EC for the interim limit. The change to EC as the DPM surrogate was made to eliminate the potential for sampling interferences from non-diesel sources of OC, such as drill oil mist or tobacco smoke, from causing erroneous TC analytical results. Our 2005 final rule on the interim DPM exposure limit incorporated these

changes, as does the current rulemaking, with the exception that we will undertake a separate rulemaking to convert from TC limits to EC limits for the 350_{TC} μg/m³ and 160_{TC} μg/m³ final limits.

Regarding the use of inaccurate or incomplete data for determining economic feasibility, some commenters suggested that the 2001 economic feasibility assessment should have been based on a representative sampling of all the underground mines affected by the rule. These commenters take the position that since the standard affects mines producing 24 different major commodities, our 2001 assessment should have included consideration for the impact of the standard on a representative sample of mines producing each commodity. The commenters also suggest that our practice of comparing the industry-wide cost of compliance to the industry's annual revenue is inappropriate. They indicate that this method ignores the fact that international commodity markets determine the viability of mines by setting market prices for their production, and that annual revenues of hundreds of millions, if not billions, of dollars have not prevented the domestic underground M/NM mining industry from shrinking in recent years.

We believe that the method we used to determine economic feasibility is valid. In the 2001 final rule, we subdivided the industry both by mine size class and commodity sector. The mine size classes were under 20 employees, 20 to 500 employees, and over 500 employees. The commodity sectors grouped mines according to the commodity produced. The commodity sectors were stone, precious metals, other metals, evaporates, and other. The resulting matrix comprised the five commodity groups with three mine size classes within each commodity group. Compliance costs were estimated for mines within each size class and commodity group based on mining methods and equipment common for those specific types and sizes of mines. Using this methodology, all underground M/NM mines were included in our economic analysis, even though compliance costs were not necessarily determined on a mine by mine or individual commodity by individual commodity basis. Compliance cost estimates were included for each of the major provisions of the standard, such as DPM controls to attain the DPM limit (DPM filters, equipment cabs, and ventilation), newly introduced engines, paperwork costs associated with applying for a special extension, tagging and examination of equipment suspected of needed emissions maintenance, training, etc.

Some commenters believe that we made incorrect assumptions in performing our economic feasibility assessments. The Regulatory Economic Analysis (REA) for the 2001 final rule was based on our determination that the most significant compliance cost component would be the cost of DPM controls to meet the respective DPM limits, accounting for 96% of the total cost of compliance. Our cost estimates for these controls were originally based on a compliance strategy that assumed that the interim limit would be attained primarily by replacing engines, installing oxidation catalytic converters, and ventilation improvements. We further assumed that the final limit would be attained primarily by adding environmental cabs with filtered breathing air and installing DPM filters. We recognized that mine operators had the flexibility to choose the engineering and administrative controls that best suited their mine-specific circumstances and conditions. However, for costing purposes, the above compliance strategies were assumed. Based on extensive industry comments on the Preliminary Regulatory Economic Analysis (PREA) for our 1998 proposed rule, we modified our cost estimates to favor diesel particulate filter systems and cabs for compliance with the interim limit, and more filters, ventilation and the turnover of engines for compliance with the final limit. Our 2001 REA was based on this modified compliance strategy.

The modified compliance strategy results in estimated industry-wide compliance costs that we believed were economically feasible for the industry as a whole. The original estimate of $19.2 million in annual compliance costs was revised upward to $25.1 million as a result of the comments received on the 1998 proposed rule. Our economic analysis for the 2005 final rule on the interim limit actually showed a slight decrease in compliance costs of $3,634 annually, primarily due to reduced recordkeeping requirements from elimination of the DPM control plan and required approval from the Secretary to use respiratory protection (70 FR 32944). The 2005 final rule analysis, however, did not address the economic impact of the final DPM limit of 160_{TC} μg/m³.

The commenters further stated that the compliance strategy used for developing compliance cost estimates was based on, ''incorrect assumptions of applicable and feasible controls.'' However, as discussed extensively in the technological feasibility section of this preamble and throughout the rulemaking record, we have established the feasibility of the various controls that are required to attain compliance with the new final limits in accordance with the phased-in dates.

Through the comments received during our DPM rulemakings, compliance assistance visits to mines, and our enforcement experience with the 2001 and 2005 final rules, we have learned that the vast majority of mine operators have acquired at least a few EPA Tier 1 and Tier 2 engines, and many have fleets that are comprised of 40% to 50% or more of such engines. Despite disagreeing with our proposed rule, a stone mining operator with seven underground mines commented that all new equipment purchased at two of their mines were supplied with EPA Tier 3 engines, and they have plans to similarly upgrade the remaining equipment at those mines. Three other stone mining operators who also disagreed with our proposed rule, nonetheless, volunteered similar information. One reported they had recently acquired a new loader, drill, and scaler, all with EPA Tier 2 engines. Another reported acquiring two new haulage trucks in 2005 at a cost of over $600,000. The third operator indicated that,

> Before the initial inventory was even required, we immediately replaced our 1970's haul trucks with trucks built in the 1990's. Later we removed a 1992 loader for a 1999 loader with a Tier 2 engine. We have recently purchased a newer roof-scaler with a Tier 2 engine. We have retrofitted one of our drills with a Tier 2 engine, and are looking at buying a new drill to replace our second drill.''

Use of low emission engines has also been common in the western multilevel metal mines. Despite opposing our proposed rule, one mine operator said that replacement of old engines with new cleaner engines, where practicable, began in 2003. Such engine replacements have now become a primary focus of our efforts to control DPM. Another operator who opposed our proposed rule indicated they have conducted a proactive engine campaign to replace higher DPM emitting engines with newer EPA Tier 1 and Tier 2 rated engines. To date, 68% of the underground equipment is powered by EPA Tier 2 rated engines. A third operator who also disagreed with our proposed rule reported they have repowered eight pieces of equipment at their mine. A mining industry organization commented that, ''* * * as our members replace their old engines with new cleaner engines, that effort

will reduce the DPM exposures of miners.'' A comment from another mine operator indicated that during the last two years, they had, ''purchased fifteen Tier 2 engines that, along with thirty Tier 1 engines, constitute 42% of the current underground fleet and 54% of the total horsepower.''

Some commenters noted they have also made improvements to their ventilation systems, such as upgraded auxiliary ventilation systems, more booster fans, and better maintenance of ventilation control structures. Examples include a mining company that operates several underground stone mines, which commented,

> All [of our] mines have performed major ventilation upgrades, which include installation of new larger portable fans that are used at active headings to help direct air flow, installation of larger main ventilation fans at two mines, installed larger booster fans in the duct tubing at three mines, installed new ventilation stoppings and curtains at various locations throughout the mine at all mines, [and] replaced less efficient ventilation fans with high volume/low pressure fans.

Another stone mine operator reported they had, ''installed a third vertical air shaft in our mine, we have added brattice cloth for over 25 rooms and adjusted brattice cloth throughout our mine, changed traffic patterns, and utilized portable fans.''

Western multilevel metal mine operators also upgraded ventilation systems. One operator of several underground gold mines reported upgrading a spray chamber, developing a new entrance drift and mine portal, and using large auxiliary fans to increase heading ventilation. A large base metal mine operator reported purchasing 17 new auxiliary fans that were one-third more powerful than the existing fans and also upgrading ventilation system maintenance.

A few mine operators have completed major ventilation system upgrades, including new ventilation shafts and fan installations. However, it is not clear whether all operators that reported such upgrades did so entirely to attain compliance with the DPM interim or final limit. For example, despite the mine operator's claims to the contrary, our detailed analysis of a ventilation system improvement project costing over $9,000,000 at a western multilevel metal mine indicated that some or most of these upgrades would have been necessary anyway to accommodate planned production increases and other non-DPM related purposes. One outcome of this ventilation upgrade was a 1,000 horsepower reduction in the ventilation system's total electrical power requirements, achieved through more efficient deployment of booster fans. Over 60% of the overall $9,000,000 project cost, when annualized, was offset by this electrical power cost savings.

Through the comments submitted to the rulemaking record, the NISOH DPM workshops in 2003, and our compliance assistance visits to mines affected by the rule, we have learned that, although many of the metal mines have experimented with DPM filters, comparatively few are relying on filters as their primary means of complying with the interim limit. Also, environmental cabs are in widespread use throughout the industry; however, comparatively few such cabs have been retrofitted to existing equipment as a primary means of compliance with the interim limit. Indeed, several commenters provided information on the high cost of retrofitting cabs to existing equipment, indicating why cab retrofits were not the first option for attaining compliance. Since the final rule is performance-oriented and gives mine operators flexibility to choose the DPM engineering and administrative controls that are best suited to their unique circumstances and conditions, it is not surprising that other compliance strategies have also been employed, such as utilization of alternative diesel fuel (high biodiesel content blends and diesel-water emulsions) and implementation of a wide array of work practice and administrative controls. But by far the most common strategies employed throughout the industry to attain compliance with the interim limit have been low DPM emitting engines and ventilation improvements, which were the basis for our original compliance cost estimates.

One commenter suggested that we conduct a full regulatory impact analysis to assess the true economic cost of our proposal. This commenter disagreed with the manner in which we updated the 2001 REA, since significant changes have occurred since then in the American economy, namely changes in fuel prices due to war and natural disasters. This commenter also believes that DPM controls are more costly than we projected and questioned whether these controls are effective. Overall, this commenter believes that we grossly underestimated compliance costs in our 2001 final rule. We are unaware of a change in the American economy presented by the commenter other than the price of fuel, which we agree has gone up since 2001. However, the commenter did not relate a rise in fuel prices with the economic feasibility of industry compliance with the subject rule. The recent rise in diesel fuel prices does not affect the 1% ''screen'' for compliance costs relative to industry annual revenue that we use as a presumptive benchmark of economic feasibility. Higher fuel prices would actually make the purchase of low DPM-emitting engines more attractive because they also have better fuel economy compared to the older technology high DPM emission engines. More importantly, we also note that the prices of the various commodities that are produced in underground M/NM mines have also gone up since 2001. For example, between 2001 and 2005, the price of gold increased 108%, zinc 53%, platinum 64%, crushed stone 11%, lead 40%, and rock salt 19%. The commenter has not established that the industry's relative financial position compared to 2001, if it has changed at all, has been so altered by a general rise in prices that compliance with the final rule is economically infeasible.

In responding to the commenter's second point, the technological feasibility of DPM controls was discussed in detail previously in this section of the preamble. In the 2005 NPRM, we proposed a five year phase-in of the final DPM limit to allow mine operators the extra time they would need to overcome technological and economic implementation issues with DPM controls. Based on new information, primarily relating to DPM filters and biodiesel fuel, we have shortened the final limit phase-in period from five to two years. However, we believe this compliance schedule, coupled with provisions in the final rule relating to special extensions of time in which to meet the final limit, will enable the entire industry to attain compliance.

Regarding the comments concerning the role of international commodity markets in determining the viability of mines by setting market prices for their production, our use of industry annual revenue tacitly incorporates the effects of ever-changing commodity prices. As prices rise, industry annual revenue rises, and as prices fall, industry annual revenue falls. Although commodity prices are indirectly incorporated into our analysis, however, for purposes of determining the economic feasibility of a rule, the dollar amount of the industry's annual revenue is not by itself determinative. Both prices and production determine industry annual revenue. Compliance costs that are only a small percentage of industry revenue help to establish economic feasibility.

We have customarily used yearly compliance costs of greater than 1% of annual industry revenue as our

screening benchmark for determining whether a more detailed economic feasibility analysis is required. The commenters correctly point out that despite hundreds of millions, if not billions, of dollars of industry annual revenue, business failures can and do occur, and over a period of decades, the characteristics of an industry can change markedly. However, by utilizing the 1% of annual revenue screening benchmark, we assure that a new MSHA rule will not significantly affect the viability of an industry.

While it is true that individual business failures can and do occur, and that over a period of many years, substantial portions of a domestic industry can be adversely affected by, for example, international competition, MSHA believes it is highly improbable that such events would be set into motion by a rule imposing costs equal to or less than 1% of industry annual revenue. Threats to an entire industry's competitive structure and resulting large scale dislocations within an industry sector are typically caused by fundamental changes in technology, permanent downward pressure on demand for a commodity due, for example, to the introduction of a superior substitute material, world-wide or regional business cycles, etc.

A commenter suggested that the economic feasibility analysis in the 31-Mine Study was flawed because our unit prices for commodities were significantly in error. For example, rock salt for highway de-icing (the primary market for the three rock salt mines included in the study) reportedly sold for about $20–$25 per ton when the analysis was made. Yet, this commenter went on to say that our estimates for revenues and likely annual production levels for the three salt mines appeared to indicate that a price of about $50–$70 per ton was used in our analysis.

We are not persuaded by commenter's view that the economic feasibility analysis for the 31-Mine Study is invalid because we used erroneous commodity prices. For the 31-Mine Study, we did not have access to actual annual revenue data for the 31 mines in the study, so we indirectly estimated annual revenues using our data on the number of employee work hours in 2000 for each mine, the total number of employee work hours reported to us in 2000 by all mines producing that commodity, and data from the U.S. Geological Survey on the industry-wide value of mineral production by commodity for the year 2000. We estimated annual revenues for a particular mine by determining the industry-wide production value per employee hour for the specific commodity each mine produced, and multiplying that amount by the number of annual employee work hours reported to us for that mine. This methodology assumes that each mine's annual revenues would be roughly proportional to each mine's share of the industry's total employee work hours. Thus, our estimates, while not necessarily exact for each mine, were a reasonable approximation for those mines based on industry averages. This methodology does not explicitly incorporate a cost per ton factor. However, implicit in this methodology, based on the U.S. Geological Survey's estimates of rock salt production in 2000 of 45,600,000 metric tons valued at $1,000,000,000, would be a cost per metric ton of $21.93 (equivalent to $19.89 per short ton), which is actually slightly less than the commenter's estimated price of $20 to $25 per ton. Thus, we have no information about how the commenter came up with a price of $50–$70 per ton of salt purportedly used in our analysis. *As demonstrated above we implicitly used a cost per metric ton of $21.93.*

Several commenters stated that our compliance cost estimates in the ''31-Mine Study'' were unrealistically low because we didn't recommend major ventilation upgrades for any of the mines in the study. Other comments relating to the ''31-Mine Study'' were that the mines included in the study were not representative of the industry as a whole, that we voided 25% of the samples collected, that we eliminated four mines from the study, and that we significantly underestimated compliance costs for the Stillwater Mine near Nye, MT, which was one of the mines included in the study. In responding to the question of major ventilation upgrades, we noted in the preamble to the 2005 final rule (70 FR 32921) that we did not specify any major ventilation upgrades in the 31-Mine Study because, based on the study methodology, the analysis did not indicate the need for major ventilation upgrades in order to attain compliance with either the interim or final DPM limits at any of the 31 mines. We further went on to explain that the purpose of specifying controls for each mine in this study was simply to demonstrate that feasible controls capable of attaining compliance existed, and to provide a framework for costing such controls on a mine-by-mine basis. We explicitly stated in the final report that the DPM controls specified for a particular mine did not necessarily represent the only feasible control strategy, or the optimal control strategy for that mine.

Since the completion of the 31-Mine Study, we have observed that mine operators in the stone industry, for example, have chosen to attain compliance without utilizing DPFs. These operators instead have opted to upgrade ventilation (usually by adding or re-positioning booster fans and installing or repairing ventilation control structures such as air curtains and brattices); install low-emission engines; utilize equipment that is supplied by the original equipment manufacturer (OEM) with cabs with filtered breathing air; initiate a variety of work practices that contribute to reducing personal exposures to DPM; and in a few cases, use alternative diesel fuels such as bio-diesel fuel blends and diesel/water emulsions.

Regarding the question of the 31 mines being unrepresentative of the industry as a whole, we note that the mines were selected jointly by us and the DPM litigants, and all parties collaborated in the study design. Although an attempt was made to include a variety of commodities in the study, the selected mines were not ever intended by us or the collaborators to be a statistically representative sample of the industry.

In a related comment, an industry organization asserted that our subsequent ''baseline'' sampling was ''similarly non-representative.'' The sampling to which this commenter refers was conducted by us in 2002 and 2003 in accordance with a provision of the second partial settlement agreement. As described in the preamble to the 2005 final rule (70 FR 32873–32874),

> Under the second partial DPM settlement agreement, MSHA agreed to provide compliance assistance to the M/NM underground mining industry for a one-year period from July 20, 2002 through July 19, 2003. As part of its compliance assistance activities, MSHA agreed to conduct baseline sampling of miners' personal exposures at every underground mine covered by the 2001 final rule. Our baseline sampling began in October 2002 and continued through October 2003. During this period a total of 1,194 valid baseline samples were collected. A total of 183 underground M/NM mines are represented by this analysis * * * MSHA [included] 320 additional valid samples [in the analysis of baseline sample data] because MSHA decided to continue to conduct baseline sampling after July 19, 2003 in response to mine operators' concerns.

We are unclear as to why the commenter would characterize the baseline sampling as ''non-representative,'' as it included all underground M/NM mines that were in

operation during this period of over one year.

Regarding voided samples, of the 464 samples obtained at the 31 mines, 106 were voided. A key consideration in the sampling conducted at the 31 mines was to insure, to the extent possible, that samples were not contaminated by non-diesel sources of airborne carbon. Testing had verified that the submicron sampler would remove mineral dust contamination (limestone, graphite, etc.), but tobacco smoke, drill oil mist, and possibly vapors from ANFO loading could contaminate a sample filter with non-diesel organic carbon. Thus, in accordance with the study protocol that had been jointly developed and approved by both us and the litigants, any sample that was known to have been, or could potentially have been contaminated with such an interferant was voided. Of the 106 voided samples, 61 were voided due to interferences. There were also some samples that were voided for other reasons, such as laboratory error (2 samples), sample pump failure (22 samples), or incomplete sample or sampling the wrong location (21 samples). Including any of these 106 voided samples in the data analysis would have cast doubt on the validity of the study.

In response to the comment that four mines were eliminated from the study, of the 31 mines selected to participate; only one was eliminated. This mine was not eliminated per se. DPM samples were obtained at this mine; however, none of these samples were included in the data analysis because they all had to be voided due to interferences.

The underestimation of compliance costs for the Stillwater Mine in the 31-Mine Study was also discussed in the preamble to the 2005 final rule (70 FR 32924). We acknowledged that the DPM compliance costs for this mine would probably be significantly higher than we reported in this study because, as we explained previously, our analysts, at the time the 31-Mine Study was conducted, had been supplied with inaccurate information regarding this mine's diesel equipment inventory. Based on updated equipment inventory data, we subsequently revised our analysis and corresponding cost estimates. The revised annual estimated compliance cost for the Stillwater Mine of $935,000 was reported in the preamble to the 2005 final rule (70 FR 32943). Although, this amount is considerably higher than the estimate from the 31-Mine Study, it is significantly less than the estimated compliance cost for a precious metals mine of this size as detailed in our REA for the 2001 final rule.

Several commenters repeated their concerns expressed in previous public comments that the 2001 final rule and subsequent economic feasibility assessment for the 31-Mine Study relied on quantitative analyses supported by a ''flawed'' computer simulation program. They believe that the Regulatory Economic Analyses for all of our DPM rulemakings, from the original 2001 final rule to and including the current rulemaking, are invalid because they incorporate analytical results obtained from this program.

As discussed in the section on technological feasibility, the computer program in question, referred to as the DPM Estimator, is a Microsoft® Excel spreadsheet program that calculates the reduction in DPM concentration that can be obtained within an area of a mine by implementing individual, or combinations of engineering controls. The two specific ''flaws'' identified by the commenters are, ''assumptions of the availability of filters that would fit the entire fleet of equipment in use, and assumptions of perfect ventilation conditions throughout the industry.'' We have responded previously to both of these comments, as well as to other criticisms of the Estimator. We have shown that suitable DPM filters were, and continue to be, available to mine operators that are capable of attaining the final DPM limits within the timeframes established in the final rule, and that the Estimator does appropriately account for complex ventilation effects. Our responses to the previous criticisms on the Estimator and to the comments on the Estimator submitted to this rulemaking are detailed in the technological feasibility section of this preamble.

A number of comments related either directly or indirectly to activities at the Stillwater Mine near Nye, MT. The Stillwater mine is a large multilevel platinum mine that operates 24/7 with a workforce of over 900 miners. The Stillwater Mining Company currently utilizes 288 pieces of diesel equipment in its underground mine. The company has been installing EPA Tier 1 and Tier 2 engines since 2001, and at present, approximately 16% of its engines are Tier 1, and 52% are Tier 2. One Tier 3 engine is in operation, and three additional Tier 3 engines were expected in late January 2006. The company has also upgraded its diesel engine maintenance program. Cabs have been installed on a few pieces of equipment which are operated in areas of the mine where the size of the mine openings provides sufficient clearance for a cab. The company has experimented with a variety of DPM filter systems, including platinum washcoated passively regenerating filters, active on-board filters, active off-board filters, a fuel burner type active regenerating system, and disposable filter element systems. The company has also evaluated a diesel-water emulsion fuel and various biodiesel blends, and the company has made significant improvements to the mine's ventilation system in recent years.

Most of the comments relating to this mine, submitted both by the mine operator and various other mining companies and organizations, suggest that the failure to attain full and consistent compliance with the interim DPM limit at this mine, despite vigorous and sustained efforts by the company, are evidence that neither the interim DPM limit nor the final DPM limit are technologically feasible. They also point out that the funds expended by the company thus far in its effort to attain compliance have been excessive, and that this experience therefore demonstrates the economic infeasibility of the rule as well.

We have found through our Technical Support assistance and enforcement experience that this mine operator, in time, could achieve more consistent compliance with the DPM interim limit and attain the final DPM limits if they would install effective engineering and administrative controls. Although this mine operator has experimented with a number of DPM control technologies, some of these trials were of quite limited scope and duration. Several were conducted as a part of collaborative studies with the NIOSH Pittsburgh Research Laboratory under the auspices of the NIOSH M/NM Diesel Partnership. While it is true that this mine operator has evaluated numerous DPM control technologies, only a few have been the subject of sustained and intensive applications engineering efforts that we believe are required to resolve the associated site-specific and application-specific implementation challenges. To mention a few examples, this operator is not currently utilizing fuel burner DPFs, biodiesel, or water-emulsion fuels. Their use of high temperature disposable diesel particulate filters (HTDPFs) has been hampered by the use of HTDPFs on equipment having very high DPM emission engines, which causes the filters to load up quickly and create possible fire hazards. This operator has not utilized heat exchangers in conjunction with HTDPFs, which would enable their use on a much broader range of equipment. They have expended far greater effort to optimize passive DPF applications compared

with active DPF applications, even though they indicate that the vast majority of their equipment is not suitable for application of passive DPFs. Through an extensive MSHA Technical Support study of their ventilation system, we had observed numerous problems with auxiliary ventilation systems in stopes. MSHA is continuing to work with Stillwater to resolve these compliance issues.

Regarding the question of economic feasibility, although the mine operator has incurred substantial costs, as mentioned earlier we do not believe that these costs would be excessive for a mine of this type and size based on expected compliance costs detailed in the Regulatory Economic Analysis (REA) for the 2001 final rule. In the preamble to the 2005 final rule (70 FR 32934–32936), compliance costs for this mine were analyzed in detail. This analysis indicated that when this operator's actual expenditures were annualized at a 7% annualization rate, the operator's yearly compliance costs for the interim limit were less than expected based on the estimates contained in the REA for the 2001 final rule for a precious metals mine of this size.

Two compliance cost issues at this mine were discussed in detail in the preamble to the 2005 final rule: the cost of implementing an active DPF program, and the cost of a major ventilation system upgrade. In that preamble, we presented several options for deploying active diesel particulate filters at this mine. These options were developed in response to a comment from this mine operator submitted to the 2003 NPRM that the cost of implementing an active DPF program for this mine would exceed $100 million over ten years. Our deployment options were functionally equivalent, and the estimated costs were less than $400,000 per year. In the preamble to the 2005 final rule (70 FR 32935–32936), we said,

> MSHA does not believe the particular plan developed by Stillwater is the optimal means of utilizing active DPM filters at this mine. Various alternative approaches for utilizing active filters exist which would be far less costly.
>
> Since excavating regeneration stations accounted for over 96% of the total cost of implementing Stillwater's active filter plan, alternatives that do not include such excavation costs would have a significant cost advantage over Stillwater's plan. It is somewhat curious that Stillwater developed its active DPF plan on the basis of this particular on-board active regeneration system, despite the extraordinarily high cost of excavating the regeneration stations, and Stillwater's prior experience with premature failure of the on-board heating elements built into the filters.
>
> A lower cost alternative to Stillwater's approach utilizes an on-board fuel burner system to regenerate filters. The ArvinMeritor® system was used at this mine in 2004 with excellent results. It actively regenerated the filter media during normal equipment operations, regardless of equipment duty cycle, with no elevated levels of potentially harmful NO_2, and without having to travel to a regeneration station to regenerate its filter.
>
> Another less costly alternative would be to utilize off-board regeneration instead of on-board regeneration. In off-board regeneration, a dirty filter is removed and replaced with a clean filter at the beginning of each shift. During shift change, the dirty filters are then transported by the equipment operator or a designated filter attendant to a central regeneration station or stations.
>
> Such stations could be a fraction of the size of the regeneration stations envisioned in Stillwater's plan, because they would only need to accommodate the filters, not the host vehicles. Since the host vehicles would not need to travel to the regeneration stations, the travel distance from normal work areas to the regeneration stations would be less important, greatly lessening the need for frequent construction of new regeneration stations as the workings advance. It is very likely that such stations could be co-located in existing underground shops, unused muck bays, unused parking areas, or other similar areas.
>
> Off-board regeneration might not be practical on larger machines due to the size of the filters. For larger machines that are not suitable for passive regenerating filters, the fuel burner approach might be preferable. But many of the machines targeted for active filtration are quite small, having 40 to 80 horsepower engines. Active filters for these engines are correspondingly small, and could be easily and quickly removed and replaced using quick-disconnect fittings. Another lower cost option would be to utilize disposable high-temperature synthetic fabric filters, especially on smaller, light duty equipment such as pickups, boss buggies, and skid steers. Depending on equipment utilization, such filters might only need to be replaced once or twice per week.

In its comments on our 2005 NPRM, the mine operator states that equipment identified for use with active regeneration systems has been limited to equipment that is parked on the surface at the end of the shift. This would allow the DPF to be removed and placed in a regeneration station. Unfortunately, not all equipment can be brought to the surface for regeneration due to logistical issues, according to this mine operator. The commenter, however, provided no rationale explaining why active regeneration should be limited only to equipment that is brought to the surface at the end of the shift, as active regeneration can easily be accomplished underground. Furthermore, later in the same section, the commenter acknowledges that underground regeneration is possible. The commenter states that for units that must be regenerated underground, additional excavations to house the regeneration equipment and to provide parking during regeneration would be required. These additional excavations are neither practical nor economically feasible, according to this commenter.

These comments neither acknowledge nor refute the recommended options we provided in the 2005 final rule preamble and as summarized above.

In another part of their comments to this rule, the mine operator discusses their experiences with disposable filter element type diesel particulate filters, and indicates that the costs of utilizing this system are excessive because the useful life of the filter is so short. The example provided by the mine operator was a particular model Toyota truck. The commenter operates many such Toyota trucks, which can be configured for a variety of service and support applications. According to the mine operator's analysis, the annual cost of maintaining a disposable element filter system on this type of vehicle is $40,000, which this mine operator characterized as ''cost prohibitive.'' In response, we note that the Toyota truck used in this example is equipped with a model 1HZ engine, which has very high diesel particulate emissions between 0.8 and 0.9 g/bhp–hr. Table 6 in this mine operator's comments indicated that the DPM emissions for this engine were 0.22 g/bhp–hr. At 0.8 g/hp–hr, the 128 hp engine on the subject vehicle would generate 102 g/hr of DPM. A 10 inch diameter, 26 inch long filter with a capacity for capturing and storing 8 g of DPM per inch of filter length could thus store 208 g of DPM. Even with two such filters installed on the subject vehicle, the filters would become fully loaded after only $(208 \times 2)/102 = 4.08$ hours, or about 4 hours and 5 minutes. The mine operator's reports of filters that, ''burnt out,'' may be caused by continued operation of the subject vehicle after the filter has been fully loaded.

The problem with this application is the engine, not the filter system. If this engine were replaced with a modern low emission engine, filter loading would occur at a fraction of the rate experienced with the current high emission engine. The cost of the engine would be partially offset through lower fuel consumption, and the cost of maintaining the disposable filter system would drop by 70% to 90% because the truck could be operated for many more hours before the filter would become fully loaded and need replacement. By

optimizing the total system, including the engine and the filter, associated costs could be significantly reduced.

Regarding the major ventilation upgrade, in its comments on the 2003 NPRM, Stillwater provided information and costs relating to a major $9,000,000 ventilation upgrade they stated was a DPM-related compliance expense. In the preamble to the 2005 final rule (70 FR 32934–32935), we disputed this claim. We determined that the expense was only partially DPM-related and that this operator was also able to obtain a significant electrical power cost savings as a result of more efficient deployment of booster fans. Over 60% of the overall $9,000,000 project cost, when annualized, was offset by this electrical power cost savings. In its comments on the current rulemaking, additional general information on the mine's ventilation system is provided, as are plans for future upgrades, but our analysis was not refuted. Another commenter observed that our analysis of the $9,000,000 ventilation upgrade was, ''suspect,'' but provided no factual information to corroborate their position.

Two commenters noted that our 2001 estimate of the cost of compliance for the industry as a whole of $25.1 million per year was too low. One commenter, a mining industry organization, provided no rationale or explanation to support this comment. The other commenter, a stone mining operator, presented estimated compliance costs for this mine and extrapolated these costs to the rest of the industry. This operator stated that it cannot accept our projections that this final rule will not have an annual effect of $100 million or more on the economy. A figure of $100 million divided by 200 M/NM mines would result in $500,000 per mine. This commenter believes that its cost estimates for new or newer equipment in its small mine show capital contribution of over three times our figure.

This mine operator then listed the following estimated equipment costs:

- Drill $350,000
- Powder truck $50,000
- Scaler $350,000
- Loader $250,000
- Truck 1 ..... $225,000
- Truck 2 ..... $225,000
- Truck 3 ..... $225,000
- Total $1,675,000

Upon examination, we have determined that this commenter's analysis does not account for several important factors. First, replacement of equipment that is near the end of its useful life and would have been replaced in the near future anyway would not be considered a DPM-related compliance cost, or at most, only partially DPM-related. It is extremely improbable that an entire inventory of underground equipment would need to be replaced all at once purely for DPM compliance. The oldest equipment in a mine's inventory, which would normally be the worst polluters, would be the first that would need to be replaced in the course of the normal equipment turnover process. The cost of replacing such worn out equipment would not be considered DPM compliance-related, because it would have occurred anyway, with or without a DPM rule. The newest equipment, typically mid to late-1990's model year or newer, would most likely not need to be replaced right away, as this equipment would have EPA Tier 1 or Tier 2 engines, and as a consequence, would be low, or at worst moderate polluters. Thus, new equipment purchased strictly for DPM compliance, if any, would typically be limited to only a portion of a mine's overall equipment inventory.

Second, it is very unlikely that the wholesale replacement of equipment is the most cost effective DPM control strategy for this, or any mine. For example, rather than replacing all equipment, an operator could replace just one or two pieces of equipment (if any equipment at all needed to be replaced), utilize diesel particulate filters, upgrade ventilation, switch to a high biodiesel content fuel blend, implement various administrative controls, or use some combination of these strategies. Indeed, this same commenter earlier in their comments stated that buying new equipment is costly. There may be less expensive alternatives to improve DPM levels, such as ventilation or alternative fuels.

This commenter indicates that they, ''have not tried diesel particulate filters due to cost and negative performance history reported by producers and manufacturers.'' However, as discussed extensively in the previous section of this preamble and throughout the rulemaking record, diesel particulate filters are a technologically and economically feasible DPM control once mine operators work through their implementation issues. The commenter indicated that they are considering the use of a B99 biodiesel fuel blend. As noted elsewhere in this preamble, use of high biodiesel fuel blends has been quite successful at other M/NM mines in significantly reducing DPM exposures.

By overlooking lower cost DPM control alternatives, this mine operator's assertion of economic infeasibility of the final limit of 160_{TC} μg/m³, even in 2011, is questionable. A fundamental concept upon which the Regulatory Economic Analysis (REA) for the 2001 final rule was based is that mine operators will choose the lowest cost method of attaining compliance with the applicable DPM limits. If a mine operator chooses other than the lowest cost method for compliance, any resulting determination of economic feasibility would be seriously flawed. We acknowledge that the process of attempting to install various alternative control technologies may be imprecise at best, and that testing multiple designs can be inherently cost-inefficient because some designs will inevitably be found to be unsuitable for a particular purpose. However, we continue to emphasize that mine operators can obtain compliance assistance from our District Managers, or utilize our DPM Single Source Page and access the internet-hosted DPF Selection Guide to help streamline this process. Economic feasibility is based on the assumption that optimal, lowest-cost controls are implemented to attain compliance taking into account recognized implementation difficulties. In the cost estimates for this final rule, we have included cost related to operator evaluation of different technologies in an effort to determine the most effective method for compliance.

Third, the equipment listed by the commenter would be expected to have a long useful life, possibly up to 20 years. Thus, the total first year acquisition cost of this equipment is an incorrect representation of the corresponding yearly cost to the operator. Even in the unlikely event that a mine operator would need to purchase all new major underground equipment in a single year, we would first need to determine that these controls are economically feasible for the operator. Moreover, when the $1,675,000 cost of this equipment is amortized over a 10-year period (to account for depreciation) at a 7% discount rate, the annualized cost to the operator is $238,482. This annualized cost is 48% of the commenter's threshold of $500,000 per year that, according to the commenter's calculations, would be required, on average, to generate industry-wide annual compliance costs greater than $100,000,000.

A mining industry organization stated that even though the Mine Act is a ''technology forcing'' statute, the projections that we made in this rule ''go far beyond this into the realm of pure theory.'' They go on to state that,

Underground stone mines cannot make purchasing decisions based on hypotheses as to what technologies may be available during the coming decade when there is scant evidence to support MSHA's assertions.

We disagree with the commenter's position regarding our conclusions on economic feasibility. As we discussed extensively in this preamble, technologically and economically feasible DPM controls are available, however, mine operators will need to resolve these implementation issues to meet the final limit of 160_{TC} μg/m³. In the 2005 NPRM, we stated that mine operators may need more time to comply with the final rule due to implementation issues, including cost implications. We nonetheless believe that in time, most of these implementation issues can be overcome, especially by May 2008. The five principal engineering controls discussed throughout this preamble—DPFs, equipment for ventilation upgrades, environmental cabs, alternative fuels, and low emission engines—are all commercially available off-the-shelf from many suppliers. The final rule, however, provides mine operators with additional time to work through their individual implementation issues. These individual issues, when viewed as a whole, result in our need to phase-in the 160_{TC} μg/m³ final limit.

Several mine operators and an industry organization commented on the costs associated with DPFs. Comments included:

Average operating life of the Englehard DPF utilized at Stillwater is 3000–4000 hours at a cost ranging from $7,000–$8,500 per unit. [Note: This mine operator reported the average unit cost of 103 passive systems installed since 2004 plus those planned for installation in 2006 is $7,170.]

For equipment not compatible with passive regeneration systems, active regeneration systems have been researched and tested at Stillwater. The cost for these systems have ranged from $4,000–$8,000 per unit. [Note: This mine operator reported the average total acquisition, installation, and maintenance cost for 10 active off-board filter systems and 4 regeneration stations sufficient for filtering the DPM emissions from 5 vehicles was $95,000, resulting in a per vehicle cost of $19,000.]

The passive regeneration filter systems we have purchased range from $6,600 to $8,700 each. These filters also have backpressure monitors costing roughly $700 each. Installation on equipment usually will cost about $1,000.

Costs for our passive regeneration filters systems will be borne over the filter life, which in our experience has ranged between 2,500 and 9,000 hours with most falling around 6,000 hours.

The last quote we received for an on-board active regeneration filter was $28,000, excluding the regeneration station which would cost an additional $8,600 and a backpressure monitor estimated at $1,100, for a total cost of $37,700 excluding freight and installation.

What many NSSGA members are experiencing is that they do not have any way of establishing the true costs of diesel particulate filters because, setting aside the direct costs and questionable results related to filter usage, the filters affect equipment in ways that are adverse but cannot be readily quantified.

We agree that the cost for passive regeneration diesel particulate filters for typical production equipment (loaders or trucks with 300 hp to 500 hp engines) would range from about $7,000 to about $8,500. A number of industry commenters agree that passive regenerating filter systems are feasible for equipment that operates at a sufficiently demanding duty cycle. Typical comments were:

Practical experiences with equipment that have the capability to operate with passive regeneration systems indicate this type of control can reduce DPM exhaust emissions.

At the present time, however, we are increasingly confident that passive regeneration filter technology can be effective in the mine's larger horsepower production units.

Turquoise Ridge believes that properly sized and fitted filters can reduce DPM emissions, and the Turquoise Ridge Mine is now at the sustained level of production to begin testing.

Both DPM filter vendors and mine operators are now gaining experience in the application of DPM filters underground. Some progress is being made. For example, the application of passive regeneration filter technology is becoming effective on larger horsepower production units. However, NMA agrees with MSHA's observation in the preamble of the NPR that '[r]elying on [filters] to be installed on older, higher DPM emitting engines may also introduce additional implementation issues since [filter] manufacturers normally do not recommend adding [filters] to older engines.' Furthermore, the application of DPM filters to equipment with medium- to low-duty cycle engines remains problematic.

Industry objections to active filter systems center on operational aspects that result in higher overall costs for applying this type of control. These systems are very efficient in capturing and retaining DPM, and the hardware costs of such systems, though higher than a comparable passive system, are not excessive for many mine operators.

An example of active off-board regeneration DPF system costs was provided by the commenter who indicated that ten filter systems and four off-board regeneration stations cost $95,000. This cost included acquisition, installation, and maintenance, and was sufficient for filtering the DPM emissions from five utility and support type vehicles. Assuming the filters would last two years and the regeneration stations would last five years, the per vehicle yearly cost, when annualized at a discount rate of 7% would be $8,963. The cost of an active on-board regeneration DPF system was quoted by another commenter at $28,000 plus an additional $1,100 for a backpressure monitor and $8,600 for the regeneration station, for a total of $37,700. The per vehicle yearly cost for this system, when annualized at a discount rate of 7% would be $18,192. We believe the difference in costs between these systems relates more to the engine horsepower they are intended to filter rather than the type of regeneration employed. The unit cost for this second active DPF system is about the same as we estimated in the 31-Mine Study for a similar system. For that study, we estimated an active system for a 400 hp to 500 hp engine would cost $18,000 and the associated regeneration station would cost another $20,000 for a total of $38,000.

Rather than the cost of the systems themselves, operators' comments primarily addressed the associated implementation issues, such as the required frequency of regeneration, travel time to a regeneration station, providing locations for regeneration stations, equipping regeneration stations with the necessary facilities and utilities, equipment downtime while regenerating, etc. and the perceived increased labor and infrastructure costs associated with applying active filter technology. These concerns have limited more widespread utilization of active systems. Comments concerning these logistical issues included:

Active filters require that equipment be idled for a considerable period of time either with on-board regeneration, or with an off board filter change-out system * * * In addition, active systems require considerable space * * * The record to date has identified other feasibility problems with DPFs that include physical size of filter systems, the short life span of filter elements, the required downtime for regeneration of active regeneration systems, the need for regeneration stations with electric power and compressed air supply near producing zones for active regeneration systems * * *

Practical experience with active regeneration systems has not indicated these control options are economically feasible for the Stillwater diesel fleet * * * Initial operating time before the unit is required to be removed and placed on a regeneration station is, at best, 10–15 hours. However, experience has shown this time can be as little as 4 hours before off-board regeneration is required. Due to the low utilization of the active DPF before the system needed to have active regeneration, two active DPFs were purchased to ensure the equipment would be

operational for the next shift. This option has proven to be cost prohibitive; it is unrealistic to logistically store spare active DPFs and regeneration stations for even the small fraction of equipment that has the capability to operate with active DPFs * * * For units that must be regenerated underground, additional excavations to house the regeneration equipment and to provide parking during regeneration would be required. These additional excavations are neither practical nor economically feasible. Additionally, moving equipment to the regeneration stations is time consuming, unproductive, and cost prohibitive.

One active regenerative DPF system, specifically DCL Mine-X Black Out Soot filter, was tested on a Tamrock 1400, 8 yard^3 scoop over an 8 month period. Because of filter limitations, the scoop was only operational for 7 to 8 hours per shift before the backpressure increases caused the need for filter regeneration. This rendered the equipment unusable for the remainder of our normal 11 hour production shift. The active regeneration system was determined to be impractical because it was not effective for an entire shift and could not be regenerated between shifts (regeneration typically took between 2 and 5 hours).

The feasibility of equipping medium-to low-duty cycle engines with passive and active regeneration DPF filter systems continue to be evaluated by Greens Creek Mine personnel. However, the need for fixed locations for installation of equipment used for active filter regeneration poses serious logistical problems due to the spread out nature of the mine's layout.

Other mine operators have not even attempted to utilize diesel particulate filter systems because of perceived logistical problems and associated costs. Typical comments from these operators who have had no first hand experience with diesel particulate filters included:

* * * the current methods to achieve compliance are not economically feasible or present other hazards to employees, specifically some of the filtration technology that we've investigated. I would state that we have not tried those technologies as of yet. As I said, the current filtering technology is a capital cost and a long-term operating cost that's difficult to absorb in the operations.

We've talked about what filters mean and what filters do and how they work and what they are. We've closely watched how that technology has moved forward. As of this point, even the employees don't see a benefit in doing that. Mainly because the maintenance that they're going to be required to do to change filters, to move filters around, is going to cause them to pull out the ladder and climb the ladder and work around the hot exhaust and move the heavy thing back down, you know, the ladder, put it where it needs to go. And they're exposed physically to something—these guys are smart. They understand these are real physical hazards I'm exposed to try and get filters on and off.

We have not gone to diesel particulate filters. In our hierarchy of controls, quite honestly diesel particulate filters would be our last choice. First of all, just from a practical perspective, there is still issues with the types of filters you might use and if you are making the engines—if the engines are inefficient to start with and you have to use a—you want to use a diesel particulate filter as the correction method, it could very well be that because of the inefficiency of the engine, it makes the filters a lot more difficult to deal with. Because they're going to clog up, they're going to create problems for you and it's just going to increase the difficulties of implementing a program. So we looked at diesel particulate filters as the last resort. It certainly may be one that we want to take, but it's not one that we would choose to go at early * * * One of the things also about diesel particulate filters and off board regeneration is you're talking about increasing the labor cost.

There's no way around it. It's going to take more people.

We believe that active regenerating filter technology is available to enable compliance with the final limit. However, these commenters have highlighted some of the implementation issues we believe will be encountered by a great many mine operators that may need to utilize this technology to attain compliance with the final rule. The additional time required to resolve these issues is provided by the two-year phase in of the final limits incorporated in this final rule.

We continue to advise that the ''toolbox approach'' be used for compliance with this rule, and that DPM controls be carefully selected on the basis of attaining compliance at the lowest cost. However, where circumstances indicate that active regenerating DPM filtration would be the optimum control method, we believe that the application of such a system would be economically feasible over time. We do intend to continue to assess feasibility of effective controls on a case-by-case basis.

We do not dispute that implementing an active regenerating filter program at an underground mine will create logistical and implementation challenges, and that mine operators will need to incur costs to solve these problems. As mines begin to solve these implementation issues, however, most should be able to reduce miners' exposure to DPM in the process. We acknowledge that a certain amount of trial and error experimentation may be unavoidable before an optimum selection is made. However, we do not believe this evaluation and selection process is economically infeasible for mine operators to successfully complete over time.

We believe that the applications engineering process followed by mine operators for overcoming implementation issues with passive DPF systems establishes a realistic model for overcoming implementation issues with active DPF systems. The early attempts at applying passive DPF systems in M/NM mines were inefficient and costly. Applications and duty cycles were not fully characterized, inappropriate filters were selected, installation methods were crude, and system maintenance requirements were not well understood, leading to short filter life and a variety of related problems. The final rule's phased-in final DPM limits provide the additional time required by the industry to successfully address these issues. With respect to the above specific comments, while it is true that active filter regeneration can require several hours, the associated piece of diesel equipment need not be idled for that entire period. As one mine operator indicated, two filter elements can be acquired for each piece of diesel equipment so that one element can be in use while the other element is being regenerated. Using quick disconnect couplings in the equipment's exhaust system, swapping out the active DPF elements could be accomplished quickly with very little physical effort. Equipment downtime in the context of this active filter regeneration scenario would be measured in minutes rather than hours.

Nonetheless, the subject mine operator declared this strategy to be ''cost prohibitive,'' due to the need to purchase two filters for each piece of equipment and the required space to store the extra filter elements. We disagree with this conclusion. First, the annualized yearly cost of providing two filters for each piece of equipment is not significantly greater than the annualized yearly cost of providing a single filter for each piece of equipment because each filter, being used only on every other shift, will last twice as long as it would have if it were used on every shift. Second, there would be no need for storing extra filters since filters would simply be swapped back and forth between the regeneration station and the piece of diesel equipment.

We agree that there will be costs associated with providing facilities and utilities such as electrical power and compressed air for the regeneration stations. However, we believe these costs will be small or negligible in the context of implementing such a system, or at worst, should not be economically infeasible. As noted above, we believe an optimally deployed active regeneration system would utilize existing locations with utilities already in place as regeneration stations, thereby simplifying implementation and minimizing associated costs. Although

several commenters have identified this requirement as a compliance cost, the actual magnitude of these costs has not been presented.

The size of active DPF filter elements has been discussed previously. Typically, active systems would be applied to smaller support and utility equipment that does not operate at a severe enough duty cycle to permit passive regeneration. Smaller equipment requires smaller DPF filter elements that can be handled without specialized materials handling equipment or lifting aids. Unlike passive systems that usually have to be installed as close as possible to the engine manifold so that the exhaust is hot when it reaches the filter, there is greater flexibility in installing active DPF systems on a piece of equipment, usually enabling convenient access for swapping out filters. In rare cases where filter elements may be too large to be conveniently handled by the equipment operator, accommodation could be made, such as providing lifting aids at the regeneration station or the exhaust could be divided into dual separately filtered branches with a smaller filter on each branch. Implementing either of these options by May 2008 would incur some cost, but not so great as to approach economically infeasible.

In instances where filters load up with soot and require regeneration before the end of a shift, a possible solution is to utilize a larger filter that has more soot storage capacity. The mine operator that was able to run an actively filtered loader for only 7 to 8 hours of an 11 hour shift could utilize a 40% larger filter to extend the loader's operating time to the full shift duration of 11 hours. Adding more filter capacity could also be accomplished by dividing the exhaust into dual separately filtered branches, as was done at the mine referenced above that used a dual element disposable filter system on its Toyota support and utility vehicles.

Another option for extending the operating time of an active filter is to replace the diesel engine with one that produces less DPM. For example, replacing a 100 horsepower Tier 1 compliant engine with the equivalent Tier 2 engine would reduce DPM emissions by over 60%. While a given active filter on a Tier 1 engine may require regeneration before the end of the shift, the same filter on a Tier 2 engine might operate for the entire shift or longer. A similar situation exists at the Stillwater Mine in Nye, MT with respect to the disposable filter element systems on their Toyota trucks. As discussed earlier in this section, a possible solution to the problem of these filters loading up to quickly is to replace the engines with a model that produces significantly lower DPM emissions. Again, there are some costs associated with these approaches, but we do not believe they would reach the level of economic infeasibility.

Regarding the feasibility of providing space for regeneration stations and parking areas, we refer to our analysis of the active regeneration system proposed by the Stillwater Mining Company and discussed in the preamble to the 2005 final rule (70 FR 32934–32936). The rationale supporting our suggested alternative active regeneration system for this mine remains our current position, and given the extra time afforded by the phased-in final limit included in the final rule, we believe a similar optimization process can be used at other mines to solve a number of implementation challenges.

We do not dispute that mine operators have had less success with active regenerating filter systems compared to passive systems. As noted above, we believe this result is largely due to greater experimentation, trial and error, and applications engineering by mine operators on passive systems. During the remaining period before enforcement of the final limit of 160_{TC} $\mu g/m^3$ begins, mine operators will have sufficient time to meet these challenges and successfully apply active regeneration systems.

Several commenters have said that they favor passive regeneration over active regeneration. For example, one mine operator said, ''Research and testing of DPF regenerations systems has concluded that passive regeneration systems are preferred over active regenerations systems.'' As a result, most mine operators who have evaluated DPFs have concentrated their efforts on passive systems. We realize, however, that mine operators who have successfully implemented passive regeneration filter systems have had to work long and hard to overcome difficult implementation issues. One mine operator commented, ''The process of achieving filter reliability has been arduous * * *'' The product of these sustained efforts has been longer filter life, acceptance and support by operating and maintenance personnel, and the streamlined integration of passive filters into these mines' overall operating procedures, all of which we believe could contribute to controlling costs.

We are confident that such efforts, applied to active systems, can achieve similar results. These systems are widely used in other industries, and they have been used successfully on a limited basis in M/NM mining. Their successful use on a more widespread basis in the mining industry is possible, but not without time and similar dedicated efforts by mine operators to solve the mine-specific and application-specific logistical and implementation issues discussed above. This point was emphasized by NIOSH in its opinion submitted on June 25, 2003 and repeated in its comments on the current rule that:

> With regard to the availability of filters and the interim standard, the experience to date has shown that while diesel particulate filter (DPF) systems for retrofitting most existing diesel-powered equipment in underground metal and nonmetal mines are commercially available, the successful application of these systems is predicated on solving technical and operational issues associated with the circumstances unique to each mine. Operators will need to make informed decisions regarding filter selection, retrofitting, engine and equipment deployment, operation, and maintenance, and specifically work through issues such as in-use efficiencies, secondary emissions, engine backpressure, DPF regeneration, DPF reliability and durability.

When these implementation issues are resolved, we believe an inevitable consequence will be significantly reduced costs due to decreased waste, fewer damaged or failed filters, increased efficiency and effectiveness of filter system installations, operations, and maintenance, acceptance by miners, minimal adverse effects on equipment operations, and smoother integration of filter regeneration into the mining process.

Two commenters provided information on the costs of utilizing low DPM emission engines. One mine operator said, ''Since 2001, Stillwater has performed a proactive engine campaign to replace the higher DPM emitting engines with the newer EPA Tier I and Tier II rated engines.'' This commenter also provided a table of the costs incurred in 2004 and 2005 for engine replacements and upgrades showing that 48 new engines were installed at a total cost of $576,000 (average cost of $12,000 each) and 98 engine upgrades (electronic engine governors) were completed at a total cost of $198,000 (average cost of $2,020 each). Several other commenters indicated they had replaced engines or had purchased new equipment with low DPM emission engines, but the only other commenter to provide cost data on engines said they had completed eight ''engine repowers'' at a total cost of $120,000, for an average cost of $15,000.

As we have suggested throughout the DPM rulemakings, utilization of low DPM-emitting engines is an excellent

way of reducing DPM concentrations underground. Depending on the specific emissions from the original and replacement engines, DPM reductions of up to 90% or more are possible. However, we acknowledge that replacing engines can be costly, especially when the replacement engine requires significant adaptations to the host vehicle to accommodate physical size constraints, new plumbing and wiring harnesses, etc. Comments on the 1998 Preliminary Regulatory Economic Analysis (PREA) suggested such ''non-like-for-like'' retrofits could cost up to $60,000. Although costs may reach $60,000 in certain extreme or worst case situations, we believe in reality, that the costs quoted above of $12,000 to $15,000 are more typical. When amortized over the 10 year life of an engine, the annualized yearly cost of a $15,000 engine at a discount rate of 7% is $2,136.

We also received comments to the 1998 PREA indicating that mining equipment at underground M/NM mines can have a useful life of up to 20 years. However, engines typically last only half that long or less, meaning that engine replacement is a routine procedure that is necessary to maintain mine production levels. We do not view replacing a worn out or blown engine with a new low DPM engine as a DPM related compliance cost. It is not clear from the commenters' data whether the subject engines were replaced due to the normal engine turnover process or whether serviceable engines were replaced solely for DPM compliance purposes.

We also note that the new low DPM emitting engines provide other significant benefits to mine operators. The electronic maintenance diagnostics reduce maintenance-related downtime, and the fuel savings between a non-EPA Tier rated engine and an EPA Tier 2 engine can be 10%–15% or more. For a 400 horsepower engine that normally consumes 8 gallons of fuel per hour (approximately 50% duty cycle), a 10% reduction in fuel consumption over 3,000 annual operating hours results in a 2,400 gallon fuel savings per year. At a diesel fuel cost of $2.00 per gallon, the new $15,000 Tier 2 engine would almost pay for itself in 3 years due to lower fuel consumption. At a diesel fuel cost of $2.30 per gallon, if an old engine was replaced with one that consumed 15% less fuel and was operated for 6,000 hours per year, the payback period for the $15,000 replacement would be less than one year. In fact, the current price of diesel fuel (in May 2006) has risen to approximately $2.90 per gallon.

A mining company that operates two gold mines in Nevada commented that,

> Our estimate of the total cost of measures taken to achieve compliance with the current interim standard [interim DPM limit] is approximately $1.68 million annually ($8.4 million since 2001). Our experience indicates that MSHA's 2001 cost estimates dramatically understated the costs of compliance.

This commenter then itemized the compliance costs incurred at their two mines since 2001 as follows:

- Engine repowers (8 @ $15,000) $120,000
- Cab installed on KMS 608 $43,000
- Cabs on 2 new loaders @ $43,000 each $86,000
- Cabs on 3 new loaders @ $48,000 each $144,000
- 1225 South Meikle Spray Chamber $139,000
- Rodeo Betze Portal Drift .. $1,200,000
- Rodeo Betze Port Drift Vent Intake $1,300,000
- Increase size of auxiliary fans $750,000
- Higher power cost, $560,000/yr × 3 yrs $1,680,000
- Total costs since 2001 ..... $5,462,000

The sum of the items listed by the commenter, $5,462,000, is about 65% of the $8.4 million amount the commenter claims was spent to attain DPM compliance. Without a thorough study of these elements, and based on the limited information provided by this mine operator in their comments, we are not able to verify that all of these costs are DPM-related. For example, we determined at another precious metals mine that claimed DPM-related ventilation upgrades were actually justified on the basis of other needs, such as planned production increases and the desire to improve overall ventilation system efficiency. Of the approximately $5.46 million in claimed DPM compliance costs itemized above, over $5.07 million, or 93% are ventilation related. Likewise, installing cabs on mobile equipment or acquiring new equipment with OEM cabs can also solve dust and noise overexposure problems and improve operator comfort.

However, even if all the listed costs were entirely justified solely on the basis of complying with the DPM rule, when the individual cost elements are amortized at a discount rate of 7% over their expected life, annualized yearly costs to the operator are about $980,000. The estimated yearly compliance cost for a medium sized gold mine was determined in the Regulatory Economic Analysis (REA) for the 2001 final rule to be $171,778 (not adjusted for inflation) based on an inventory size of 24 pieces of diesel equipment. In their comments, this mine operator indicated they are currently operating 154 pieces of diesel equipment for mining and support activities. In 2002, this operator reported 236 pieces of diesel equipment in its diesel equipment inventory. Using the lower number and applying a ratio multiplier of 6.4 (154/24) to the $171,778 compliance cost estimate from the 2001 REA results in an estimated compliance cost for the commenter's two mines of $1,099,379. Thus, this commenter's actual annualized compliance cost of $980,000 is about 89% of the expected annualized compliance cost for gold mines of this size, as estimated for the 2001 final rule. Under the new final rule, the mine operator's compliance costs would be expected to decrease due to the phase-in of the final DPM limits.

This same mine operator urged us to update our compliance cost estimates based on the current price of diesel fuel. They indicated that,

> In 2001, when the proposed limit was adopted, diesel costs were approximately $1.40 per gallon. Currently, diesel prices are in the range of $2.39 per gallon, an increase of over 70%. Available control technologies, particularly filters, reduce horsepower and increase fuel consumption and costs to accomplish the same work. The agency's cost estimates should acknowledge current diesel fuel prices.

Since 2001, a major component of DPM compliance strategies that are being widely adopted throughout the industry, including by this operator, is the use of modern low emission engines, which in addition to significantly lowering DPM emissions, also reduces fuel consumption by 10% to 15% compared to older, high DPM emission engines. We also note that the fuel penalty of using a properly sized diesel particulate filter is very small. Even the fuel burner system, which combusts diesel fuel in the exhaust to raise the exhaust gas temperature sufficient for filter regeneration, only increases fuel consumption by about 1%.

We received comments on the costs of environmental cabs from gold mines in Nevada. One company indicated they had retrofitted five fully enclosed cabs onto haulage trucks and loaders, and that as a result, the operators of this equipment were in compliance with the final limit. These cabs were installed during major re-builds on the subject equipment at a cost of $30,000 to $50,000 each. Another operator indicated they had installed environmental cabs on six loaders at a cost of $43,000 to $48,000 each. These unit costs are higher than we originally estimated for environmental cabs in the REA for the 2001 final rule. However,

our original cost estimate applied to the industry in general and to all equipment. We expected the cost of retrofitting cabs onto purpose-built underground mining equipment to be substantially higher than the cost of cabs installed at the factory on construction-type equipment by the OEM. The costs quoted by the commenters reflect this expected difference. It is also important to note that the costs of these retrofitted cabs are only a small part of overall compliance costs for these mines, and their overall compliance costs are less than expected based on the REA for the 2001 final rule.

We received several comments on the cost of biodiesel fuel. These comments generally fell into three categories: the cost of the fuel itself, the biodiesel tax credit, and the cost of infrastructure for fuel storage and handling. Regarding the cost of the fuel itself, typical comments were:

> Fuel prices will have a substantial impact as Bio-Fuel cost is over $1.00 per gallon higher than diesel.
>
> [Biodiesel] * * * is not widely distributed or accessible at a reasonable cost to many mining operations.
>
> Our current diesel fuel supplier has indicated that the cost for bio-diesel fuel * * * would be priced at a premium of 20 to 25 cents per gallon for a B20 blend.

Regarding the tax credit, typical comments included:

> We are now considering a B99, with the hope that the current $1.00 per gallon tax credit remains to help control costs.
>
> The economic feasibility of alternative fuels depends upon uncertain government price supports that are due to expire in the near future.

Regarding the cost of infrastructure upgrades, typical comments included:

> Cost analysis concerning on-site storage was conducted with a regional supplier and proved cost prohibitive. The cost of the infrastructure to support biodiesel at the mine would include a 10,000 gallon tank for diesel, 15,000 gallon tank for biodiesel, and a 10,000 gallon tank for the blended product. The cost for this system would be in excess of $250,000.
>
> [The higher cost per gallon for biodiesel] does not include costs for specialized transport during the winter season to keep the biodiesel fuel from gelling. Further, we would have to install separate fuel tankage to segregate biodiesel fuels from other fuels * * *

We agree with the commenters who indicated that the cost of biodiesel is typically about $1.00 per gallon more than standard diesel fuel, though this has not always been the case. Prices for standard diesel and biodiesel are determined by the market, and when the price of standard diesel fuel spiked in the late summer and fall of 2005, the price difference between standard diesel and biodiesel was considerably less than $1.00 per gallon. But the $1.00 per gallon price difference quoted by the commenters is more typical. However, the net cost of biodiesel to mine operators is significantly affected by the federal excise tax credit for biodiesel fuels, which applies to fuel blenders (typically the fuel distributor), and is valued at $0.01 per gallon per percentage of biodiesel in a fuel blend for biodiesel made from agricultural feedstock (such as soy biodiesel). Because the cost of biodiesel is typically approximately $1.00 per gallon more than standard diesel, the credit of $0.01 per gallon per percent biodiesel has nominally eliminated the cost difference between standard diesel and biodiesel. For example, if standard diesel is $2.00 per gallon, and the cost of biodiesel before the excise tax credit is applied is $3.00 per gallon, a 98% biodiesel fuel blend (98% biodiesel mixed with 2% standard diesel) with the tax credit applied would cost:

$[\$2.00/\text{gal} \times 2\%] + [\$3.00/\text{gal} \times 98\%] - [98\% \times \$0.01] = \$2.00/\text{gal}$. Thus, a gallon of the 98% blend of biodiesel, after the tax credit is applied, would cost the same as a gallon of standard diesel.

This tax credit, which has been in effect since 2004, was scheduled to expire in 2006, but has been extended through 2008. It is impossible to predict whether the credit will be extended beyond 2008, as its further extension is subject to Congressional action. It is also impossible to predict the future price difference between standard diesel and biodiesel, as the prices of both commodities are determined by market forces. The only factor affecting the price of either fuel that can be predicted with any degree of certainty is the supply of biodiesel. Biodiesel production in the United States has grown from 0.5 million gallons in 1999 to an estimated 75 million gallons in 2005. Production growth between 2004 and 2005 alone was 300%, from 25 million gallons to 75 million gallons. Annual production capacity that is currently under construction is 329 million gallons. Biodiesel production plants in the pre-construction phase will have an annual capacity of an additional 529 million gallons. To the extent that increased supply tends to attenuate upward pressure on price, the expected effect of this large increase in biodiesel supply would be to moderate price increases, if any, or possibly serve to lower the price. Another indicator of future price trends is the capacity of individual plants. At present, only 13 of 52 plants have an annual capacity of 10 million gallons or more. In contrast, of the plants currently under construction or in the pre-construction phase, 27 have an annual capacity of 10 million gallons or more, including several ranging from 30 million to 80 million gallons of annual capacity. To the extent that larger plants can reduce costs through economies of large scale production, the growth of larger plants will also attenuate upward price pressure. Thus, even without the tax credit, we expect the price difference between standard diesel and biodiesel to shrink over time. Our determination of whether biodiesel fuel is a feasible DPM control at a particular mine, however, does not depend on extension of the federal excise tax incentive.

Regarding the issue of infrastructure upgrades to accommodate biodiesel, we agree that some upgrades may be necessary at some mines. For example, due to the cold weather properties of the fuel, storage tanks at mines that experience sub-freezing temperatures would need to be heated, moved to a heated indoor space, or moved underground. Some mines that are using high biodiesel content fuel blends have, or are planning such changes. There may also be costs incurred by the fuel distributor. Some distributors are already capable of off-loading, handling, and storing biodiesel in cold weather. However, those that do not have this capability would need to acquire the necessary infrastructure upgrades, and the associated costs would reasonably be passed along to their biodiesel customers. However, such costs, whether incurred by the mine operator or the fuel distributor and passed on to the mine operator, would largely be one-time expenses that would be amortized over a period of many years. For example, although we dispute the commenter's assertion that infrastructure upgrades to support biodiesel at their mine would cost $250,000, even this amount, when amortized over 20 years, results in an annualized yearly cost of $23,598. We assume a tank already exists at the mine for standard diesel, so it is not clear why another tank is necessary. We also question why a tank for blended fuel is needed, as greater DPM reductions are obtained when biodiesel content is maximized. While it is true that biodiesel needs to be blended with standard diesel to qualify for the federal excise tax credit, the IRS has determined that a 99.9% blend (nominally 10 gallons of standard diesel mixed with 10,000 gallons of biodiesel)

satisfies this requirement. Such a blending process would not require a separate blending tank. Thus, the commenter's $250,000 cost estimate for infrastructure to support biodiesel appears high. However as noted above, even if this cost is supportable, the total cost, when amortized over the life of the asset, results in an annualized yearly cost of $23,598. It is also significant to note that this commenter's fuel consumption is about 80,000 gallons per month. The corresponding costs for infrastructure upgrades at an average or typical mine would be much lower.

Depending on circumstances at a given mine, there may also be a need to provide vehicle fuel tank heaters, fuel line heaters, and fuel filter heaters. These items are commercially available at reasonable costs. For example, the MSRP for an Artic Fox model AF–F–203 14″ to 29″ in-tank fuel warmer is $169.27, the MSRP for an Artic Fox model AF–D3085–2180 24V, 600W, 12 ft heated fuel line is $614.86, and the MSRP for a Diesel Therm fuel filter heater is $180.81.

The operator of two large stone mines commented that there are occupations at their mines such as roof bolters that require personnel to work outside of a cab near the mine roof where DPM concentrations would be expected to be the highest. Due to the high cost of major ventilation upgrades, this commenter asked that consideration be given to allowing such miners to utilize PPE for compliance with the DPM limit. Another stone mine operator made a similar comment, asking:

> Is it economically sensible to expend monies to ensure compliance with the DPM rule for 15 employees exposed to the polluted air when they venture outside of the cab and can use PPE? MSHA also did not allow the most cost-effective method of use of PPE and other administrative controls to reach the final limit.

In responding to these comments, we note first that mine operators have available engineering control options other than cabs and ventilation, and second, that under certain circumstances, PPE is allowed as a means of compliance. Under § 57.5060(d), mine operators have been granted great flexibility in choosing controls to attain compliance, and are not limited to only cabs or ventilation. The operator of the two large stone mines has acknowledged having had success with alternative diesel fuels, and has also acquired new equipment with low emission engines. However, they have not utilized diesel particulate filters on any equipment, and it is not clear whether expanded use of low emission engines or the use of administrative controls might also be possible.

As noted previously in the technological feasibility section, it is a widely accepted principle of industrial hygiene that PPE is inherently inferior compared to engineering and administrative controls for reducing exposures, so the requirement to implement all feasible engineering and administrative controls before PPE could be utilized as a means of compliance was promulgated in the 2005 final rule and is applicable to this final rule. We also note that, in accordance with our DPM sampling procedures, a miner's exposure to DPM is determined through full-shift personal sampling. This sampling procedure integrates or averages a miner's exposure throughout the shift so that an occasional exposure to a high concentration to DPM will not cause the full shift sample to exceed the DPM limit if the majority of the miner's exposure is sufficiently below the limit. Given adherence to this sampling procedure, it is highly unlikely that any of the, ''15 employees exposed to the polluted air when they venture outside of the cab,'' would be overexposed to DPM on a full-shift basis if their excursions outside their cabs were brief, and their cabs were properly maintained and provided with filtered breathing air.

The operator of the two large stone mines included cost estimates for a new ventilation shaft and fan for one of its mines. They indicated the cost of a 16-foot diameter shaft at $1,000 per vertical foot and 800 to 1,200 feet deep would be $800,000 to $1.2 million, and that when fan costs are added, the total cost approaches $1.5 million. We note that the upper end of the range of the commenter's estimated cost for a new shaft and fan of $1,500,000, would not necessarily be considered economically infeasible for a stone mine of this size. The cost of this shaft and fan, when amortized over 20 years at a discount rate of 7%, results in an annualized yearly cost to the operator of $142,000. The estimated total yearly compliance cost for a medium sized stone mine was determined in the Regulatory Economic Analysis (REA) for the 2001 final rule to be $150,738 based on an inventory size of 17 pieces of diesel equipment. In 2002, this mine operator reported a total diesel equipment inventory of 60 pieces of diesel equipment at the subject mine. Applying a ratio multiplier of 3.5 (60/17) to the estimated $150,738 compliance cost from the 2001 REA results in an estimated yearly compliance cost for the mine of $527,583. Thus, if a new ventilation shaft and fan are installed to attain compliance at the subject mine, the annualized yearly cost of $142,000 for this major ventilation upgrade, though significant, is less than 30% of the expected total yearly compliance cost for a stone mine of this size.

Not all commenters disagreed with the economic feasibility of the rule. One commenter said,

> In January 2001, MSHA estimated that compliance with the rule would cost approximately $25.1 million on an annual basis (66 FR 5889). MSHA estimated that 73% of those costs would be expended to comply with the interim level and 27%, or just $6.6 million annually, to comply with the final limit. MSHA found these costs to be economically feasible. They represent less than one percent of industry revenues. Nothing in the record suggests that these compliance costs have increased. If anything, advances in technology and the availability of substitute fuels mean the likely costs of compliance have decreased since the 2001 estimates were completed.

Another commenter said,

> A standard is not infeasible simply because it is financially burdensome, or even because it threatens the survival of some companies within an industry. MSHA estimated that the annual cost of the final rule was $25.1 million or $128,000 annually for an average underground metal and nonmetal mine. (70 FR 53282) The NPRM does not contain any data suggesting that these minimal costs would be significantly greater than originally estimated, let alone that costs would be so high to threaten the economic viability of the industry.

The DPM rulemaking record contains considerable comments supporting the need for more time to effectuate controls that are economically feasible for mine operators. In the cost estimates for this final rule, we have included cost related to operator evaluation of different technologies in an effort to determine the most effective method for compliance.

A number of comments were received on the cost of medical evaluations. Under the final rule, a miner is required to wear respiratory protection if the miner is overexposed to DPM and all feasible engineering and administrative controls are installed. Prior to being fit tested or assigned to a task where respiratory protection is required, the miner must be evaluated by a physician or other licensed healthcare professional to determine whether the miner is medically capable of wearing a respirator in the mine. As shown in Table IX.1 later in this preamble, the estimated yearly cost to the underground M/NM mining industry of this medical evaluation requirement is about $20,000. Comments on medical evaluation included:

• Prior to any miner being placed into a respirator, steps are taken to ensure that the miners are medically fit for wearing a negative pressure respirator. A formal medical evaluation is conducted prior to being fit tested and annually thereafter. To date, approximately 65 miners needed additional evaluation to receive clearance to wear a negative pressure respirator. The average cost for the additional medical evaluation was $250/visit. Estimated annual cost for medical clearance has been $16,000.

• MSHA seeks comments on whether the final rule should include a provision requiring a medical evaluation to determine a miner's ability to use a respirator before the miner is fit tested or required to work in an area of the mine where respiratory protection must be used. Barrick already complies with this proposed requirement. Each of our employees undergoes a medical evaluation before being fitted with a respirator * * * Based on currently available data, we estimate that the average cost per person for medical evaluations for our Goldstrike operations is $660.

• Greens Creek also conducts its own pulmonary function tests on individuals required to wear respirators under our respiratory protection program. That program includes proper fit testing. We have on-site technicians who are certified to conduct these tests, however, the analysis of the pulmonary function tests is provided by a licensed healthcare provider. The tests cost roughly $17.00 per individual.

• At our mines, we provide a medical exam and certification of the ability to wear a respirator upon hire * * * If the miner's health conditions change preventing the safe use of a respirator, then additional tests can be provided including spirometry and if indicated, a medical examination. We have not had a case where a miner's health changed preventing the wearing of a respirator, that the miner was not aware of the health condition. We do not object to annual spirometry testing following guidelines developed and supervised by a medical doctor or other medical professional. We do object to the added expense of requiring a medical exam every year if there are no indicators of a medical necessity, either by the miner's own request or the conditions mentioned.

Mine operators that provided comments on the cost of medical evaluations for respirator users already routinely conduct such evaluations. Based on the significant disparity in quoted costs from $17 to $660 per miner, it appears that some operators' evaluations are quite basic, consisting of a simple pulmonary function test and possibly the completion of an employee questionnaire, whereas other operators are apparently conducting actual medical examinations. No commenters provided information suggesting that the requirement for medical evaluations would be economically infeasible. Although we require a medical evaluation to determine a miner's ability to wear a respirator before using a respirator, we only require a re-evaluation when the mine operator has reason to believe that conditions have changed which could adversely affect the miner's ability to wear a respirator. We also will accept prior medical evaluations to the extent the mine operator has a written record and there have not been any changes that will adversely affect the miner's ability to wear a respirator. We believe that this approach will minimize the economic burden on the mine operator in conducting medical evaluations while still protecting the miner.

VI. Summary of Benefits

In Chapter III of the Regulatory Economic Analysis in support of the 2001 final rule (2001 REA), we demonstrated that the DPM final rule for M/NM mines will reduce a significant health risk to underground miners. This risk included the potential for illnesses and premature death, as well as the attendant costs to the miners' families, the mine operators and society at large.

We have incorporated into this rulemaking record the previous DPM rulemaking records, including the risk assessment to the 2001 final rule. Benefits of the 2001 final rule include continued reductions in lung cancers. In the long run, as the mining population turns over, we estimated that a minimum of 8.5 lung cancer deaths will be avoided per year. We noted that this estimate was a lower bound figure that could significantly underestimate the magnitude of the health benefits. For example, the mean value of all eight quantitative estimates examined in the 2001 final rule was 49 lung cancer deaths avoided per year.

Other benefits noted in the 2001 REA were reductions in the risk of premature death from cardiovascular, cardiopulmonary, or respiratory causes and reductions in the risk of sensory irritation and respiratory symptoms. However, we did not include these health benefits in our estimates because we could not make reliable or precise quantitative estimates of them. Nevertheless, we noted that the expected reductions in the risk of death from cardiovascular, cardiopulmonary, or respiratory causes and the expected reductions in the risk of sensory irritation and respiratory symptoms are likely to be substantial.

The 2001 risk assessment used the best available data on DPM exposures at underground M/NM mines to quantify excess lung cancer risk. ''Excess risk'' refers to the lifetime probability of dying from lung cancer during or after a 45-year occupational DPM exposure. This probability is expressed as the expected excess number of lung cancer deaths per thousand miners occupationally exposed to DPM at a specified mean DPM concentration. The excess is calculated relative to baseline, age-specific lung cancer mortality rates taken from standard mortality tables. In order to properly estimate this excess, it is necessary to calculate, at each year of life after occupational exposure begins, the expected number of persons surviving to that age with and without DPM exposure at the specified level. At each age, standard actuarial adjustments must be made in the number of survivors to account for the risk of dying from causes other than lung cancer. Occupational exposure is assumed to begin at age 20 and to continue, for surviving miners, until retirement at age 65. The accumulation of lifetime excess risk continues after retirement through the age of 85 years.

Table IV–9 in Section IV of this Preamble, taken from the 2001 risk assessment, shows a range of excess lung cancer estimates at mean exposures equal to the final DPM limit. The eight exposure-response models employed were based on studies by Säverin *et al.* (1999), Johnston *et al.* (1997), and Steenland *et al.* (1998). All of the exposure-response models shown are monotonic (i.e., increased exposure yields increased excess risk, though not proportionately so). Thus, despite evidence from recent sampling of substantial improvements attained since the 1989–1999 sampling period addressed by the 2001 risk assessment, underground M/NM miners are still faced with an unacceptable risk of lung cancer due to their occupational DPM exposures.

Another principal conclusion of the 2001 risk assessment was:

> By reducing DPM concentrations in underground mines, the rule will substantially reduce the risks of material impairment faced by underground miners exposed to DPM at current levels.

DPM levels have declined since MSHA's first sampling period (from 1989 to 1999). MSHA expects that further improvements will continue to significantly reduce the health risks identified for miners. There is clear evidence of DPM's adverse health effects, not only at pre-2001 levels but also at the generally lower levels currently observed at many underground mines. These effects are material health impairments as specified under section 101(a)(6)(A) of the Mine Act. During the time period from November 1, 2003 to January 31, 2006, 1798 valid personal compliance samples from all mines covered by the

2001 rule were collected. From these samples collected, 18% (324) of samples exceeded 308_{EC} μg/m³, 22% (396) exceeded 350_{TC} μg/m³, and 64% (1151) exceeded 160_{TC} μg/m³. Because the exposure-response relationships shown are monotonic, MSHA expects that industry-wide implementation of the final limit of 160_{TC} μg/m³ will significantly reduce the risk of lung cancer and other adverse health effects among miners.

This final rule would amend the 2001 final DPM rule by phasing in the final limit over a two-year period to address feasibility constraints that have arisen. By phasing in the final limit to address the feasibility issues, this final rule would contribute to the realization of the benefits mentioned above. In addition, the medical evaluation and transfer provisions of this final rule would provide further benefits by ensuring that miners who are required to wear a respirator are able to do so safely, thereby obtaining the full health protection available from that equipment.

VII. Section 101(a)(9) of the Mine Act

Section 101(a)(9) of the Mine Act provides that: ''No mandatory health or safety standard promulgated under this title shall reduce the protection afforded miners by an existing mandatory health or safety standard.'' We interpret this provision of the Mine Act to require that all of the health or safety benefits resulting from a new standard be at least equivalent to all of the health or safety benefits resulting from the existing standard when the two sets of benefits are evaluated as a whole. The U.S. Court of Appeals for the D.C. Circuit approved such a ''net effects'' application of Section 101(a)(9). *Int'l Union, UMWA* v. *Federal Mine Safety and Health Admin.*, 407 F. 3d 1250, 1256–57 (D.C. Cir. 2005).

We conclude that this final rule will not reduce protection afforded miners under the 2001 final rule. The phase-in period of the 2001 final limit of 160_{TC} μg/m³ is not feasible for the mining industry as a whole in May 2006, but we could not justify a greater reduction in the final limit than 350_{TC} μg/m³ before May 2008. Feasibility issues with respect to operator compliance are discussed above. Moreover, we intend to convert the final limits of 350_{TC} μg/m³ and 160_{TC} μg/m³ in a separate rulemaking by January 2007. As we said in the 2005 NPRM, if we do not complete this rulemaking by that time, we will use the EC equivalent as a check to validate that an overexposure to the 350_{TC} μg/m³ final limit is not the result of interferences. This enforcement policy, which is based on the Second Partial Settlement Agreement and data in the rulemaking record, would be the same that we used to implement the 400_{TC} μg/m³ interim limit before we converted it to 308_{EC} μg/m³ in the June 2005 final rule. Whereas we have evidence that we can obtain an accurate sample analysis of the final limit of 350_{TC} μg/m³, there is no evidence in the rulemaking record suggesting that the 1.3 conversion factor is appropriate for substantially lower limits, such as the final limit of 160_{TC} μg/m³. In the 2005 NPRM, we stated that we have an additional concern with whether an effective sampling strategy exists to enforce the final limit of 160_{TC} μg/m³ with TC as the surrogate. Evidence after January 2001 suggests that without an appropriate conversion factor, which we do not have presently, there is no practical sampling strategy that would adequately remove organic carbon interferences that occur when TC is used as the surrogate without the ability to confirm the sample results with an EC analysis. Thus, we acknowledge that it is questionable whether the final limit with a TC surrogate of 160_{TC} μg/m³ would provide more protection for miners than the final limits of 350_{TC} μg/m³ when we use the 1.3 conversion factor to confirm an overexposure. We have the burden of proof in court to demonstrate that an overexposure to DPM actually occurred and the sample result is not due to interferences. If we were to enforce the final DPM limit of 160_{TC} μg/m³, we would need to validate a TC sample result, which cannot be done without an appropriate conversion factor for EC at that level. Discussion of the complexity of developing an appropriate conversion factor for the final limit is discussed in *Variability of the Relationship Between EC and TC.*

We requested comments in the 2005 NPRM on whether a five-year phase-in period for lowering the final limit to 160_{TC} μg/m³ complies with Section 101(a)(9) of the Mine Act. A number of commenters objected to our 2005 NPRM that would have delayed implementation of the final limit of 160_{TC} μg/m³ until 2011. They stated that the 2005 NPRM would weaken protection provided by the 2001 final rule, a consequence that Section 101(a)(9) prohibits, since the lower level can be met in some jobs in underground metal and nonmetal mines, if not in all jobs. They believe that the 2005 NPRM violates the law since we would be raising the final limit above 160_{TC} μg/m³ and extending the timeframe for its applicability. In response, we emphasize that we determined that it is presently infeasible for the mining industry to comply with 160_{TC} μg/m³, and we have no data to confirm in court that a 160 TC sample is not the result of interferences.

Regarding feasibility, we chose May 2008 for the effective date of the final limit to correspond with when we believe mine operators, especially small mine operators, will be able to find effective approaches to utilizing available DPM control technology so that they will be capable of meeting the standard. Over the five years since the 2001 final rule was promulgated, both MSHA and the mining industry have gained considerable experience with the implementation, use, and cost of DPM control technology. We have reviewed this experience, and our own enforcement data, and conclude in the final rule that effective DPM controls will be feasible and commercially available to mine operators by 2008.

Other commenters stated that the proposed five year phase-in period, a longer phase-in period, or a decision to adopt the current interim limit of 308_{EC} μg/m³ as a final standard would all comply with Section 101(a)(9) of the Mine Act, and that we should take no action to require reductions below the current interim standard. These commenters also noted that our inability to enforce a final limit of 160_{TC} μg/m³ is critical because Section 101(a)(9) is predicated on the assumption that the existing standards are enforceable, and therefore, ensure the health of miners. They do not believe that the final limit of 160_{TC} μg/m³ would provide any more protection than the 308_{EC} μg/m³, and that many mines will not be able to comply with the 160_{TC} μg/m³ due to economic and technological feasibility issues. These commenters further stated that most miners at these sites will be required to wear respirators for extended periods of time.

We disagree with these commenters. As discussed above under Section V.A. Technological Feasibility, and Section V.B., Economic Feasibility, we are confident that feasible technology exists to reduce miners' exposures to DPM to the final limit by May 2008. Although most mines can feasibly comply with the existing DPM final limit of 308_{EC} μg/m³ we expect that some miners will continue to have to wear respiratory protection under the final limit of 160_{TC} μg/m³. By phasing in the 160_{TC} μg/m³ final limit over two years, we believe that many existing compliance difficulties can be successfully resolved as mine operators are able to access alternative fuels and become more adept and familiar with DPFs.

Similarly, some commenters stated that the proposed standard is based on the wrong exposure matrix, is infeasible, and should be withdrawn. They believe that implementation of the 160_{TC} μg/m³ final limit would result in widespread experimentation with unproven and untested control technology that presents new and potentially significant risks to miners. In these commenters' views, such a result would violate the Mine Act and should not be permitted.

We responded to these control technology issues in our feasibility discussion of this preamble at Section V. It is important to note, nevertheless, that we stated in the 2005 NPRM that implementation issues may adversely affect the feasibility of using DPFs to reduce exposures despite the results reported in NIOSH's Phase I Isozone Study. Under the prescribed timeframes of the final rule, mine operators should be able to resolve their unique implementation issues with DPFs. Moreover, proper selection of available filters will resolve the problem with risks to miners from increased levels of nitrogen dioxide. As we stated previously, we are confident that the current rulemaking record includes sufficient scientific data to retain the final limit of 160_{TC} μg/m³.

More importantly, we have no evidence to substantiate deleting the final limit, especially when miners' exposures are expected to further decline over time, based on our enforcement sampling results. The 2001 risk assessment and its updates confirm the serious health risks to miners from exposure to DPM, and we intend for the mining industry to continue to reduce miners' exposures to the final limit of 160_{TC} μg/m³ by May 2008. Additionally, although some mines may experience implementation difficulties in meeting the DPM limits, the final rule allows for instances where mine operators may request special extensions of time in which to comply with the final limits in situations where controls may be technologically or economically infeasible. Finally, our longstanding enforcement policy considers an individual mine operator's ability to feasibly comply with the applicable limit. If we determine that the mine operator has installed all feasible controls and has placed affected miners in an appropriate respiratory protection program, we will not issue a citation for an overexposure.

Another commenter stated that due to the scientific uncertainty that DPM poses, we should wait for the outcome of the NIOSH/NCI study to help identify the appropriate exposure limit. The commenter also stated that we are violating the requirements of Section 101(a)(6)(A) by proceeding with the rulemaking. We disagree. We have discussed our data to support our position to proceed with requiring the mining industry to continue to take the initiative to further reduce miners' exposures to DPM. Throughout this rulemaking, we expressed our intent to phase in the final limit of 160_{TC} μg/m³ over time rather than in 2006. With regard to the collaborative study between NIOSH/NCI, if the study becomes available, we will assess it to determine if it provides additional information about the relationship between DPM exposure levels and disease outcomes. NIOSH, in its recent comments to our 2005 final rule, stated that, ''In summary, new peer-reviewed publications addressing the health effects of exposure to diesel exhaust continue to support MSHA's 2001 risk analysis and its 2005 updated information on health effects.'' Considering the foregoing, we do not believe that it is in the best interest of miners' health to delay beyond the implementation dates of the final rule.

A number of other commenters believe that the five year phase-in period would have complied with 101(a)(9) of the Mine Act unless this rulemaking is not completed before May 20, 2006, the existing effective date of the 160_{TC} μg/m³ final limit. They stated that the Mine Act provision applies only upon the effective date of a requirement rather than the promulgation date of the standard. Consequently, they advise that if the Secretary were to allow the 160_{TC} μg/m³ final limit to take effect on May 20, 2006 then the Mine Act would prohibit any subsequent reduction or phase-in period. We do not agree with these commenters' interpretation of the Mine Act. We refer the commenters to our explanation in this section as to why we must phase in the final limit of 160_{TC} μg/m³, and why we do not believe that we have violated our mandate under Section 101(a)(9) not to reduce protection afforded by an existing standard.

VIII. Section-by-Section Analysis

A. PEL § 57.5060(b)

Section 57.5060(b) in the 2001 final rule established a final concentration limit of 160_{TC} μg/m³ which was scheduled to become effective on January 20, 2006. The final limit restricts total carbon (TC) concentrations in underground mines in areas where miners normally work or travel. Total carbon is the sum of elemental and organic carbon. In the 2001 final rule, we chose TC as the surrogate for measuring DPM concentrations. In our 2005 final rule, we changed the surrogate for the interim concentration limit measured by TC to a comparable permissible exposure limit (PEL) measured by elemental carbon (EC), which renders a more accurate DPM exposure measurement. We also committed to revising the 2001 final concentration limit of 160_{TC} μg/m³ in future rulemaking. Currently, the 160_{TC} μg/m³ final limit is to become applicable on May 20, 2006.

In our 2005 NPRM, we recommended staggering the effective dates for implementing the final limit, to be phased-in over a five-year period, and decreased approximately 50 micrograms each year until the final limit of 160_{TC} μg/m³ would be reached in January 2011. This proposal was based on our position that the industry was encountering economic and technological implementation issues that could affect feasibility, while seeking to further reduce miners' exposures (70 FR 53283). These implementation issues surfaced following promulgation of the 2001 final rule. We stated in the 2005 NPRM that the mining industry, as a whole, may need additional time to address these implementation issues and find effective solutions for implementing additional DPM controls (70 FR 53284).

We also proposed changing the final concentration limit to final permissible exposure limits (PELs), and we noted that special extensions of time in which to comply with the final PELs under existing § 57.5060(c) would apply to each of the phased-in final limits, including the initial final limit of 308_{EC} μg/m³. We explained that mine operators could apply to the District Manager if they were seeking additional time to come into compliance with each of the final limits, due to technological or economic constraints. We requested comments on the impact of granting extensions for compliance with exposure limits that are greater than the 160_{TC} μg/m³ final limit.

In the 2005 NPRM, we also asked the mining community to provide us their views on whether five years is the correct timeframe for reducing miners' exposures to 160_{TC} μg/m³. Additionally, we requested information on whether the proposed annual 50 microgram reductions of the final DPM limit are appropriate or, in the alternative, should the final rule include an approach such as one or two reductions. We asked whether our reduction scheme for the final limit of 50 micrograms of TC each succeeding year, from 400_{TC} μg/m³ (converted to a comparable limit of 308_{EC} μg/m³) is feasible, and whether

it will provide additional time for the implementation of controls, development of distribution centers for alternative fuels, and consideration of the economic impact of the proposed phased-in approach (70 FR 53288). Finally, we emphasized our need for information and views on the mining industry's current experiences with feasibility of compliance with a lower limit than the interim PEL of 308_{EC} μg/m³. In addition to our requests for comments, we notified the mining community that we were committed to initiating a separate rulemaking to determine the correct TC to EC conversion factor for the phased-in final limits. As discussed later in the subsection ''*Variability of the Relationship Between EC and TC*'', we will address those comments in our future rulemaking. We further stated in the 2005 NPRM that in the event that we did not complete this subsequent rulemaking to establish a conversion factor before January 20, 2007, the date of the first proposed reduction of the final limit, we were considering using the current 1.3 conversion factor that we use to establish the interim DPM PEL of 308_{EC} μg/m³ to convert the phased-in final DPM TC limits to EC equivalents. As we did with the interim TC limit pursuant to the Second Partial Settlement Agreement, we would use the EC equivalents as a check to validate that an overexposure is not the result of interferences until this issue is addressed in future rulemaking.

In development of this final rule, we also considered public comments related to the final limit which we received in response to the 2002 ANPRM to revise the DPM limits. Some commenters to the ANPRM recommended that we propose separate rulemakings for revising the interim and final DPM limits to give us an opportunity to gather further information to establish a final DPM limit. In the 2003 NPRM, we agreed with these commenters and solicited other information from the mining community that would lead to an appropriate final DPM standard. Moreover, we announced our intention to publish a separate rulemaking to amend the existing final concentration limit in § 57.5060(b).

To assist us in achieving this objective, we requested comments on an appropriate final limit to replace the 160_{TC} μg/m³ concentration limit, and asked for information on an appropriate surrogate for measuring miners' DPM exposures. We concluded our request for information by clarifying that revisions to the final DPM concentration limit would be included in a separate rulemaking. The public comments in response to our requests are reflected below in this section.

Based on feasibility with respect to compliance and an effective strategy for implementing the final limits, we believe the mining industry as a whole can reduce DPM levels to the 2001 final limit of 160_{TC} μg/m³ by May 20, 2008. We have determined that M/NM underground mines using diesel powered equipment are capable of reducing miners' exposures to 160_{TC} μg/m³ by May 20, 2008, rather than on January 20, 2011. As proposed, the initial final limit will be the same as the current interim limit of 308_{EC} μg/m³ and will remain in effect through January 19, 2007. On January 20, 2007, the final limit will be reduced, as we proposed, to 350_{TC} μg/m³, which represents a 50 microgram reduction. This limit, and the 160_{TC} μg/m³ final limit, will be TC limits rather than EC limits, since we do not have current data establishing a conversion factor from TC to EC. We discuss the complexity of developing a conversion factor later in this section under ''*Variability of the Relationship Between EC and TC.*''

As we did with the 400_{TC} μg/m³ interim limit pursuant to the Second Partial Settlement Agreement, we will use the EC equivalent as a check to validate that an overexposure to the 350 TC limit is not the result of interferences (67 FR 47296, 47298). We will implement an enforcement policy for the 350_{TC} μg/m³ final limit that will use EC as an analyte to ensure that a citation based on the 350_{TC} μg/m³ limit is valid and not the result of interferences. Under our policy, we will first develop an appropriate error factor to account for variability in sampling and analysis from such things as pump flow rate, filters, and the NIOSH Analytical Method 5040. If the TC measurement is below 350_{TC} μg/m³ plus the error factor, we will not issue a citation for an overexposure. If the TC measurement is above 350_{TC} μg/m³ times the error factor, we would look at the EC measurement from the sample obtained through the NIOSH Analytical Method 5040, and multiply EC by a factor of 1.3 to produce a statistical valid estimate of what the TC result is without interferences. If the TC measurement is above this estimate, we would not issue a citation when the EC measurement times the multiplier is below the TC analysis.

The 1.3 multiplier that we will use to estimate TC (*i.e.*, EC × 1.3 = estimated TC) is derived from NIOSH's determination that TC is 60–80% EC. We will announce our enforcement policy in our updated DPM Compliance Guide.

As we stated in the 2005 proposed rule, we will continue to cite a violation of the DPM limit only when we have solid evidence that a violation actually occurred. Accordingly, we will apply the existing error factor to the first phased-in final limit of 308_{EC} μg/m³ to determine that an overexposure to the final limit has occurred. The error factors for the first step-down limit of 350_{TC} μg/m³ and second step-down limit of 160_{TC} μg/m³ will be slightly different.

We will continue to base our compliance determinations on a single, personal sample, taken over the miner's full shift as specified in existing § 57.5061, Compliance determinations. Also, under existing § 57.5060(d), we will continue to require mine operators to install all feasible engineering and administrative controls to reduce miners' exposures to DPM. When such controls do not reduce a miner's exposure to the DPM limit, controls are infeasible, or controls do not produce significant reductions (as defined in the 2005 rule (70 FR 32868, 32916) in DPM exposures, operators must continue to use all feasible engineering and administrative controls and supplement them with respiratory protection. When respiratory protection is required under the final standard, mine operators must establish a respiratory protection program that meets the specified requirements. See the discussion of respirator use in Section VIII.C. Medical Evaluation and Transfer.

We have determined that these new final limits are both technologically and economically feasible for the M/NM mining industry to achieve as scheduled. Feasibility data, however, do not support delaying the applicability of the 160_{TC} μg/m³ final limit until 2011, nor do they support application of the 160_{TC} μg/m³ final limit as early as May 2006. Regarding feasibility, we chose May 2008 for the effective date of the final limit to correspond with when we believe mine operators, especially small mine operators, will be able to find effective approaches to utilizing available DPM control technology so that they will be capable of meeting the standard. Over the five years since the 2001 final rule was promulgated, both MSHA and the mining industry have gained considerable experience with the implementation, use, and cost of DPM control technology. We have reviewed this experience, and our own enforcement data, and conclude in the final rule that effective DPM controls will be feasible and commercially available to mine operators by 2008. We

continue to acknowledge that our 2001 feasibility projections for the ability of the M/NM mining industry to comply with the final limit of 160_{TC} μg/m³ by January 2006 were incorrect.

In the 2005 proposed rule, we continued to project that many mine operators would have to use DPFs to reduce DPM levels to the final concentration limit. We believe that DPFs can be a very effective engineering control throughout the mining industry for reducing miners' exposures to DPM, provided mine operators address their implementation issues. These implementation issues include such decisions as DPF media selection, sizing, regeneration scheme, and installation.

The rulemaking record includes updated data and promising information from the Biodiesel industry on the progress of increasing mine operators' access to this fuel. Accessing biodiesel fuels has been a feasibility issue for M/NM mine operators primarily due to the lack of sufficient distribution centers. The growing trend on demand and supply of alternative fuels; availability of special extensions; enforcement of our hierarchy of controls strategy; additional time for the mining industry to continue to resolve their existing maintenance and other implementation issues with control technology; ventilation upgrades; continued introduction of cleaner engines; and current enforcement data support both the economic and technological feasibility of the final limits as prescribed in this final rule. Although the risk assessment indicates that a lower DPM limit, lower than 160_{TC} μg/m³, would enhance miner protection, it is infeasible for the underground M/NM mining industry to reach a lower final limit.

We acknowledge in the Technological Feasibility discussion in Section V of this preamble that our projections for availability of alternative fuels were underestimated in the 2005 proposal. We also considered our updated enforcement data from November 2003 to January 2006 which show that 82% of the 1,798 samples we collected were below the initial final limit of 308_{EC} μg/m³, 78% were below the January 2007 final limit of 350_{TC} μg/m³, and 46% were below the May 2008 final limit of 160_{TC} μg/m³. We remain committed to assuring that mine operators continue the significant progress they have already demonstrated in reducing miners' exposures to DPM.

We received a number of comments from the mining community on our proposed revisions to the final limits. Establishing a standard that focuses control efforts on diminishing the DPM level in air breathed by a miner is supported by some commenters in labor. These commenters stated, ''We agree that personal sampling gives a better representation of real exposure, and we support the change in the final rule.'' A number of industry commenters stated that we should rescind the 160_{TC} μg/m³ final limit, since they believe that it is unjustifiable and infeasible, and urged us to adopt as the final limit the current interim exposure limit of 308_{EC} μg/m³ currently in place. We disagree, primarily because the 2001 risk assessment concludes that exposure to DPM could result in a material impairment of miners' health and functional capacity, including lung cancer, and that our analysis has concluded that controls significantly reducing DPM exposure are both technologically and economically feasible. Moreover, in the 2005 NPRM, when we decided that we should consider phasing in the final limit of 160_{TC} μg/m³, we acknowledged complications with feasibility and stated the following:

> We believe that wider use of alternative fuels and filter technology can make the 160_{TC} μg/m³ final limit feasible if a staggered phase-in approach is adopted. By lowering the exposure limit in intervals over five years beginning in January 2007, market forces should have sufficient time and incentive to adjust to the new standard. Specifically, a reliable alternative fuel distribution system should induce mine operators to adopt this relatively low-cost method to achieve compliance. The development and distribution of alternative fuels is also encouraged by existing tax credits. We believe that regional distribution networks are beginning to emerge. We seek data on alternative fuel distribution systems (70 FR 53283–84).

We received comments on the availability of distribution systems and other means of DPM exposure controls and have discussed them in detail in Section V of this preamble. Our sampling data, compliance experience, and comments in the rulemaking record lead us to conclude that reductions below the 308_{EC} μg/m³ limit are achievable by the phase-in dates specified.

Another industry commenter suggested that the proposed five-year phase-in of the final limit would drive technology development but would not allow sufficient time for further research and development, and in-field testing. This commenter did state, however, that a two-phase approach would allow mine operators to implement changes in mining techniques and strategies and would provide for continued protection of miners. Some other commenters state that if we pursue our proposed course, or worse, allow the 160_{TC} μg/m³ limit to take effect immediately, it would result in an infeasible rule with which the underground M/NM mining industry could not comply. They believe that this could potentially subject mines to closure orders, and require miners to wear respirators to protect against what many regard as undemonstrated adverse health effects. These commenters also urge that we retain the interim limit of 308_{EC} μg/m³, limit pending results of NIOSH/NCI study.

Another mine operator noted that the proposed phase-in of the final limit is an improvement, but agreed with some other commenters that we need to stay the interim and final limits and wait for completion of the NIOSH/NCI Study. We have sufficient evidence in the DPM rulemaking record which supports the need for us to lower miners' current exposures to DPM beginning in January 2007. We will, however, continue to closely monitor the progress of the NIOSH/NCI joint study, and when the results of this study become available, we will carefully consider them.

As discussed at length in Section V. addressing feasibility of the final rule, we now have more definitive information on availability of alternative fuels and the implementation issues that mine operators face to warrant the time frames under this final rule. We, therefore, cannot justify further delays of implementing the applicability of the 160_{TC} μg/m³ beyond May 2008.

We also considered that the mining industry has had since January 2001 to work through many of their implementation issues. By now mine operators have implemented more effective controls to meet the interim limit. These controls can be used to assist in reducing miners' exposures even further, ultimately resulting in successful achievement of the final limits. We acknowledge that the mining industry as a whole still needs more time to meet the 160_{TC} μg/m³ final limit and believe May 2008 will give them an appropriate amount of time for implementing additional controls needed to comply with the final limit.

Most industry commenters, however, emphasized that compliance with the interim limit of 308_{EC} μg/m³ still poses feasibility issues for the mining industry as a whole. Some other industry commenters added that the proposed reductions are infeasible for 90% of the industry.

We disagree with these commenters. Our data in the 2005 final rule demonstrate that compliance with the interim limit is both technologically and economically feasible (70 FR 32915,

32939). Moreover, our updated compliance sampling results demonstrate that most mines are presently capable of meeting the interim limit of 308_{EC} μg/m³. Like in the 2005 final rule, compliance with this final rule also relies on our traditional hierarchy of controls enforcement strategy (70 FR 32915–16) discussed above. Thus, this regulatory scheme adequately accomplishes control of exposure under circumstances where an individual mine operator cannot reduce a miner's exposure to the final limit solely by use of engineering and administrative controls, including work practices.

One commenter took the position that we should retain the current interim limit of 308_{EC} μg/m³ based on EPA's timeframe for industry to develop cleaner burning engines for diesel engines regulated by EPA. The commenter stated that the Tier 4 engines mandated by EPA are to be available in the very near future and are designed to reduce the DPM levels by at least 90%. Tier 4 engines that are greater than 130 hp are to be available in 2011; engines from 56 to 130 hp will be available in 2012; and 19 to 56 hp will be available in 2013. This includes the availability of very low sulfur fuel as well. According to the commenter, this Tier 4 technology deals with the source of DPM exposures; however, they believe that the final DPM limit should not be reduced until these engines are available and tested in the underground mine environment. They also remark that if MSHA believes that the technology will eventually catch up to its DPM final limit, then the phase-in schedule should coincide with the EPA mandated schedule for clean engines. In response, the EPA specifically exempts underground mining diesel powered equipment, as we addressed in the 2001 final rule (Control of Emissions of Air Pollution From Nonroad Diesel Engines, 40 CFR Parts 9, 86, and 89 (1998)). However, § 57.5067, Engines, allows the mine operator to introduce EPA certified diesel engines into mines using either an on-highway vehicle that is a 1994 model year or newer, a Tier 1 nonroad diesel engine, or a Tier 2 nonroad engine dependent on the horsepower. Also in the 2001 final rule, we documented through our risk assessment the need for us to proceed presently to reduce miners' exposures. The final rule requires the mining industry to continue to make progress in further reducing DPM levels in underground M/NM mines.

The EPA standards referred to by the commenter only include newly manufactured diesel engines based on EPA's implementation dates with no requirements on engine retrofits. As discussed in the Technological Feasibility section of this preamble, the EPA's emission regulations will significantly reduce DPM through the use of DPFs installed on newly manufactured engines. We agree that this technology will benefit the mining industry by offering mine operators the opportunity to purchase this technology in the form of new and used machines over time. However, we do not believe that it would be cost effective for the mining industry to purchase all new equipment when the EPA engines become available in order to get the DPM controls that will be mandated by the EPA as suggested by the commenter. We do believe however, that the EPA standards will make it easier for mine operators over time to purchase diesel engines and machines which are equipped with DPFs which should decrease the need to retrofit DPFs. The MSHA DPM final rule provides mine operators with an opportunity to purchase some on-highway vehicles which will include DPFs but will not be available until January 2007. As discussed in Section V of this preamble, this will initially include automotive pickup trucks and other utility trucks.

In addition, EPA is mandating the use of ultra low sulfur diesel fuel, less than 15 ppm, for on-highway vehicles starting in mid 2006. This fuel will not be required by MSHA; however this may be the only economical diesel fuel to purchase over the coming years based on availability. Eventually by 2010, 15 ppm sulfur fuel will be required for all nonroad diesel powered vehicles and due to the EPA requirements, we anticipate that 15 ppm sulfur fuel will be the only available diesel fuel to purchase. Even though 15 ppm sulfur fuel does directly reduce DPM or EC, it will be needed for compatibility with specialized catalyst formulations used by engine manufacturers for DPM and nitrous oxide reductions.

A number of industry commenters noted that experience of both MSHA and the industry under the DPM rules demonstrate an evolving learning process regarding controlling diesel exhaust. It is in this context that these commenters stated that they support the proposed staggered effective date schedule for implementation of the final limit, provided that we address their other concerns related to the final limit. They believe that it would be more appropriate to promulgate a two-step phased-in approach for the final limit ending on January 20, 2011, rather than an annual, 50 microgram reduction of the final limit. These commenters recommended that the first reduced final limit be the EC equivalent of 250_{TC} μg/m³ on January 20, 2009. The final EC equivalent of 160_{TC} μg/m³ would become effective on January 20, 2011. They suggest that this schedule would more realistically take into account the purchasing decisions by the mining industry to buy new equipment and engineering controls designed to ultimately achieve compliance with the final limit. In this final rule, we based our timetable on definitive information on availability of alternative fuels and the implementation issues that mine operators face in complying with the final limit of 160_{TC} μg/m³. We discussed this at length in Section V, Feasibility, of this final rule.

Organized labor commented that exposure to DPM causes cancer, and lawful or not, they believe that delay will cost miners' lives, since they are breathing these fumes at toxic levels. These commenters discussed what they believe to be our protracted rulemakings to revise the 2001 final rule. They also expressed their disagreement with us in changing the applicability of the 2001 final limit of 160_{TC} μg/m³, and not including medical evaluation and transfer protection for miners. They stated, among other things, that:

> On September 7, 2005, the agency proposed to postpone the final PEL by five more years, reducing it instead by small steps. The agency also suggested there might be difficulties converting the 160 μg/m³ TC limit to an appropriate EC limit, and proposed to leave that determination to yet another rulemaking. The final standard has now been delayed until May 20, but MSHA clearly intends to delay it far longer,[2] ostensibly on the grounds of feasibility, and based primarily on unsubstantiated claims from the mine operators. These proposed changes would significantly weaken the rule by permitting the continued exposure of miners to levels of DPM the agency has found to be unacceptable * * *
>
> MSHA made a promise to underground M/NM miners in 2001. It told them that help was on the way and that they would someday be protected from choking levels of diesel exhaust. Relief would come slowly, and exposures would be reduced in steps, but by January 2006, a protective standard would be in place. MSHA now proposes to break that promise.
>
> Instead, MSHA should withdraw the proposal to delay the 160 μg/m³ TC limit, and revise its effective date to no later than July 20, 2006. The USW has no objection to converting the standard to one based on EC at some time in the future, when the data exists to do so. For the time being, TC and EC measurements should be taken

[2] The USW did not object to the 5 month delay; it was necessary to allow the rulemaking process to be as complete as possible. However, we object strenuously to the 5 year delay.

simultaneously, so that MSHA or NIOSH can calculate a proper conversion factor when the time comes. (USW, AB29–COMM–117)

As we stated earlier in this preamble, data continue to support our 2001 risk assessment. That risk assessment establishes a material impairment of health or functional capacity to miners from exposure to DPM. We have incorporated into this rulemaking record the previous DPM rulemaking records, including the 2001 risk assessment. In the 2005 NPRM, we discussed the decline in miners' exposures to DPM from a mean of 808_{DPM} μg/m³ (646_{TC} μg/m³ equivalent) prior to the implementation of the 2001 standard, to a mean of 233_{TC} μg/m³ based on enforcement sampling at that time (70 FR 53283). More recent enforcement data show that miners' exposures to DPM continue to decline. Nevertheless, we continue to believe that mine operators' experiences with control technology confirm that it is infeasible for us to implement the 160_{TC} μg/m³ final limit earlier than May 2008. We believe that these data dictate the need to afford the mining industry more time to work through their implementation and maintenance issues with DPFs, and to allow sufficient time for construction of more biodiesel fuel distribution centers.

Some industry commenters strongly suggest that feasibility of the final DPM limits must be based on fair and effective implementation of existing § 57.5060(c) regarding special extensions of time in which to comply with the final DPM limit. It is their contention that many mines will be unable to meet the lower DPM limit of 160_{TC} μg/m³, even if staggered over a five-year period as the agency proposed. Some other mine operators stated that the special extension process ''is not a feasible means of salvaging the infeasible 160_{TC} μg/m³, or the unworkable and unsupported yearly 'phase-in' proposal.''

Section 57.5060(c) allows mine operators to apply to the MSHA District Manager for additional time to meet the final DPM limits due to economic or technological constraints. Mine operators must demonstrate infeasibility of compliance to the District Manager before they can qualify for a special extension. The feasibility considerations for the District Manager in granting special extensions are very similar to those for determining feasibility under our hierarchy of controls enforcement scheme. Given the progress the mining industry has shown in reducing DPM levels thus far, we do not believe that the industry, as a whole, will be unable to meet the lower DPM limit of 160_{TC} μg/m³ by May 2008. Initially, we expect to have greater numbers of miners overexposed to the final limit, than with the interim limit. However, we believe that miners in this category will decline over time as mine operators introduce improved engines and continue to resolve their implementation and maintenance problems with DPFs and access problems with biodiesel.

These industry commenters also point out that we should develop, in their views, an accurate, scientifically supportable conversion factor to change the current TC-based final limit of 160_{TC} μg/m³ to an EC-based limit. We intend to use the best available evidence to develop a proposed rule to appropriately and accurately convert the final DPM limit in the near future.

We received comments from the mining industry on establishing an appropriate surrogate for the DPM final limit. In our 2005 final rule, we changed the surrogate for the interim limit by changing from a concentration limit measured by TC to a comparable PEL measured by EC, which renders a more accurate DPM exposure measurement, and committed to revising the final concentration limit in a future rulemaking. The final rule adopts 308_{EC} μg/m³ as the initial final limit, but retains TC as the surrogate for the 350_{TC} μg/m³ and 160_{TC} μg/m³ final limits. We will initiate a separate rulemaking to determine the correct TC to EC conversion factor for the phased-in final limit of 160_{TC} μg/m³.

Several commenters to the proposed rule continue to question the applicability of the 2001 risk assessment when using a surrogate measure of elemental carbon to regulate exposures to DPM. These commenters also question the accuracy of the NIOSH Analytical Method 5040 and expressed disapproval for our using EC as a surrogate. In contrast, a number of other commenters objected to MSHA not enforcing a limit of 160_{TC} μg/m³ immediately. We refer the commenters to the preamble to the 2005 final rule (70 FR 32868) for our position on these issues. Commenters presented some new information, however, in response to the 2005 NPRM.

NIOSH Analytical Method 5040 Validation and Accuracy

The guidelines for development and evaluation of analytical methods are documented in the NIOSH publications NIOSH Manual of Analytical Methods, Chapter E (NIOSH 2nd Supplement Publication No. 98–119) and *Guidelines for Air Sampling and Analytical Method Development and Evaluation* (NIOSH Publication No. 95–117). These documents are guidelines that are used in the process of determining that an analytic method accurately measures what it purports to measure. NIOSH validation criteria state that the NIOSH Analytical Method 5040 provides a result that differs no more than ±25% from the true value 95 times out of 100.

The NIOSH Analytical Method 5040 validation is documented in several publications. These publications include:

(1) Chapter Q of the NIOSH Manual of Analytical Methods (NMAM), DHHS (NIOSH) Publication No. 94–113,

(2) Occupational Monitoring of Particulate Diesel Exhaust by NIOSH Analytical Method 5040, Birch, Applied Occupational and Environmental Hygiene, Vol. 17(6):400–405, 2002,

(3) Diesel Particulate Matter (as Elemental Carbon) 5040, Issue 3: March 15, 2003, NIOSH Manual of Analytical Methods (NMAM), Fourth Edition.

In addition to the above documented validations, there are additional peer-reviewed studies providing evidence that the NIOSH Analytical Method 5040 method is valid. In a study published by Noll, et al., in January 2005 evaluating sampling results of DPM cassettes, the authors report a 95% upper confidence limit Coefficient of Variation (CV) of 7% when analyzing samples for EC and 6% for TC. In this same study, NIOSH reported good agreement and precision between EC for DPM samples using SKC impactor and respirable samples in both laboratory and field studies. The CVs for EC measurements between SKC impactors and respirable samples ranged from 0.2% to 12.3% when taking measurements in an underground mine. The CVs for EC ranged from 3.5% to 5.4% when samples were taken in a laboratory chamber. Two studies published in 2004 (Noll, et al., 2004 and Birch, et al., 2004) reported results from investigating sampling for EC in the presence of coal dust using submicron impactors. The results show good agreement between submicron EC and respirable samplers for collecting DPM samples.

Error Factor

In accordance with generally accepted good industrial hygiene practice and MSHA policy, we develop method-specific error factors to assure that a personal exposure result is more than likely to represent an overexposure. These error factors account for normal and expected variability inherent in any analytic method and sampling protocol and provide a basis for interpretation of sampling results. When we interpret sampling results and make a determination of compliance, we apply

the error factor to the result to gage whether the sample indicates a true overexposure. We use the validated NIOSH Analytical Method 5040 for diesel particulate matter to analyze our personal exposure samples collected for compliance determinations.

The NIOSH criteria and guidelines used for method validation do not directly apply to the development of error factors. However, similar statistical procedures to develop analytical methods can also be used to develop error factors. The commenters fail to recognize other differences between validation of methods and development of error factors.

Error factors are developed to compare an infinite number of sampling results to a specific target value of the analyte whereas the method validation protocol specifies a range of 0.1 to 2 times a specific value. Many other differences exist between the two procedures.

We believe the NIOSH Analytical Method 5040 is most appropriate for use in a mining environment because:

(1) The results from the additional method validation efforts by NIOSH using samples collected in mines, as mentioned above, show the method is valid, and

(2) The data we used are generated from miners' samples and analyzed in our laboratory (using multiple analyzers) and other laboratories account for variability in the determination of the error factor.

In response to commenters' concerns that ''MSHA has developed this Error Factor as though the NIOSH Analytical Method 5040 were perfectly accurate for measurements of EC,'' we refer the commenter to item (2) above. We have incorporated inter-laboratory variability and inter-instrument variability into the calculation of the error factor that does, in fact, address accuracy. By incorporating this type of variability we account for some possible biases. It was stated in the 31-Mine study that, based on the available data from all laboratories, the estimated coefficient of variation for analytical TC measurements declines from 12.7% to 8.0% at TC loadings corresponding to 8-hour equivalent concentrations of 160 μg/m³ and 400 μg/m³, respectively. These estimates are approximately 60 percent greater than those based on the MSHA and NIOSH data alone. Intra- and inter-laboratory analytical imprecision appears to be similar to other airborne contaminants' monitoring methods used by us and other regulatory agencies.

Specific Issues Raised by Commenters on Elemental Carbon Variability of the Relationship Between EC and TC

Industry commenters raised the following specific issues regarding the use of EC as a surrogate for DPM exposure. Commenters asserted that the EC content of DPM is neither stable nor predictable and thus the proposed conversion of TC limits to EC limits is not feasible.

We have addressed this issue in the 2005 final rule (70 FR at 32945–32951), and we continue to support using EC as the most suitable surrogate for measuring DPM. Our 2005 final rule (70 FR 32868) establishes the measurement of DPM using EC as a direct measure of total DPM. Using EC as the surrogate permits personal sampling of miners (such as those who smoke, operate jackleg drills, or load ANFO) that would otherwise be difficult or impossible using the OC components in the calculation of TC. Several commenters also noted that the ratio of EC:TC in DPM can vary widely. One commenter pointed out that EC appeared to make up nearly all of the TC at the mine with which he was affiliated. This commenter stated that replacing a 400_{TC} μg/m³ limit with a 308_{EC} μg/m³ limit would impose a much more stringent standard at that mine. Another commenter noted that a 308_{EC} μg/m³ limit would be less protective of miners than the 400_{TC} μg/m³ limit in cases where the ratio of EC comprised less than 78% of the TC. One industry association submitted comments authored by a consultant who emphasized that the highly variable nature of the EC to OC ratio introduces ''large and important uncertainties in the exposure assessments needed to sustain QRA [i.e., quantitative risk assessment].''

We addressed these concerns regarding variability previously in our discussion of the *Relationship Between EC and TC* in our preamble to the 2005 final rule (70 FR 32894–32899). In the 2005 NPRM we solicited comments about converting the final phased-in limits based on TC measurements to corresponding EC limits. In the 2005 NPRM, we also notified the mining community that we would initiate a separate rulemaking to determine what the correct TC to EC conversion factor would be for the phased-in TC final limits below 308_{EC} μg/m³. We requested comments on whether the record supports an EC PEL without regard to any conversion factor, the appropriate conversion factor if one is used, and any other scientific approaches for converting the existing TC limit to an appropriate EC limit.

Several commenters agreed with our use of the 1.3 conversion factor for the interim limit and the first phased-in final limit of 400_{TC} μg/m³ (308_{EC} μg/m³), but did not believe sampling evidence supported its use at a lower PEL. One commenter recommended we either use the EC number from the lab evaluation, or use a compliance strategy similar to the method used by the Agency in 2004 for the interim limit of 400_{TC} μg/m³.

Several commenters agreed that more work is required to develop an appropriate conversion factor from TC to EC for the final limits. They stated it was reasonable to expect sampling and analysis variability to increase, and accuracy and precision to decrease at lower EC levels. They further stated that MSHA data demonstrate that no accurate conversion factor exists for the highly variable ratio of TC to EC at levels below the interim standard and that this ratio becomes even more unstable once diesel equipment is modified by installation of DPM filtering devices.

Other commenters also believed more research is needed to determine an appropriate conversion factor and noted that recent evidence indicated the EC to TC relationship may change depending on various factors such as fuel type, engine duty cycle, and the control technologies being used.

A number of commenters stated that an accurate, scientifically supportable conversion factor was essential to their acceptance of a staggered effective date schedule. One of them further stipulated the need for peer review of the conversion factor. Other commenters believe that the EC content of DPM is not stable or predictable so the proposed conversion of TC limits to EC limits is not feasible and that the measurement of EC is not accurate.

Organized labor commented that the only proper course of action for MSHA would be to leave the standard at 160 μg/m³ TC until an equally protective standard based on EC can be established. They said that leaving the standard at 308 μg/m³ EC, or going to an EC level not equivalent to 160 μg/m³ TC would violate the ''no-less protection'' restriction under section 101(1)(9) of the Mine Act.

We maintain that the 31-Mine Study data establish that a conversion factor of 1.3 is appropriate for both the initial and final limit of 308_{EC} μg/m³. As we determined in the 2005 final rule, we believe that the limit of 308_{EC} μg/m³ is equally protective of miners' health and equally feasible for the mining industry

to meet. Although the EC:TC ratio can exhibit considerable variability in specific cases, we concluded that application of the 1.3 conversion factor, pursuant to the Second Partial Settlement Agreement, achieves the goal of equal protection and feasibility at the 308_{EC} μg/m³ final PEL.

We are considering various alternatives for converting the 350_{TC} μg/m³ and 160_{TC} μg/m³ final limits to comparable EC limits. We will consider all comments in this rulemaking record concerning the relationship between EC, OC and TC in a separate rulemaking to determine the most appropriate conversion of the final TC limits. Presently, we believe that the DPM rulemaking record is inadequate for us to make determinations regarding a more appropriate conversion factor other than 1.3 for the 350_{TC} μg/m³ final PEL. If a rulemaking to establish a conversion factor is not completed before January 20, 2007, we intend to use the 1.3 conversion factor to convert the 350_{TC} μg/m³ final limit to an EC equivalent. We will use the EC equivalents as a check to validate that an overexposure is not the result of interferences as we did with the 400_{TC} μg/m³ interim limit pursuant to the Second Partial Settlement Agreement 67 FR 47296, 47298). We discussed this concept earlier in this section.

Measurement of EC

Some commenters stated that any carcinogenic effect of DPM is due entirely to the organic fraction. We believe this assumption is speculative. This assumption contradicts findings reported by Ichinose *et al.* (1997b) and does not take into account the contribution that inflammation and active oxygen radicals induced by the inorganic carbon core of DPM may have in promoting lung cancers. Indeed, identifying the toxic components of DPM, and particulate matter in general, is an important research focus of a variety of government agencies and scientific organizations (see, for example: Health Effects Institute, 2003; Environmental Protection Agency, 2004b).

In focusing on the carcinogenic agents in OC, the commenters seem to have ignored non-cancer health effects documented in the 2001 risk assessment—e.g., immunological, inflammatory, and allergenic responses in healthy human volunteers exposed to 300_{DPM} μg/m³ (i.e., ≈ 240_{TC} μg/m³) for as little as one hour (66 FR at 5769–70, 5816–17, 5820, 5823, 5837, 5841, 5847). We discussed this also in our 2005 final rule (70 FR 32898,32899).

The implication of non-organic chemicals in a chemical pathway explaining the induction of lung carcinogenesis indicates that organic and inorganic chemical compounds, acting together, contribute to the toxicity of DPM. Identification of a single carcinogenic component of DPM (whether EC, OC, or some combination of chemicals in DPM) is not germane to the issue of whether DPM actually causes adverse health effects as established by the 2001 risk assessment and its updates. This rule reduces the adverse health risks associated with miners' exposure to DPM and not just those associated with the EC or OC fractions of DPM.

The NIOSH Analytical Method 5040 characterizes compounds found in DPM into several classes of substances. These classifications are convenient categories and do not distinguish hazardous compounds from other compounds. As stated by NIOSH (Birch, 1996), ''[M]ethods that speciate EC and OC are considered operational (Cadle and Groblicki, 1980) in the sense that the method itself defines the analyte.''

The possible chemical pathways causing adverse health effects (including lung cancer) include both organic and inorganic chemical elements. Since we believe that both organic and inorganic chemicals contribute to the overall toxicity of DPM our use of EC as a surrogate is intended to control miners' exposure to whole DPM. As NIOSH stated:

> Elemental carbon is the superior measure of exposure to particulate diesel exhaust because elemental carbon constitutes a large portion of the particulate mass, it can be quantified at low levels, and its only significant source in many workplaces is the diesel engine. Selection of an elemental carbon marker also was based on previous work by Fowler (1985), who evaluated various analytes as indices of ''overall diesel exposure.'' (Birch, 1996)

We have not obtained additional information, either provided in comments or from peer-reviewed literature, to change our position that the EC and OC fractions of DPM contribute to the adverse health effects of miners caused by exposure to DPM found in diesel exhaust and that EC is the superior measure of exposure to DPM.

The 308_{EC} μg/m³ final PEL established by this rule is intended to be commensurate with the interim TC limit of 400 micrograms established under the 2001 rule—i.e., to be equally protective and equally feasible as well as the 308 μg/m³ interim EC PEL established by the 2005 final rule. Although the EC:TC ratio can exhibit considerable variability in specific cases, we concluded that application of the 1.3 conversion factor, as suggested in the Second Partial Settlement Agreement, achieves equal protection and feasibility at the 308_{EC} μg/m³ final PEL.

In the 2005 NPRM we solicited comments about converting the final phased-in limits based on TC measurements to corresponding EC limits. We have discussed the relationship between EC and TC and conclude the relationship of EC:TC is adequate to promulgate a personal exposure limit of 308_{EC} μg/m³ final PEL. However, we are considering various alternatives for converting the 350_{TC} μg/m³ and 160_{TC} μg/m³ final limits to commensurate EC limits. We will consider all comments in this rulemaking record concerning the relationship between EC, OC and TC in a separate rulemaking to determine the most appropriate conversion of the final TC limits. Presently, we believe that the DPM rulemaking record is inadequate for us to make determinations regarding a more appropriate conversion factor other than 1.3 for the 350_{TC} μg/m³ final PEL. If a rulemaking to establish a conversion factor is not completed before January 20, 2007, we intend to use the 1.3 conversion factor to convert the 350_{TC} μg/m³ final limit to an EC equivalent. We will use the EC equivalents as a check to validate that an overexposure is not the result of interferences as we did with the 400_{TC} μg/m³ interim limit pursuant to the Second Partial Settlement Agreement (67 FR 47296, 47298). We discussed this concept earlier in this section.

Other commenters asserted that measurement of EC is not accurate and the inherent inaccuracies are not accounted for by the MSHA ''error factor.'' NIOSH Analytical Method 5040 has been validated. The Error Factor accounts for uncontrollable components of measurement except for the variability inherent in EC:TC ratios. We have shown these ratios vary between mines and within mines. The commenters obtained additional information from us and presented a new analysis addressing the validity of the NIOSH Analytical Method 5040.

Based on this new analysis, they concluded that ''* * * the MSHA Error Factor described in the proposed Final Rule is too small to meet the statistical goals (*i.e.*, '95-percent confidence') adopted by the Agency.'' We disagree. We have demonstrated the mathematical fallacies of the commenters' position in the 2005 final rule. We show it is plausible to have 32 percent of sampling clusters with the experimental design specified by Cohen,

et al., 2002 with an inherent coefficient of variation (CV) of 12% and still be consistent with the NIOSH accuracy criterion. The Monte Carlo analysis we performed shows that the commenters' data are consistent with NIOSH validation criteria even though the commenters' collection procedures and analyses were substandard.

The commenters' experimental design and results as presented to the 2003 NPRM were critiqued in the 2005 final rule. No explanation has been provided by these commenters as to why the submitted data were restricted to 75_{EC} μg/m³ to 200_{EC} μg/m³ and whether additional basket data falling outside of this range were collected. The samples were collected without the submicron impactor. The sample results are, therefore, inappropriate to address this rulemaking. The study reference does not indicate the type of filter holder and cyclone attachment configuration or if the mineral-dust-related carbonate that occurs in the organic portion of the analysis was subtracted off the OC determination. When using a filter holder with an internal cyclone connection, the cyclone nozzle acts as an impactor jet and mineral dust is deposited in the center of the filter. This inferior sampling equipment arrangement gives a high level of mineral dust in the center of the filter, and a non-uniform deposit of material on the filter surface. A non-uniform deposit precludes any analysis of duplicate sample punch repeatability.

Additionally, three of the seven mines in the referenced study produced either limestone or trona. Both of these minerals contain carbonates which are evolved in the organic portion of the analysis. The referenced study indicates that up to 15 mg/m³ of total mineral dust was present at one of the mines. Failure to remove this mineral dust by use of an impactor may affect the ability of the analytical analysis to discern between OC and EC, thus introducing an artificially high variability of results.

No information is provided on sampling times or filter loadings (μg/cm²), both of which affect expected analytical variability. Commenters provided no information as to whether multiple punches were used to determine EC concentrations similar to what we do in our analyses. Only summary data, consisting of the EC measurement range, mean, standard deviation (SD), and coefficient of variation (CV), were provided for each group of ''four or five'' samples. No confidence intervals or other measures of statistical uncertainty were provided for their summary statistics. The commenters failed to address these issues.

Some commenters presented a new analysis addressing the validity of the NIOSH Analytical Method 5040. The new Monte Carlo simulation study results are not persuasive. The commenters' statement that ''MSHA employed its Monte Carlo simulation to support the conclusion that their sampling and analytical method was adequately precise and therefore feasible'' misrepresents our inferences. We used a Monte Carlo simulation to show that, even with all the uncertainties in the quality of the referenced study and conjectures made by the commenter, it is possible for those results to have been generated by a valid analytical method. We generally agree with the commenters insofar as hypothetically generated data seem to only obscure the discussion of real-world data that document analytical precision.

Industry commenters believed that our analysis of more than 600 EC samples (punch-repunch) show that the results are neither precise nor reproducible. This issue was addressed in the preamble to the 2005 final rule. We continue to rely on our previous analysis of the commenters' statement. The commenters' analysis of the punch-repunch data used in the calculation of the error factors for the PELs is incorrect. We summarize our critique of the commenters' analysis here in response to their new analyses of their updated data set.

1. The commenter's analysis of the punch-repunch data is now closer to the mathematical definition of a Coefficient of Variation (CV). Their calculation of a ''difference between punches, to the average of the two punch results'' presents artificially larger variations in the analytic method compared with those with properly calculated CVs. We point out that the commenters did not follow the guidelines specified in NIOSH validation guidelines. The calculation used by the commenters to show large variability is misleading and inconsistent with their own criticisms, and overstates the variation of the NIOSH Analytical Method 5040 instrumentation.

2. Although the commenters adjust their calculation of the difference between punches by the mean of the punches, they fail to make meaningful statistical inferences of the results. They simply tabulate instances in which the ''% Difference'' exceeds a specified CV. The CV values used for their demonstration thresholds do not represent an upper bound on individual deviations or differences. Approximately one-third of individual errors (without regard to direction) would normally be expected to exceed the corresponding CV.

This is why we multiply the appropriate CVs used in calculating the error factor (EF) by a ''Confidence Coefficient'' when establishing a 1-tailed confidence error factor for noncompliance determinations along with other sources of uncontrollable variability of the measurement system.

Industry commenters also contended that there is no NIST ''standard'' for defining EC for analysis and measurement, thus accurate measurement is not feasible. The National Institute of Standards and Technology (NIST) provides two Standard Reference Materials that define not only EC but also TC. These reference materials are well characterized to help determine the operating characteristics of NIOSH Analytic Method 5040 and others. NIST Standard Reference Material 1649a (Urban Dust) provides a Certified Concentration Value for TC. NIST provides an Information Concentration Value for the fraction of EC (EC/TC) contained in this standard material. Although components of the material assigned Information Concentration Values are not as well characterized as those with certified Concentration Values, they are valuable sources of information used by laboratories to validate and assure proper operation of analytic methods.

NIST Standard Reference Material 8785 (Air Particulate Matter on Filter Media) has been available since July 8, 2005 and provides the means to compare methods and laboratories for the measurement of EC. This reference material has value-assignments for TC, EC, and OC measured according to two thermal-optical methods: the NIOSH and IMPROVE (Interagency Monitoring of Protected Visual Environments) protocols. Our laboratory utilizes these NIST Standard Reference Materials as part of a comprehensive quality assurance program.

Health Implications of Using EC

Commenters also asserted that EC is not a constituent of diesel exhaust that is suspected of causing lung cancer, and the MSHA risk analysis of diesel exhaust is inapplicable to the proposed EC limits. The particulate component of combustion products produced by a diesel engine is characterized by the analytic method as primarily either EC or OC. The analytic decomposition of DPM defines which components are characterized as EC or OC without specifically determining the exact

chemical, physical, or carcinogenic chemicals found in DPM (NIOSH Analytical Method 5040, March 15, 2003). Diesel particulate matter is firmly characterized as a hazardous substance and we do not further characterize DPM into hazardous components and non-hazardous components. The final rule intends to limit exposures to total DPM rather than any single constituent of DPM. The NIOSH Analytical Method 5040 characterizes compounds found in DPM into two classes of substances. These classifications are convenient categories and do not distinguish hazardous compounds from other compounds. As stated by NIOSH (Birch, 1996), ''[M]ethods that speciate EC and OC are considered operational (Cadle and Groblicki, 1980) in the sense that the method itself defines the analyte.''

The assumption that any carcinogenic effect of DPM is due entirely to the organic fraction is speculative. This assumption contradicts findings reported by Ichinose *et al.* (1997b) and does not take into account the contribution that inflammation and active oxygen radicals induced by the inorganic carbon core of DPM may have in promoting lung cancers. Indeed, identifying the toxic components of DPM, and particulate matter in general, is an important research focus of a variety of government agencies and scientific organizations (*see,* for example: Health Effects Institute, 2003; Environmental Protection Agency, 2004b). The 2001 risk assessment discusses possible mechanisms of carcinogenesis for which both EC and OC would be relevant factors (66 FR at 5811–5822). Multiple routes of carcinogenesis may operate in human lungs—some requiring only the various organic mutagens in DPM and others involving induction of free radicals by the EC core, either alone or in combination with the organics (70 FR 32898).

The implication of non-organic chemicals in a chemical pathway explaining the induction of lung carcinogenesis indicates that organic and inorganic chemical compounds, acting together, contribute to the toxicity of DPM. Identification of a single carcinogenic component of DPM (whether EC, OC, or some combination of chemicals in DPM) is not germane to the issue of whether DPM actually causes adverse health effects as established by the 2001 risk assessment and its updates. This rule reduces the adverse health risks associated with miners' exposure to DPM and not just those associated with the EC or OC fractions of DPM.

We have not obtained additional information, either provided in comments or from peer-reviewed literature, to change our position that the EC and OC fractions of DPM contribute to the adverse health effects of miners caused by exposure to DPM found in diesel exhaust and that EC is the superior measure of exposure to DPM.

B. Special Extensions § 57.5060(c)(3)(i)

In our 2005 final rule addressing the interim limit, we revised the requirements at § 57.5060(c) regarding special extensions of time in which to meet the final DPM limit. We retained the requirement in § 57.5060(c)(3)(i), however, that the mine operator must specify in the application whether diesel-powered equipment was used in the mine prior to October 29, 1998. The purpose of the 2001 restriction was to limit special extensions to underground mines that operated diesel-powered equipment prior to October 29, 1998. We chose this date because we released the NPRM to our 2001 final rule on that date. We reasoned that some mines in operation prior to that date could experience compliance difficulties relating to such factors as the basic mine design, use of older equipment with high DPM emissions, etc., and that as a result, some of these mines may require additional time to attain compliance with the 2001 final concentration limit. Also, we envisioned that mines opened after that date would be using cleaner engines to help them comply with the final limit. Furthermore, we stated in the 2005 proposal that we had reason to believe that our 2001 assumptions were incorrect, and that it was unnecessary to limit extensions to mines operating diesel equipment prior to October 29, 1998.

We believe the consequence of such a conclusion does not compromise the level of health protection afforded under the existing prohibition. This is because it is optional as to whether a mine operator applies for a special extension under current § 57.5060(c). Special extensions involve considerable paperwork for mine operators, but they result in a document that a mine operator can rely on for a period of one year (renewable) to demonstrate to our inspectors that we have determined that it is infeasible for that particular mine operator to achieve compliance with the final limit using engineering and administrative controls. If affected miners are included in a respiratory protection program which meets the requirements of § 57.5060(d), the mine operator is in compliance and no citation will be issued. To qualify for a special extension, a mine operator must demonstrate infeasibility, which is the same test which we use for enforcement of § 57.5060(d) at mines that don't have a special extension. Current § 57.5060(d) requires mine operators to install, use, and maintain all feasible engineering and administrative controls to achieve compliance. If we determine that reaching the final limit is infeasible for technological or economic reasons, and over-exposed miners are in an appropriate respiratory protection program, the operator is deemed to be in compliance and we will not issue a citation. We will periodically check to determine current DPM exposures and the ability of the mine operator to implement new control technology.

We received no comments objecting to deleting § 57.5060(c)(3)(i). Commenters supporting the deletion stated that they saw no reason to limit special extensions to those mine operators who were operating diesel equipment prior to the arbitrary date of October 29, 1998. They also stated that there would be no reduction in the level of health protection from a standard that was not feasible, nor with which health risks were never associated. Another commenter stated that if this restriction is left in the DPM standard, mines that are just starting will not be allowed to file for a special extension. They claimed that in their case, if they were to develop a new mine, they would have essentially the same constraints as far as mine opening dimensions, maximum air volumes, and equipment as their existing mines have. Consequently, they would not necessarily have lower DPM levels in a new mine. For this reason, they believe that it is critical that we allow new mines the same opportunity to qualify for special extensions after taking all reasonable steps to reduce DPM emissions.

Other commenters agreed that we should delete § 57.5060(c)(3)(i) from the existing DPM standard, but provided no information as to whether elimination of this requirement would result in a reduction in the current level of health protection afforded to miners.

We also received numerous comments recommending that we make other changes to the special extension provisions. These commenters suggested that the final rule include: Comprehensive criteria for granting a special extension; specific language to expand the application of an extension to the entire mine or to portion(s) of a mine; additional procedures for the District Manager to consider in making a determination of whether to grant a special extension; requirements that the District Manager include reasons for any

denial of a special extension; and, procedures allowing appeal of the District Manager's determination to the Administrator, and ultimately, to the independent Federal Mine Safety and Health Review Commission.

In the 2005 proposed rule, we informed the public that the scope of revision to § 57.5060(c) was limited to the removal of paragraph (c)(3)(i). Accordingly, such changes would be beyond the scope of this rulemaking. Consequently, the final rule does not reflect consideration of the above stated issues. We note that we made comprehensive revisions to § 57.5060(c) in the 2005 final rule.

Some other commenters discussed how the special extension procedures enhance feasibility and that the courts have recognized that such procedures can resolve individual problems with feasibility. The commenter refers us to the *United Steelworkers of America* v. *Marshall,* 647 F. 2d 1189, 1266 (1980). We address this comment under our discussions on feasibility.

Based on the comments received supporting the deletion of § 57.5060(c)(3)(i), and our discussions above, we have deleted this provision from the DPM standard. For the forgoing reasons, we do not believe that deletion of this provision reduces miners' current level of health protection, and there were no comments submitted to the contrary.

C. Medical Evaluation and Transfer § 57.5060(d)

In the preamble to the 2005 NPRM, we requested comments from the mining community on whether we should include in the final rule a provision requiring a medical evaluation to determine a miner's ability to use a respirator before the miner is fit tested or required to work in an area of the mine where respiratory protection must be used. In addition, we asked for comments on whether the final rule should contain a requirement for transfer of a miner to an area of the mine where respiratory protection is not required if a medical professional has determined as a result of the medical evaluation that the miner is unable to wear a respirator for medical reasons.

Further, we asked whether we should amend the existing respiratory protection requirement at § 57.5060(d) by adding new paragraphs (d)(3) and (d)(4) to address medical evaluation and transfer rights for miners. We particularly wanted to know if the final rule should include the following language:

(3) The mine operator must provide a medical evaluation, at no cost to the miner, to determine the miner's ability to use a respirator before the miner is fit tested or required to use the respirator to work at the mine.

(4) Upon notification from the medical professional that a miner's medical examination shows evidence that the miner is unable to wear a respirator, the miner must be transferred to work in an existing position in an area of the same mine where respiratory protection is not required.

(i) The miner must continue to receive compensation at no less than the regular rate of pay in the classification held by that miner immediately prior to the transfer.

(ii) The miner must receive wage increases based upon the new work classification.

We also requested comments in the preamble to the proposed rule on whether a transfer provision in the final rule should include issues of notification to the District Manager of the health professional's evaluation and the fact that a miner will be transferred; the appropriate time frame within which the transfer must be made; whether a record of the medical evaluation conducted for each miner should be maintained along with the correct retention period; medical confidentiality; and any other relevant issues such as costs to mine operators for implementing a rule requiring medical evaluations and transfer of miners. Our current DPM requirements for respiratory protection at § 57.5060(d) do not include requirements for medical evaluation of miners before they are required to work in an area where respiratory protection must be worn, or transfer of miners who are medically unable to wear respirators.

Section 101(a)(7) of the Mine Act authorizes medical evaluation and transfer protection for miners, and states, in pertinent part:

Where appropriate, such mandatory standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring miner exposure at such locations and intervals, and in such manner so as to assure the maximum protection of miners. In addition, where appropriate, any such mandatory standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the operator at his cost, to miners exposed to such hazards in order to most effectively determine whether the health of such miners is adversely affected by such exposure. Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based upon the new work classification.

Existing § 57.5060(d) requires that mine operators comply with the respiratory protection requirements under § 57.5005(a) and (b) (control of exposure to airborne contaminants) of our air quality standards for M/NM underground mines. Sections 57.5060(d)(1) and (d)(2) designate acceptable respirator filters under the standard. Section 57.5005(a) requires that respirators be furnished and miners use the protective equipment in accordance with training and instruction. Currently, we do not require mine operators to provide miners with medical evaluation before they wear a respirator and transfer protection in the event that they cannot wear one.

Existing § 57.5005(b) for control of miners' exposures to airborne contaminants requires that mine operators establish a respiratory protection program consistent with the (ANSI Z88.2–1969) ''American National Standard for Respiratory Protection —''ANSI Z88.2–1969, ''American National Standards Practices for Respiratory Protection.'' The final rule, however, adopts our approach taken in the proposed preamble recommendations along with additional requirements which we deem necessary to protect miners. These additional requirements address issues related to medical confidentiality, evaluation of a miner's ability to wear a PAPR, reevaluation of miners, and recordkeeping requirements, along with other revisions to clarify our intent under the standard.

We believe that there is adequate evidence in the rulemaking record establishing the need for medical evaluation of miners. We incorporated into the DPM rulemaking record the Occupational Safety and Health Administration's (OSHA) data from its rulemaking record supporting its generic respiratory protection standard at 29 CFR 1910.134 related to the health risk to persons from using respirators with certain medical conditions. Based on their data, OSHA concluded, and MSHA agrees, that use of a respirator may place a physiological burden on a worker while wearing such a device. Depending on the medical condition of the person, this burden could result in illness, injury, and in some instances, even death. OSHA also concludes that common health problems can cause

difficulty in breathing while a person is wearing a respirator. Most healthy persons, however, will not have physiological problems wearing properly chosen and fitted respirators.

The final rule amends the existing DPM respiratory protection standard at § 57.5060(d) by adding requirements for mine operators to provide, at no cost to the miner, a confidential medical evaluation by a physician or other licensed health care professional (PLHCP) to determine the miner's ability to use a respirator before the miner is fit tested or required to work in an area of the mine where respiratory protection must be used. When these conditions occur the miner must be reevaluated to determine the miner's ability to use the respirator.

Also included in the final rule is the right of miners to discuss their medical evaluations with the PLHCP before the PLHCP submits to the mine operator a copy of the PLHCP's medical determination. The mine operator must have a written record of the most recent medical evaluation to confirm that the miner was evaluated. We believe that the final rule includes a practical approach for requiring medical evaluations that lessens the compliance burden on mine operators without compromising miners' health.

In addition, the final rule includes requirements for transferring a miner to an existing job in an area of the mine where respiratory protection is not required if a PLHCP has determined that the miner's medical condition precludes the miner from safely wearing any required respirator, including a powered air-purifying respirator (PAPR). The details of this requirement are discussed below in this preamble. We believe that compliance with the final rule will enhance miner protection.

Section 57.5060(d)(3) of the final rule requires that the mine operator provide a confidential medical evaluation by a PLHCP to determine the miner's ability to use a respirator before the miner is required to be fit tested or to use a respirator at the mine. The mine operator must provide the medical evaluation to the miner and pay the cost of each of the miner's medical evaluations. Mine operators must make certain that the PLHCP administers the testing in a manner that protects the confidentiality of the miner being evaluated.

If the PLHCP determines that the miner is able to wear a negative-pressure respirator, the mine operator must provide it and require the miner to wear it under our existing respiratory protection requirements. On the other hand, if the PLHCP concludes that the miner is unable to wear a negative-pressure respirator, the mine operator must make certain that the PLHCP also determines the miner's ability to wear a PAPR. If the PLHCP finds that the miner can wear a PAPR, the mine operator must provide the PAPR and require the miner to wear it.

The miner must be evaluated by a PLHCP prior to the miner wearing the respirator for any duration or frequency of respirator use, including prior to fit testing of the respirator. This is because we intend that a miner not be assigned to tasks in the mine that require use of a respirator unless a PLHCP makes a written determination that the miner is physically able to perform the work to which the miner is assigned while using the respirator. For enforcement purposes, we will use the results of the most recent written determination of the PLHCP to assess compliance with this provision. Whereas we have chosen not to include a specific protocol for how evaluations must be conducted, we expect the PLHCP to conduct an evaluation based on the individual miner's medical information.

As part of the PLHCP's determination, § 57.5060(d)(4) requires that the mine operator provide the miner with an opportunity to discuss their evaluation results with the PLHCP before the PLHCP submits the written determination to the mine operator. If the miner disagrees with the determination of the PLHCP, the miner has up to 30 days to submit to the PLHCP additional evidence of their medical condition. Depending upon the miner's medical history, it may be critical for the miner to discuss any discrepancies or errors in a PLHCP's determination. The miner, however, may at any time provide additional medical information to the mine operator if the miner believes that it may impact the miner's ability to wear a respirator.

Section 57.5060(d)(5) requires the mine operator to obtain a written determination from the PLHCP regarding the miner's ability to wear a respirator. The mine operator must make certain that the PLHCP provides a copy of the determination to the miner. Though the rule does not specify a timeframe in which the mine operator must have the PLHCP provide a copy to the miner of his or her medical determination, we intend for the mine operator to exercise diligence in getting this important information to the miner.

Section 57.5060(d)(6) requires the mine operator to reevaluate the miner when the operator has reason to believe that conditions have changed such as when the miner is assigned to a new task requiring a significantly greater degree of physical exertion, or the miner is assigned to work at a lower level of a deep mine that is hotter and imposes greater physiological stress. We expect the mine operator to exercise sound judgment when deciding whether the miner must be reevaluated by a PLHCP.

Section 57.5060(d)(7) requires that upon written notification that the PLHCP has determined that the miner is unable to wear a respirator (including a PAPR), the miner must be transferred within 30 days of the PLHCP's determination to work in an existing position in an area of the same mine where respiratory protection is not required. Congress specifically included in Section 101(a)(7) of the Mine Act that when transfer of a miner is required under this section that their compensation must be as we specifically stated in this final rule. As a result, the miner must continue to receive compensation at no less than the regular rate of pay in the classification held by that miner immediately prior to the transfer. However, wage increases of the transferred miner must be based on the new work classification.

Under § 57.5060(d)(8) of the final rule, the mine operator must maintain a record of the identity of the PLHCP and the most recent written determination of each miner's ability to wear a respirator for the duration of the miner's employment plus six months thereafter.

In response to our 2005 NPRM, we received numerous comments on issues related to medical evaluation of respirator wearers and transfer of miners medically unable to wear respirators. We requested comments in the 2005 NPRM regarding whether we should amend existing § 57.5060(d) addressing respiratory protection requirements by adding regulatory language to provide miners medical evaluations and transfer rights pursuant to Section 101(a)(7) of the Mine Act. One mine operator commented that they still face significant challenges to compliance with the interim limit. They currently require miners to wear respirators when performing certain tasks that have been a significant source of DPM exposure. Based on their own samples, they believe that the use of respiratory protection would increase under the final limit and be required of all miners through the entire shift. They also stated their concern for the burden this would place on affected miners and noted that mandatory respirator usage for the entire shift would compromise miners' acceptance of the rule and their ability to safely remain productive. Further, they believe that most companies that have a formal respiratory protection

program are currently conducting medical evaluation in the program, and consequently, should not have to perform medical evaluation ''solely to comply with the rule.'' Some other mine operators commented that they perform medical evaluations of a miner's ability to wear a respirator during pre-employment examination, and annually thereafter for workers who must wear respirators, but did not believe it was necessary to require medical evaluations through regulation.

Although some mine operators are already conducting medical evaluations before fit testing and requiring miners to wear respirators, not all underground M/NM mine operators using diesel powered equipment are conducting voluntary medical evaluations. We believe that the data establishing the need for the evaluations support a uniform approach for requiring reevaluations.

We agree with the commenters who acknowledged that existing voluntary medical evaluations currently provided by some mine operators do not establish uniform protection for all miners covered under the DPM standard. These commenters also stated that simply because some mine operators have provided miners this protection does not justify why others should continue to be denied them. These commenters support the need for including medical evaluation in the final rule and stated that voluntary medical evaluation programs in the industry show that mine operators, acting in good faith, can easily implement a respirator program, including transfer rights, without practical or financial difficulty.

One commenter recommended that we defer requiring medical evaluation and transfer until we are able to establish an accurate database on the number of miners projected to be affected. Our 2005 NPRM preliminary estimates of the number of miners that may be affected resulted from the available data in the rulemaking record at the time of the proposal. We have since received comments from several mine operators who included their current costs for medical evaluations and the number of miners affected. We used this information in assessing our cost analysis for the Regulatory Economic Analysis (REA) supporting this final rule.

Several other commenters voiced concern over worker acceptance of respirators in general, but believed that medical evaluations were a good idea. Organized labor stated that there is substantial evidence in the record of the relevant OSHA hearings to support medical evaluations, and requested that we incorporate that evidence into this record as well. We have incorporated these data into the DPM rulemaking record. As stated earlier, OSHA acknowledges within its current standards addressing respiratory protection at 29 CFR 1910.134(e) that use of a respirator may place a physiological burden on workers while using them. At a minimum, OSHA requires employers to provide medical evaluations before an employee is fit tested or required to use respiratory protection. Employers are required to have a physician or other licensed health care professional have the worker complete a questionnaire, or in the alternative, conduct an initial medical examination in order to make the determination. If the worker has a positive response to certain specified questions, the employer must provide a follow-up medical examination. The questionnaire is contained in the body of the OSHA rule. The preamble to the OSHA final rule states:

> Specific medical conditions can compromise an employee's ability to tolerate the physiological burdens imposed by respirator use, thereby placing the employee at increased risk of illness, injury, and even death (Exs. 64–363, 64–427). These medical conditions include cardiovascular and respiratory diseases (*e.g.*, a history of high blood pressure, angina, heart attack, cardiac arrhythmias, stroke, asthma, chronic bronchitis, emphysema), reduced pulmonary function caused by other factors (*e.g.*, smoking or prior exposure to respiratory hazards), neurological or musculoskeletal disorders (*e.g.*, ringing in the ears, epilepsy, lower back pain), and impaired sensory function (*e.g.*, a perforated ear drum, reduced olfactory function). Psychological conditions, such as claustrophobia, can also impair the effective use of respirators by employees and may also cause independent of physiological burdens, significant elevations in heart rate, blood pressure, and respiratory rate that can jeopardize the health of employees who are at high risk for cardiopulmonary disease (Ex. 22–14). One commenter (Ex. 54–429) emphasized the importance of evaluating claustrophobia and severe anxiety, noting that these conditions are often detected during respirator training. [See 63 FR 1152, 01/08/1998]
>
> Organized labor also stated:
>
> * * * In all of our certification programs we have included blood pressure and spirometry measurements. In respirator certification for a group of electrical workers, we identified 7.5% who had abnormal spirometry and were not given a respiratory certificate until they had received further medical evaluation and a repeat of the spirometry.
>
> This observation was [sic] supported in a study of nurses working in a hospital close to the World Trade Center at the time of the disaster. Although exhibiting no respiratory symptoms on their questionnaires, 10 of 110 nurses had abnormal spirograms and were referred to a Pulmonologist for further evaluation.
>
> In our evaluation of World Trade Center Rescue workers, we have found similar discrepancies between the questionnaire and spirometry.
>
> A report by S. Levine *et al.* (MMWR Sept. 10, 2004) notes that 33% [sic] had abnormal spirometry but wheeze was [sic] only reported in 0.9%. (David Parkinson, MD, United Steelworkers Consultant, Occupational Physician)

The final rule does not include a protocol to guide the PLHCP on how to conduct medical evaluations as the OSHA standard does, but places the responsibility on the mine operator to provide an appropriate medical evaluation by a PLHCP to determine the miner's ability to use a respirator before the miner is required to be fit tested or to use a respirator at the mine.

We intend that a ''physician or other licensed health care professional (PLHCP)'' be a physician, physician's assistant, nurse, emergency medical technician or other person qualified to provide medical or occupational health services, as we have defined a ''health professional'' under our Hazard Communication standards at 30 CFR 47.11. We will accept the license as proof of qualification to perform the medical evaluation. We specified that the health care worker be licensed to ensure an acceptable level of competency, but have not specified which states' licensing to accept. As we said in our preamble to the final rule (64 FR 49578) on Health Standards for Occupational Noise Exposure at 30 CFR Part 62, ''* * * although some state licensing requirements are more stringent than others, even the least rigorous of the state requirements will provide an acceptable level of competence * * * [for audiologists].''

NIOSH commented that in other industries where respirators were used, they supported the requirements specified in the OSHA Respiratory Protection Standard (29 CFR 1910.134), with the exception of:

> (a) The use of irritant smoke for qualitative respirator fit testing, and (b) unsupervised medical evaluations conducted by health care professionals who are not licensed for independent practice to perform or supervise medical evaluations.

We also received comments from mine operators who stated that they already conduct medical evaluations, or at the very least, pulmonary function tests, during pre-employment examinations. From the mine operators who commented on their frequency of these examinations, several commenters stated that they test annually, another tests every three years, while another

performs them bi-annually. Others noted that the tests were initially performed during pre-employment examinations, and thereafter, were conducted whenever a miner was about to be required to wear a respirator. One commenter that provides a medical exam upon employment and annually thereafter stated:

> If the miners health conditions change preventing the safe use of a respirator, then additional tests can be provided including spirometry and if indicated, a medical examination. We have not had a case where a miner's health changed preventing the wearing of a respirator, that the miner was not aware of the health condition. We do not object to annual spirometry testing following guidelines developed and supervised by a medical doctor or other medical professional. We do object to the added expense of requiring a medical exam every year if there are no indicators of a medical necessity, either by the miners own request or the conditions mentioned.

The final rule requires that miners be reevaluated when the mine operator has reason to believe that conditions have changed which could adversely affect the miner's ability to wear the respirator. We believe that the final rule provision is more appropriate and cost effective than a restrictive schedule of frequency of reevaluation to detect or confirm the miner's ability to safely wear respiratory protection. We do not envision, in most instances, that miners will be in a respiratory protection program for an extended length of time. We recognize, however, that more miners may have to wear respirators when the PEL is reduced to 160_{TC} μg/m^3. We received no comments in support of establishing the need for a specific frequency, but we did receive several comments opposing them. Also, a miner should alert the mine operator whenever the miner experiences changes in his or her health that could impact his or her ability to safely wear a respirator. Mine operators have the responsibility for conducting a reevaluation where a change in workplace conditions may result in a substantial increase in the physiological burden that respirator use places on the miner. For example, a change in the miner's work task may require greater physical exertion or a change in the work environment could increase the stress on the miner.

A mine operator stated that the use of PAPRs was not practical in most mining applications. They believe that the need for battery charging stations for the PAPRs, storage facilities and maintenance would significantly increase the cost of a respiratory protection program. NIOSH commented that PAPRs have some of the same limitations as negative-pressure respirators in that both impede communication, hearing, vision, and require periodic replacement of the purifying elements, as well as other disadvantages. NIOSH further stated:

> * * * In addition, the battery must be recharged on a daily basis so that the blower will deliver enough respirable air to the respiratory inlet covering. Batteries have a limited useful life and cannot be recharged indefinitely. The blower's high speed motor can wear out and require replacement; if the blower fails in a loose-fitting PAPR, the wearer will be without respiratory protection. Other disadvantages include the weight and bulk of the PAPR with its blower and battery, which can hinder movement; complex design; and the need for a higher level of maintenance than a negative pressure respirator.

NIOSH also commented, however, that under normal use, PAPRs do not impose the resistance to breathing that is associated with negative-pressure respirators and that for a miner who has a medical condition placing the miner at risk from using a negative-pressure respirator, use of a PAPR is a potential alternative to transfer of duties.

Another commenter stated that anybody who is working underground at their operations is provided a pulmonary function check to make sure that they are capable of wearing a respirator. That commenter was not aware of anyone being found unable to do so. Several industry commenters stated that they performed medical evaluations for testing the ability of miners to wear a negative-pressure respirator during pre-employment and annually thereafter. One commenter noted that although they had found a few miners who were unable to wear negative-pressure respirators initially, each of them responded to medical treatment and subsequently was found medically able to wear a negative-pressure respirator.

Another commenter specified that they have pulmonary function tests performed on anyone entering a respiratory protection program (about 10 miners), and had no one who was determined to be unable to wear a negative-pressure respirator. While a commenter, on behalf of organized labor, stated that only a few miners would be unable to wear a negative-pressure respirator, most of these miners would be able to wear a PAPR. A medical testing company that provides pulmonary function and respiratory fits, primarily for compliance with OSHA regulations testified that, in their experience, ''with maybe a hundred workers, anywhere from three to five [workers] could not go to work because of their lung problems over the years.'' They also stated that they had not found any workers unable to wear an air-supplying respirator or powered air-purifying respirator, as long as they were clean-shaven. We agree with these commenters that few miners will be unable to wear a PAPR while performing their tasks in a mine.

In the event that a miner is medically unable to wear a negative-pressure respirator, § 57.5060(d)(3) requires the mine operator to make certain that a PLHCP evaluates the miner's ability to use a PAPR, such as those that are integrated into a hard hat. Although a determination needs to be made that the miner is medically able to wear a PAPR, it is likely that most miners could wear a PAPR. We believe that such respirators are an effective option for persons who cannot wear a negative-pressure respirator and, in most instances, will negate the need to transfer the miner.

One commenter suggested that mine operators be required to provide PAPRs to miners who are medically unable to wear a negative-pressure respirator, and not be required to transfer the miner to another position at equal pay unless the miner was unable to wear either a negative-or positive-pressure respirator. Most commenters favored leaving the choice to the mine operator. NIOSH suggested transfer be reserved for those who could not use either a negative-pressure respirator or a PAPR. Final § 57.5060(d)(7) requires transfer of miners when the PLHCP determines that the miner cannot wear a respirator, including a PAPR. If the PLHCP finds that the miner cannot wear a negative-pressure respirator, the mine operator must make certain that the PLHCP tests the miner's ability to wear a PAPR. Pursuant to existing § 57.5060(d), if the mine operator can wear a PAPR, the mine operator has an obligation to provide it and require the miner to wear it.

One commenter stated that as the DPM standard becomes more stringent and respirator usage increases, the medical evaluation would need to be adapted to evaluate the miner's ability to wear the respirator for the full shift during high workload duties. The commenter believes this would increase the number of miners that are unable to successfully pass the medical evaluation, increasing the need for transfer or termination. Although we agree that the number of miners required to use respirators would increase as the DPM final limit is lowered, we do not believe that it would result in any significant increase in the

number of transfers, because most miners could wear a PAPR if they cannot wear a negative pressure respirator.

Most commenters stated that in the event that we require medical transfer of a miner, they opposed creating a job for the transferred miner. They strongly believe that transfer rights should be limited to those circumstances where a position is available where respiratory protection is not required, and the miner is qualified for that position. Several of these commenters stated that not giving consideration to miners' skills or qualifications could result in a miner being transferred into a position where they are unqualified to perform the work. As a result, this could create a threat to the safety of the transferred miner as well as to other miners.

We concluded in final § 57.5060(d)(7) that the miner must be transferred to an existing job in an area of the same mine where respiratory protection is not required. We believe that the rulemaking record is insufficient to establish justification for requiring mine operators to create jobs for transferred miners. The mine operator is in the best position to determine if a miner is qualified to perform the job to which the miner is transferred based upon the tasks involved. We would, however, expect the mine operator to provide necessary task training under our existing standards at 30 CFR part 48.

Several small mine operators were particularly concerned with the difficulty of moving people to different positions within their small workforce. One operator said they often do cross-training, but that their labor market was limited and it was becoming more difficult to find people willing to work underground. Our primary objective under this standard is to prevent miners from being required to use a respirator before the miner is determined to be medically able to wear the respirator. Section 101(a)(7) of the Mine Act, and the data confirming the potential health consequences of using a respirator with certain illnesses and other medical conditions, lead us to disagree with these commenters.

Several mine operators commented that available positions were limited for transferred miners due to terms of labor contracts. One mine operator with several properties said it might be difficult to find an available job at their mine having about 25 employees, but that they would consider offering a position at one of their other properties if a position was available there. Another mine operator said that they might not be able to find a job underground, but that one on the surface might be available. The final standard does not prohibit mine operators from transferring a miner to an existing job on the surface of the same mine. Mine operators, however, must make certain that they comply with the compensation requirements in § 57.5060(d)(7)(i) and (ii). Moreover, they must make certain that the new miner is not overexposed to DPM on the new job and is not required to use respiratory protection, until such time that a subsequent medical evaluation by a PLHCP determines that the miner is able to use the respirator.

One mine operator stated that most of their underground miners would be required to wear respirators, and as a consequence, the availability of alternative positions would be extremely limited. The commenter stated that the rate of pay should not be tied to the position held by the worker prior to the transfer but should be based on the new position because wage scales for underground workers are typically higher than for comparable above ground positions. Several other commenters also wanted the wage rate for a transferred miner to be based on the new position. Again, we emphasize that the final rule adopts our statutory mandate articulated in the Mine Act regarding compensation of transferred miners. Under § 57.5060(d)(7)(i), transferred miners are to receive ''no less'' than the regular rate of pay that they received in the job classification that they were in immediately before the transfer. Under § 57.5060(d)(7)(ii), mine operators must base increases in wages of transferred miners on the new work classification.

We received several comments regarding an appropriate regulatory response to when a miner cannot meet the requirements of wearing a respirator while performing their duties, and there is no available work that the restricted miner is qualified to perform. Some commenters suggested that the miner should be considered medically unfit for duty and terminated subject to their company policies, collective bargaining agreements, and State or Federal laws. One commenter stated that they did not have transfer rights in their contracts, but had been assured that if the circumstance arose, their human resources department would see whether the miner could be moved to an available job. In response, the final rule does not require mine operators to create a job for miners who need to be transferred.

Organized labor stated its strong support for medical evaluation and transfer. They believe that since a mine operator who assigns a miner to work in a respirator without a medical evaluation puts that worker's life at risk, we have an obligation to protect miners from such harm. We agree that medical evaluation and transfer requirements are a necessary component to the existing DPM respiratory protection program, and we have included this protection in the final rule for improving miners' health.

In our preamble to the 2005 final rule, we stated our belief that a requirement for medical evaluation of respirator wearers and transfer of miners unable to wear respirators was inappropriate for that rulemaking (70 FR 32957). At that time, we believed that these requirements would have minimal application, particularly considering the extent to which mine operators were voluntarily implementing such provisions and the limited long term use of respirators envisioned under the interim rule. We are now persuaded that under the final limit, this is no longer the case.

Notwithstanding the continuation of some voluntary use of these programs in the mining industry, we are concerned that more miners may be required to wear respirators for longer periods of time as the final limit is lowered, and therefore, medical evaluation and transfer should not remain an elective. If, however, we fail to include transfer rights for miners unable to wear respiratory protection, the effect may be worse than not requiring a medical evaluation at all. The mine operator, acting on false information given by the miner to protect his or her job, is then in the position of assigning a respirator to a miner who cannot safely wear it. The best course of action for miner's health is to remove the fear of reprisals to the degree necessary to allow the miner to truthfully and fully participate in a medical evaluation.

We realize that particularly at a small mine, an alternative position may not exist. Under this circumstance, we believe that the mine operator is best suited to determine how to accommodate that miner based on existing employment rights pursuant to collective bargaining agreements, and state and federal laws, etc. The final rule, however, prohibits a mine operator from allowing a miner to voluntarily work in an area where respiratory protection is required without a respirator and when the miner is medically unable to wear a respirator.

We received one comment objecting to notification to the District Manager of the health professional's evaluation and the fact that a miner will be transferred. We have not included notification requirements in the final rule due to our

objective to limit the paperwork burden on mine operators, and due to the fact that our inspectors have access to mine operators' records and can determine that miners have been transferred.

NIOSH recommended that mine operators be required to maintain records of miners' medical evaluations, respirator use, and transfers required under this rule and that the records be kept confidential and in a secure location. The final rule requires mine operators to keep a record of the identity of the PLHCP and the most recent written determination of each miner's ability to wear a respirator for the duration of the miner's employment plus six months. It is important that we note that our compliance specialists have access to these records pursuant to Section 103(h) of the Mine Act, and operators must make these records available to the authorized representatives of the Secretary of Labor.

NIOSH recommended that the timeframe for transfer be as rapid as possible if a miner is experiencing acute health effects from exposure. The final rule requires the mine operator to transfer the affected miner within 30 days of the final determination by the PLHCP that the miner is unable to wear a respirator. We anticipate most overexposures to be chronic rather than acute, and therefore, have given greater latitude in the time for compliance.

A number of commenters stated that where miners' exposures cannot be reduced below the applicable final limit, the standard should provide that the mine operator may assign other miners who must wear respiratory protection to work in the affected area to reduce the amount of time that any given miner must wear respiratory protection. We do not agree. Allowing this practice fails to eliminate the hazard of DPM exposure and results in placing more miners at risk. We do believe that a two-year phase-in approach of the final limit of 160_{TC} μg/m^3 will resolve many of the existing feasibility issues as discussed in the feasibility section of this preamble. Although the number of miners required to wear respirators is likely to increase initially under the 160_{TC} μg/m^3 final limit, with the use of biodiesel and other available DPM controls, we project that the number of miners in respiratory protection should decrease over time.

In the 2005 NPRM, we estimated that medical evaluation and transfer requirements would affect about 50 miners annually for evaluation, about 3 miners annually for transfer, and cost about $40,000 annually. We asked for comments on costs to mine operators for implementing a rule requiring medical evaluations and transfer of miners.

One mine commented that they have a formal medical evaluation conducted prior to being fit tested and annually thereafter. Their average cost for an evaluation to be able to wear a negative-pressure respirator was $250 per miner. They also estimated that the cost for them to provide a PAPR for miners unable to wear a negative-pressure respirator would be approximately $700. One large gold mine commented that they believed approximately 70% (480) of their 686 underground personnel would require respiratory protection in meeting the final 160 TC limit.

Another commenter said they have onsite technicians who are certified to conduct these tests (medical evaluation), however, the analysis of the pulmonary function tests is provided by a licensed healthcare provider. Their cost for the pulmonary function tests is roughly $17.00 per individual. Another company estimated that the average cost per person for medical evaluations is $660. The range for costs varied widely depending on the types of tests performed and whether the cost of the respirator itself was included. We have considered these new data in our REA in support of the final rule and have revised our costs estimates.

As explained in section IX.A. of this preamble, a total of 680 miners will require a medical evaluation in the first year after the rule takes effect to meet the 350_{TC} μg/m^3 limit. An additional 244 miners will require a medical evaluation when the 160_{TC} μg/m^3 takes effect. The estimated yearly medical evaluation and transfer costs to mine operators to meet the requirements of the final rule are $69,170.

D. Diesel Particulate Records § 57.5075(a)

The recordkeeping requirements of the DPM standards contained in §§ 57.5060 through 57.5071 are listed in a table entitled ''Table 57.5075(a)—Diesel Particulate Matter Recordkeeping Requirements.'' The table lists the records the operator must maintain pursuant to §§ 57.5060 through 57.5071, and the retention period for these records.

The final rule also makes a confirming change to the Table in § 57.5075(a) which includes a record of the identity of the physician or other licensed health care professional (PLHCP) and the most recent written determination of each miner's ability to wear a respirator for the duration of the miner's employment plus six months.

As discussed in detail under section VIII.C. Medical Evaluation and Transfer, we have determined that medical evaluation and transfer requirements are a necessary component to the existing DPM respiratory protection program, and have included this requirement for improving miners' health in the final rule. Thus, we are amending the existing DPM respiratory protection standard at § 57.5060(d) by adding a provision requiring a medical evaluation to determine a miner's ability to use a respirator before the miner is fit tested or required to work in an area of the mine where respiratory protection must be used.

The final rule also includes requirements for transferring a miner to an existing job in an area of the mine where respiratory protection is not required if a PLHCP has determined that the miner's medical condition precludes the miner from safely wearing any type of respirator, including a PAPR.

Under paragraph (d)(8) the mine operator must maintain a record of the identity of the PLHCP and the most recent written determination of each miner's ability to wear a respirator for the duration of the miner's employment plus six months. We consider this document to be a medical record and our retention requirements are consistent with other medical records that we require mine operators to maintain, such as those specified in our existing Hearing Conservation Program requirements in 30 CFR 62.171. By requiring the operator to retain a copy of these documents, it will help protect miner's health and assist with compliance with § 57.5060(d). This new recordkeeping requirement will be incorporated into existing Table 57.5075(a)—Diesel Particulate Recordkeeping Requirements.

IX. Regulatory Costs

Section IX.A discusses the costs attributable to this final rule. These costs arise from new provisions for medical evaluation and transfer. Section IX.B discusses the costs of implementing the 160_{TC} μg/m^3 final limit, given that the existing 308_{EC} μg/m^3 interim limit is in effect. The move from the existing higher limit to the lower final limit results from a series of final rules, including both this final rule and two prior rules. Other than the costs for medical evaluation and transfer (estimated in Section IX.A and reported in Section IX.B), the costs presented in Section IX.B are not attributable to this final rule. All costs are reported in 2004 dollars.

A. Costs of Medical Evaluation and Transfer

The medical evaluation and transfer provisions would require the mine operator to provide a medical evaluation by a physician or other licensed health care professional (PLHCP) to each miner required to wear a respirator. MSHA will accept a prior medical evaluation to the extent the mine operator has a written record and there have not been any changes that will adversely affect the miner's ability to wear a respirator. For those miners who do not have an existing medical evaluation, we expect that the mine operator would need to provide the PLHCP with information, including the types and weights of the respirator that the miner will use, the duration and frequency of respirator use, the expected physical work effort, additional protective clothing and equipment worn, and temperature and humidity extremes that may be encountered. The mine operator would also need to provide additional medical evaluations if: the miner's supervisor notifies the PLHCP of medical signs or symptoms related to the miner's ability to use a respirator; the PLHCP informs the mine operator that the miner needs to be reevaluated; information from the respiratory protection program indicates a need for miner reevaluation; or a change in workplace conditions occurs.

If a respirator is needed, the mine operator would have to provide a negative-pressure respirator. However, if the PLHCP determines that the miner cannot wear a negative-pressure respirator but can wear a positive-pressure respirator, then the mine operator would be required to provide a powered air-purifying respirator (PAPR) to the miner.

The mine operator would have to transfer the miner to an existing position in the same mine where respiratory protection is not required if the PLHCP determined that the miner was unable to wear either a negative-pressure respirator or a PAPR. The mine operator would be required to compensate the miner at no less than the regular rate of pay received by the miner immediately before the transfer.

To estimate the cost of these medical evaluation and transfer provisions, for the 308_{EC} μg/m^3, 350_{TC} μg/m^3, and 160_{TC} μg/m^3 limits, MSHA made the following assumptions:

In each year that medical evaluations are required for a mine, it would take a mine health and safety specialist, earning $52.31 per hour, 1 hour to prepare information for the PLHCP.[3]

The cost of a medical evaluation is $50. This medical evaluation consists of a medical questionnaire or interview with the PLHCP and a simple pulmonary function test.

Four miners per mine in mines with fewer than 20 employees will need to use respirators and therefore require a medical evaluation in the first year that respirators are required for mines that need them.[4] Twelve miners per mine in mines with 20–500 employees will need to use respirators and therefore require a medical evaluation in the first year that respirators are required for mines that need them.[5] Thirty miners per mine in mines with over 500 employees will need to use respirators and therefore require a medical evaluation in the first year that respirators are required for mines that need them.[6]

Based on these assumptions a total of 680 miners will require a medical evaluation in the first year after the rule takes effect to meet the 308_{EC} and 350_{TC} μg/m^3 limits. An additional 244 miners will require a medical evaluation at the beginning of the third year when the 160_{TC} μg/m^3 limit takes effect.

Because of turnover, new miners will require medical evaluations in years subsequent to the first year in which respirators are first used. In each year after the first year, approximately 0.28 additional miners per mine will require a medical evaluation in mines with fewer than 20 employees. In each year after the first year, approximately 0.84 additional miners per mine will require a medical evaluation in mines with 20–500 employees. In each year after the first year, approximately 2.1 additional miners per mine will require a medical evaluation in mines with 20–500 employees.[7]

In ten percent of the cases, the PLHCP will determine that additional tests are needed for the miner's medical evaluation. These additional tests may include X-rays and cardio-pulmonary tests. The cost of the additional tests is $250.

Five percent of the miners required to wear a respirator will need a PAPR. A PAPR costs approximately $1,000 and has a useful life of about 5 years.

At any point in time, approximately ½% of the number of miners using respirators will need to be transferred. The total is expected to be fewer than five transferred employees at any one time for the entire mining industry. The normal hourly wage rate in an existing position where respiratory protection is not required averages 20% less than the miner's hourly wage rate in the position where respiratory protection is required, taking into account the rare cases where there is no position in the mine to which the miner can be transferred. A miner works 2,000 hours per year on average. The average remaining work life of a miner is 20 years.

Based on the preceding assumptions, Table IX–1 summarizes the costs of medical evaluation and transfer by mine size for 308_{EC} μg/m^3, 350_{TC} μg/m^3, and 160_{TC} μg/m^3 limits. The estimated yearly medical evaluation and transfer costs to mine operators to meet the requirements of the final rule are $69,170 in 2004 dollars.[8] The costs shown in Table IX–1 are the only costs attributable to this final rule.

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[3] MSHA assumes that the wage of a health and safety specialist is the same as the wage of a mine supervisor. The wage is reported in 2004 dollars.

[4] This estimate is based on the assumption of two two-person crews for one shift in mines with fewer than 20 employees.

[5] This estimate is based on the assumption of three two-person crews for each of two shifts at mines with 20–500 employees.

[6] This estimate is based on the assumption of five two-person crews for each of three shifts at mines with over 500 employees.

[7] These numbers are based on a turnover rate of 7% for the four miners per mine in mines with fewer than 20 employees, the 12 miners per mine in mines with 20–500 employees , and the 30 miners per mine in mines with over 500: $4 \times 0.07 = 0.28$; $12 \times 0.07 = 0.84$; $30 \times 0.07 = 2.10$.

[8] The spreadsheets underlying the development to the cost estimates presented in this section, as well as in Sections V, X, and XI of this preamble, are posted on MSHA's Web page.

Table IX-1. Itemized Summary of the Estimated Yearly Costs of the Medical Evaluation and Miner Transfer Provisions of the Final Rule

Yearly Costs to Meet the 308_{EC} and 350_{TC} μg/m^3 Limits						
Mine Size by Number of Employees	Providing Information to the PLHCP	Medical Evaluations	PAPRs	Transfers Of Miners Who Cannot Wear Respirators	Total Yearly Costs	Yearly Cost Per Mine
1-19	$445	$1,847	$1,185	$4,115	$7,591	$131
20-500	$2,113	$10,126	$6,497	$22,559	$41,295	$390
Over 500	$94	$955	$613	$2,128	$3,790	$948
All Mines	$2,652	$12,928	$8,294	$28,802	$52,676	$314
Additional Yearly Costs to Meet the 160_{TC} μg/m^3 Limit[1]						
Mine Size by Number of Employees	Providing Information to the PLHCP	Medical Evaluations	PAPRs	Transfers Of Miners Who Cannot Wear Respirators	Total Yearly Costs	Yearly Cost Per Mine
1-19	$139	$578	$371	$1,288	$2,377	$41
20-500	$662	$3,171	$2,034	$7,064	$12,930	$122
Over 500	$29	$299	$192	$666	$1,187	$297
All Mines	$830	$4,048	$2,597	$9,018	$16,494	$98
Yearly Costs to Meet the 308_{EC}, 350_{TC}, and 160_{TC} μg/m^3 Limits						
Mine Size by Number of Employees	Providing Information to the PLHCP	Medical Evaluations	PAPRs	Transfers Of Miners Who Cannot Wear Respirators	Total Yearly Costs	Yearly Cost Per Mine
1-19	$584	$2,425	$1,556	$5,403	$9,968	$172
20-500	$2,775	$13,297	$8,531	$29,623	$54,225	$512
Over 500	$123	$1,254	$805	$2,795	$4,977	$1,244
All Mines	$3,482	$16,976	$10,891	$37,820	$69,170	$412

[1]The additional costs to meet the 160_{TC} μg/m^3 limit are discounted for two years at the 7% discount rate (divided by $(1.07)^2$), since the 160_{TC} μg/m^3 limit takes effect after two years.

B. Costs of Implementing the 160_{TC} μg/m^3 Limit

This subsection discusses all the costs of reducing the existing 308_{EC} μg/m^3 interim limit to the 160_{TC} μg/m^3 final limit. These costs arise from both this final rule and the existing 2001 and 2005 final DPM rules for metal/nonmetal mines. Most of the costs estimated in this subsection are not attributable to this final rule. The costs described and explained in this subsection are presented for purposes of completeness and clarity and to support the Agency's finding of feasibility for the final limit, as shown in Section V.

In Chapter IV of the Regulatory Economic Analysis in support of the January 19, 2001 final rule (2001 REA), we estimated that underground M/NM mine operators would incur yearly costs to comply with the DPM final rule of $25,149,179 (p. 106). Of this amount, $6,612,464 was the discounted (from 2006 to 2001) yearly cost of compliance with the final limit. The yearly cost for compliance with the final limit beginning in 2006 was estimated as $9,274,325 (p. 58). If we adjust for the change in the number of mines and also adjust for inflation (from 1998 dollars, in which the costs of the 2001 rule were reported, to 2004 dollars), this yearly cost becomes $9,259,519. These calculations are shown in Table IX–2.

Table IX-2. Estimate From 2001 REA, Adjusted for Inflation and Number of Mines, of the Yearly Cost of Implementing the 160_{TC} µg/m^3 Final Limit Given 400_{TC} (308_{EC}) µg/m^3 Interim Limit in Effect

Mine Size	Yearly Cost Estimate from 2001 REA[1]	1998 Number of Diesel Mines[2]	2004 Number of Diesel Mines[3]	Yearly Cost Adjusted for Number of Mines[4]	Yearly Cost Adjusted for Inflation[5]	Yearly Cost Per Mine[6]
1-19 Employees	$2,413,542	77	58	$1,817,993	$2,106,864	$36,325
20-500 Employees	$6,004,029	112	106	$5,682,385	$6,585,291	$62,125
Over 500 Employees	$856,753	7	4	$489,573	$567,364	$141,841
All Mines	$9,274,325	196	168	$7,989,950	$9,259,519	$55,116

[1]2001 REA, Table IV-10, page 58, with cost figure for over 500 employees corrected based on error discovered in Table IV-7, page 54.

[2]2001 REA, Table II-4, page 14.

[3]Number of mines based on data from MSHA's Directorate of Program Evaluation and Information Resources, 2004 calendar year data, for mines with employment. Diesel mines are identified based on DPM sampling data.

[4](Yearly Cost Adjusted for Number of Mines) = (Yearly Cost Estimate from 2001 REA) x (2004 Number of Diesel Mines) / (1998 Number of Diesel Mines).

[5](Yearly Cost Adjusted for Inflation) = (Yearly Cost Adjusted for Number of Mines) x (Price Index), where (Price Index) = (2004 Annual CPI) / (1998 Annual CPI) = (188.9) / (163.0) = 1.159.

[6](Yearly Cost Per Mine) = (Yearly Cost Adjusted for Inflation) / (2004 Number of Diesel Mines).

This final rule would amend the January 19, 2001 final DPM rule by phasing in the 160_{TC} µg/m^3 final limit over an additional two-year period, from May 20, 2006 to May 20, 2008, to address feasibility issues that have surfaced since the 2001 final rule. The discounted present value of the reduction in the cost estimate for this two-year phase-in period is $15,467,387. The annualized value of this reduced cost estimate, using an annualization rate of 7%, is $1,082,717 in 2004 dollars. Table IX–3 shows these calculations, as well as the breakdown by mine size of this reduced cost estimate. Because of feasibility issues associated with currently meeting the 160_{TC} µg/m^3 limit, this reduction in cost estimate is not properly attributable as a cost saving due to this final rule.

Table IX-3. Reduced Cost Estimate from Two-Year Phase-In of 160_{TC} μg/m^3 Final Limit

Year[1]	Yearly Cost of Immediate Phase-In[2]	TC Limit (μg/m^3)	Percent of Phase-In[3]	Yearly Cost of Delayed Phase-In[4]	Reduction in Yearly Cost Estimate[5]	Discount Factor[6]	Discounted Reduction in Yearly Cost Estimate[7]
1	$9,259,519	400 & 350	7%	$643,022	$8,616,497	1.0000	$8,616,497
2	$9,259,519	350	21%	$1,929,067	$7,330,453	0.9346	$6,850,890
3	$9,259,519	160	100%	$9,259,519	$0	0.8734	$0
4	$9,259,519	160	100%	$9,259,519	$0	0.8163	$0
Sum of Discounted Reduction in Yearly Cost Estimate							$15,467,387
Annualized Value of Reduced Cost Estimate (All Underground M/NM Mines)[8]							$1,082,717
Annualized Value of Reduced Cost Estimate (Mines with under 20 Employees)[9]							$246,356
Annualized Value of Reduced Cost Estimate (Mines with 20 to 500 Employees)[9]							$770,019
Annualized Value of Reduced Cost Estimate (Mines with over 500 employees)[9]							$66,342

[1]Years are measured from May 20 of one calendar year to May 19 of the next calendar year. The first year begins May 20, 2006.

[2](Yearly Cost of Immediate Phase-In) is obtained from Table IX-2, Yearly Cost Adjusted for Inflation.

[3](Percent of Phase-In) = {(400 - (TC Limit)) / (400 - 160)} x (100%), where the (TC Limit) = 383.333 in the first year, because it is a weighted average of 400_{TC} μg/m^3 for 8 months (May 20 to January 19) and 350_{TC} μg/m^3 for 4 months (January 20 to May 19).

[4](Yearly Cost of Delayed Phase-In) = (Yearly Cost of Immediate Phase-In) x (Percent of Phase-In).

[5](Reduction in Yearly Cost Estimate) = (Yearly Cost of Immediate Phase-In) - (Yearly Cost of Delayed Phase-In).

[6](Discount Factor) = $1 / (1.07)^{(Year - 1)}$.

[7](Discounted Reduction in Yearly Cost Estimate) = (Reduction in Yearly Cost Estimate) x (Discount Factor).

[8](Annualized Value of Reduced Cost Estimate, All Underground M/NM Mines) = (Sum of Discounted Reduction in Yearly Cost Estimate) x (0.07), where 0.07 is the annualization factor.

[9](Annualized Value of Reduced Cost Estimate, employment size subset) = (Annualized Value of Reduced Cost Estimate, All Underground M/NM Mines) x (Table IX-2, Yearly Cost Adjusted for Inflation, employment size subset) / (Table IX-2, Yearly Cost Adjusted for Inflation, All Mines).

The process of evaluating and implementing DPM control technologies has been more difficult, time consuming, and costly for some mine operators than we had initially anticipated in the 2001 final rule. For example, some mine operators that initially installed a passive regeneration system on a machine learned through trial and error that the machine did not have a consistent duty cycle that would support passive regeneration, so they had to alter their regeneration strategy to incorporate an active regeneration system. Another mine operator, who initially tried a high-temperature disposable particulate filter (HTDPF) without exhaust gas cooling prior to the filter media, needed to add a heat exchanger prior to the filter media to meet the manufacturer's exhaust gas temperature specifications. Yet another mine operator, who used biodiesel fuel during the summer months, needed to make changes to the fuel delivery system during the winter months in order to deal with the lower ambient temperatures.

These evaluation and implementation costs, it should be noted, do not involve testing the workability of the known methods for reducing DPM emissions. Rather, the evaluation is for determining the suitability of the various existing DPM-control technologies for mine-specific applications and integrating such technology into the mining and maintenance process. While the industry has provided examples of its experience with implementation difficulties, they provided limited information as to the magnitude of these

particular costs. Accordingly, the costs associated with evaluating various methods to achieve compliance are difficult to quantify.

Evaluation costs typically will not involve all diesel equipment. For example, we would expect a mine operator to evaluate filters on one or a few pieces of diesel equipment, probably during maintenance shifts. We therefore expect that costs of evaluation will be only a fraction of MSHA's estimated costs of achieving the final limit. Accordingly, based on its technical expertise and experience with DPM controls, MSHA estimates that, for the average mine that has evaluation costs, annual costs of evaluating alternative methods of compliance are 25% of the previously estimated compliance costs for mines to reduce the 308_{EC} μg/m³ limit to the 160_{TC} μg/m³ limit.

Not all the diesel mines will incur evaluation costs, beyond the costs previously estimated, to comply with the rule. Many mines are already in compliance or can achieve compliance using technologies already proven to work in these mines. MSHA estimates that during the first two years of the rule, 50% of mines will experience evaluation costs. Further, MSHA estimates that during the third and fourth years of the rule, 10% of mines will continue to experience evaluation costs. These evaluation costs are being recognized in this final rule, as needed to achieve the final limit. However, these costs were not caused by, or attributable to, this final rule. These costs would exist even in the absence of this final rule. These cost estimates are shown in Table IX–4.

Table IX-4. Increased Cost Estimate for Mines to Evaluate Technologies Needed to Meet 350_{TC} and 160_{TC} μg/m³ Final Limits

Year[1]	Evaluation Costs Per Mine[2]	Percent of Mines with Evaluation Costs[3]	Number of Mines with Evaluation Costs[4]	Yearly Cost of Evaluating Controls[5]	Discount Factor[6]	Discounted Yearly Cost of Evaluating Controls[7]
1	$13,779	50%	84.0	$1,157,440	1.0000	$1,157,440
2	$13,779	50%	84.0	$1,157,440	0.9346	$1,081,720
3	$13,779	10%	16.8	$231,488	0.8734	$202,191
4	$13,779	10%	16.8	$231,488	0.8163	$188,963
Sum of Discounted Yearly Cost of Evaluating Controls						$2,630,313
Annualized Value of Evaluation Cost (All Underground M/NM Mines)[8]						$184,122
Annualized Value of Evaluation Cost (Mines with under 20 Employees)[9]						$41,894
Annualized Value of Evaluation Cost (Mines with 20 to 500 Employees)[9]						$130,946
Annualized Value of Evaluation Cost (Mines with over 500 employees)[9]						$11,282

[1]Years are measured from May 20 of one calendar year to May 19 of the next calendar year. The first year begins May 20, 2006.

[2](Evaluation Costs Per Mine) = (Table IX-2, Yearly Cost Per Mine) / 4.

[3](Percent of Mines with Evaluation Costs) is 50% for the first two years and 10% for the third and fourth years.

[4](Number of Mines with Evaluation Costs) = (Table IX-2, 2004 Number of Diesel Mines) x (Percent of Mines with Evaluation Costs).

[5](Yearly Cost of Evaluating Controls) = (Evaluation Costs Per Mine) x (Number of Mines with Evaluation Costs).

[6](Discount Factor) = $1 / (1.07)^{(Year - 1)}$.

[7](Discounted Yearly Cost of Evaluating Controls) = (Yearly Cost of Evaluating Controls) x (Discount Factor).

[8](Annualized Value of Evaluation Cost, All Underground M/NM Mines) = (Sum of Discounted Yearly Cost of Evaluating Controls) x (0.07), where 0.07 is the annualization factor.

[9](Annualized Value of Evaluation Cost, employment size subset) = (Annualized Value of Evaluation Cost, All Underground M/NM Mines) x (Table IX-2, Yearly Cost Adjusted for Inflation, employment size subset) / (Table IX-2, Yearly Cost Adjusted for Inflation, All Mines).

Table IX–5 integrates all the cost estimates and cost adjustments discussed in this subsection to provide an updated estimate of the cost for the industry to comply with the 160_{TC} μg/m³ final limit, given that the existing 308_{EC} μg/m³ interim limit is already in effect. Table IX–5 also includes the costs of the medical evaluation and transfer provisions discussed in Section IX.A of this preamble and the costs of the special extensions for the final limit provided for in the 2005 DPM final rule.[9] The yearly cost of implementing the 160_{TC} μg/m³ final limit is $8,454,853. The economic feasibility of the 160_{TC} μg/m³ final limit, as reflected in these revised cost estimates, is discussed in Section V.B.

Table IX-5. Updated Estimate, Adjusted for Several Factors, of the Yearly Cost of Implementing the 160_{TC} μg/m³ Final Limit Given 400_{TC} (308_{EC}) μg/m³ Interim Limit in Effect

Mine Size by Number of Employees	Adjusted Estimate from 2001 REA[1]	Medical Evaluation and Miner Transfer Provisions[2]	Reduced Cost Estimate from Two-Year Phase-In[3]	Increased Cost Estimate for Mines to Evaluate Controls[4]	Revised Costs of Special Extension for Final Limit[5]	Yearly Cost Adjusted for Several Factors[6]	Yearly Cost Per Mine[7]
1-19	$2,106,864	$9,968	($246,356)	$41,894	$5,234	$1,917,604	$33,062
20-500	$6,585,291	$54,225	($770,019)	$130,946	$18,815	$6,019,259	$56,785
Over 500	$567,364	$4,977	($66,342)	$11,282	$710	$517,991	$129,498
All Mines	$9,259,519	$69,170	($1,082,717)	$184,122	$24,759	$8,454,853	$50,327

[1]From Table IX-2, Yearly Cost Adjusted for Inflation.

[2]From Table IX-1, Total Yearly Costs to Meet the 308_{EC}, 350_{TC}, and 160_{TC} μg/m³ Limits.

[3]From Table IX-3, Annualized Value of Reduced Cost Estimate, for each employment size category.

[4]From Table IX-4, Annualized Value of Evaluation Cost, for each employment size category.

[5]From Regulatory Economic Analysis for Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Miners, May 2005 (2005 REA), page 15, Table IV-3, "Adjusted Total Annual Cost". Figures are adjusted for change in number of underground M/NM diesel mines and for inflation between 2002 and 2004.

[6](Yearly Cost Adjusted for Several Factors) = (Adjusted Estimate from 2001 REA) + (Medical Evaluation and Miner Transfer Provisions) + (Reduced Cost Estimate from Two-Year Phase-In) + (Increased Cost Estimate for Mines to Evaluate Controls) + (Revised Costs of Special Extension for Final Limit).

[7](Yearly Cost Per Mine) = (Yearly Cost Adjusted for Several Factors) / (Table IX-2, 2004 Number of Diesel Mines).

X. Regulatory Flexibility Act Certification and Small Business Regulatory Enforcement Fairness Act (SBREFA)

Pursuant to the Regulatory Flexibility Act (RFA) of 1980 as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), we have analyzed the impact of the final rule on small businesses. Further, we have made a determination with respect to whether or not we can certify that the final rule would not have a significant economic impact on a substantial number of small entities that are covered by the final rule. Under the SBREFA amendments to the RFA, we must include in the rule a factual basis for this certification. If a rule would have a significant economic impact on a substantial number of small entities, we must develop a regulatory flexibility analysis.

A. Definition of a Small Mine

Under the RFA, in analyzing the impact of a rule on small entities, we must use the Small Business Administration (SBA) definition for a small entity or, after consultation with the SBA Office of Advocacy, establish an alternative definition for the mining industry by publishing that definition in the **Federal Register** for notice and comment. We have not taken such an

[9]The cost savings due to other provisions of the 2005 DPM final rule are not included in the estimates here because they have already accrued to mine operators in achieving the interim limit.

action and hence are required to use the SBA definition. The SBA defines a small entity in the mining industry as an establishment with 500 or fewer employees.

We have also looked at the impacts of our rules on a subset of mines with 500 or fewer employees—those with fewer than 20 employees, which we and the mining community have traditionally referred to as ''small mines.'' These small mines differ from larger mines not only in the number of employees, but also in economies of scale in material produced, in the type and amount of production equipment, and in supply inventory. Therefore, their costs of complying with our rules and the impact of our rules on them will also tend to be different. It is for this reason that ''small mines,'' as traditionally defined by us as those employing fewer than 20 workers, are of special concern to us.

This analysis complies with the legal requirements of the RFA for an analysis of the impacts on ''small entities'' while continuing our traditional definition of ''small mines.'' We conclude that we can certify that the final rule would not have a significant economic impact on a substantial number of small entities that are covered by this rulemaking. We have determined that this is the case both for mines affected by this rulemaking with fewer than 20 employees and for mines affected by this rulemaking with 500 or fewer employees.

B. Factual Basis for Certification

MSHA's analysis of impacts on ''small entities'' begins with a ''screening'' analysis. The screening compares the estimated compliance costs of a rule for small entities in the sector affected by the rule to the estimated revenues for the affected sector. When estimated compliance costs are less than one percent of the estimated revenues, the Agency believes it is generally appropriate to conclude that there is no significant economic impact on a substantial number of small entities. When estimated compliance costs exceed one percent of revenues, it tends to indicate that further analysis may be warranted.

As shown in Table X–1, using either MSHA's traditional definition of a small mine (those having fewer than 20 employees) or SBA's definition of a small mine (those having 500 or fewer employees), the estimated yearly costs of this final rule for small underground M/NM mines that use diesel-powered equipment is less than 0.01 percent of their estimated yearly revenues, well below the level suggesting that this rule might have a significant economic impact on a substantial number of small entities. Accordingly, we have certified that this final rule will not have a significant economic impact on a substantial number of small entities covered by the final rule.

Table X-1. Estimated Yearly Costs of Final Rule Relative to Yearly Revenues For Selected Small Underground M/NM Mines That Use Diesel-Powered Equipment

Mine Size	Yearly Costs of Final Rule[1]	Yearly Revenues[2]	Costs as Percentage of Revenues[3]
Fewer than 20 Employees	$9,968	$222,357,776	0.004%
500 or Fewer Employees	$64,193	$3,875,386,233	0.002%

[1]Table IX-1, Total Yearly Costs of the final rule for given small entities.

[2]Yearly revenues for underground metal/nonmetal mines were obtained by multiplying price and production figures from Mining & Quarrying Trends, 2004 (Tables 1 and 3). These revenues were then prorated by hours of employment to obtain an estimate of revenues only for mines that use diesel equipment. Data for mine hours and employment are from MSHA's Directorate of Program Evaluation and Information Resources, 2004 calendar year data. Diesel mines are identified based on DPM sampling data.

[3](Costs as Percentage of Revenues) = (Yearly Costs of Final Rule) / (Yearly Revenues).

XI. Paperwork Reduction Act

This final rule addresses information collection requirements under OMB Control Number 1219–0135 that have been submitted to the Office of Management and Budget (OMB) for review under 44 U.S.C. 3504(h) of the Paperwork Reduction Act of 1995, as amended.

The paperwork costs presented in this section are a subset of the total costs presented in Table IX–1 and reflect only those costs which relate to burden hours that are a result of the final rule. Both paperwork burden hours and costs were derived from the spreadsheets (posted on our Web page) used to estimate the costs in Table IX–1.

MSHA estimates that the final rule would create 3,687 burden hours for the first year, 299 burden hours for the second year, 1,120 burden hours for the third year, and 371 burden hours each year after the third year. This is equivalent to an annualized value of 1,261 burden hours per year and related annualized burden costs of $28,905 per year. On a per-mine basis, the annualized paperwork burden is 7.5 hours and $172 per year.

The paperwork burden to the mine operator is attributable primarily to § 57.5060(d)(3), to prepare and provide information to the PLHCP and to send the miner to the PLHCP for a medical evaluation to determine the miner's

ability to use a respirator. The annualized paperwork and cost burden to the mining industry for this provision is 1,140 hours and $26,330 per year. The remaining paperwork burden is attributable to § 57.5060(d)(4), which allows miners to submit additional evidence of their medical condition to the PLHCP, and to § 57.5060(d)(8), which requires mine operators to maintain a record of the identity and written determination of the PLHCP. The annualized paperwork and cost burden to the mining industry for these two provisions is 103 and 17 hours per year, and $2,190 and $385 per year, respectively.

The total paperwork hour and cost burden is summarized in Table XI–1 by first year, second year, third year, and each year after the third year.

Table XI-1. Total Paperwork Burden Hours and Costs by Year

Mine Size	Burden Hours	Burden Cost
First Year Burden Hours and Costs		
< 20	541.0	$12,219
20-500	2,877.2	$62,348
> 500	268.9	$5,750
Total	3,687.0	$80,318
Second Year Burden Hours and Costs		
< 20	43.0	$1,122
20-500	235.6	$6,153
> 500	20.4	$484
Total	298.9	$7,759
Third Year Burden Hours and Costs		
< 20	165.4	$3,989
20-500	875.1	$20,205
> 500	79.8	$1,763
Total	1,120.3	$25,957
Annual Burden Hours and Costs After Third Year		
< 20	53.4	$1,419
20-500	292.6	$7,777
> 500	25.1	$603
Total	371.1	$9,799

XII. Other Regulatory Considerations

A. The Unfunded Mandates Reform Act of 1995

This final rule does not include any Federal mandate that may result in increased expenditures by State, local, or tribal governments; nor does it increase private sector expenditures by more than $100 million annually; nor does it significantly or uniquely affect small governments. Accordingly, the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*) requires no further agency action or analysis.

B. National Environmental Policy Act

We have reviewed this final rule in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 U.S.C. 1500), and the Department of Labor's NEPA procedures (29 CFR part 11). This final rule has no significant impact on air, water, or soil quality; plant or animal life; the use of land; or other aspects on the human environment. We solicited public comment concerning the accuracy and completeness of this environmental assessment when this rule was first proposed, and received no comments relevant to this environmental assessment. We find, therefore, that the final rule has no significant impact on the human environment. Accordingly, we have not provided an environmental impact statement.

C. The Treasury and General Government Appropriations Act of 1999: Assessment of Federal Regulations and Policies on Families

This final rule has no affect on family well-being or stability, marital commitment, parental rights or authority, or income or poverty of families and children. Accordingly, Section 654 of the Treasury and General Government Appropriations Act of 1999 (5 U.S.C. 601 note) requires no further agency action, analysis, or assessment.

D. Executive Order 12630: Government Actions and Interference With Constitutionally Protected Property Rights

This final rule does not implement a policy with takings implications. Accordingly, Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, requires no further agency action or analysis.

E. Executive Order 12988: Civil Justice Reform

This final rule was written to provide a clear legal standard for affected conduct, and was carefully reviewed to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the Federal court system. Accordingly, this final rule meets the applicable standards provided in Section 3 of Executive Order 12988, Civil Justice Reform.

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

This final rule has no adverse impact on children. Accordingly, Executive

Order 13045, Protection of Children from Environmental Health Risks and Safety Risks, as amended by Executive Orders 13229 and 13296, requires no further agency action or analysis.

G. Executive Order 13132: Federalism

This final rule does not have ''federalism implications,'' because it does not ''have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Accordingly, Executive Order 13132, Federalism, requires no further agency action or analysis.

H. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This final rule does not have ''tribal implications,'' because it does not ''have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.'' Accordingly, Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Regulation of the M/NM sector of the mining industry has no significant impact on the supply, distribution, or use of energy. This final rule is not a ''significant energy action,'' because it is not ''likely to have a significant adverse effect on the supply, distribution or use of energy * * * (including a shortfall in supply, price increases, and increased use of foreign supplies).'' Accordingly, Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, requires no further agency action or analysis.

J. Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking

We have thoroughly reviewed this final rule to assess and take appropriate account of its potential impact on small businesses, small governmental jurisdictions, and small organizations. As discussed in Chapter V of the REA, we have determined and certified that this final rule will not have a significant economic impact on a substantial number of small entities. We solicited public comment concerning the accuracy and completeness of this potential impact when the rule was first proposed. We took appropriate account of comments received relevant to the rule's potential impact on small entities. Accordingly, Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking, requires no further agency action or analysis.

XIII. Information Quality

In accordance with the Information Quality Act and the Department of Labor Information Quality Guidelines, we are responding to the substantive information quality request of the Methane Awareness Resource Group (MARG) as part of other information/data related comments received in the record to this rulemaking. Some of the commenters' issues are limitations of models, such as the 31-Mine Study and the Estimator model. No better data were offered by commenters and we find that that information remains the best available. We also conclude that some of the corrections requested were policy solutions rather than information corrections, thus they will not be addressed in our response.

We received a number of comments from the mining industry suggesting that our risk assessment does not comply with the present requirements under the data quality guidelines to use the best available, peer reviewed science. In addition, industry commenters stated that the DPM rule does not comply with the congressional, Office of Management and Budget (OMB) and the Department of Labor (DOL) information quality guidelines because the DPM rule is not supported by an adequate scientific basis, and it fails to meet the reproducibility standard required for disseminating influential information. Moreover, these commenters stated that OMB requires agencies in their own data quality guidelines to submit for public comment data on which we rely or disseminate. The guidelines also establish administrative mechanisms that allow affected persons to seek or obtain correction of disseminated information if they believe such information does not comply with either the OMB or MSHA guidelines.

Throughout the DPM rulemakings, we have given serious consideration to the issues raised by commenters. As a result, we have made some adjustments to our data and provided comprehensive responses in this preamble. For example, we conducted the 31-Mine Study, which resulted from a joint protocol of government, the mining industry and organized labor, to address and correct, where necessary, the following issues with regard to our 2001 data:

—The validity, precision and feasibility of the sampling and analysis method specified by the diesel standard (NIOSH Method 5040);
—The magnitude of interferences that occur when conducting enforcement sampling for total carbon as a surrogate for diesel particulate matter (DPM) in mining environments; and,
—The technological and economic feasibility of the underground metal and nonmetal (MNM) mine operators to achieve compliance with the interim and final DPM concentration limits.
—The parties developed a joint MSHA/Industry study protocol to guide sampling and analysis of DPM levels in 31 mines. The parties also developed four subprotocols to guide investigations of the known or suspected interferences, which included mineral dust, drill oil mist, oil mist generated during ammonium nitrate/fuel oil (ANFO) loading operations, and environmental tobacco smoke (ETS). The parties also agreed to study other potential sampling problems, including any manufacturing defects of the DPM sampling cassette (70 FR 32871). (Executive Summary, Report on the 31-Mine Study)

MSHA requested that NIOSH peer review the draft Report on the 31-Mine Study, and NIOSH's conclusions were placed in the rulemaking record and published in the 2005 final rule (70 FR 32871).

We are confident that we have set forth the evidence and rationale behind our decisions to establish a rule amending the existing DPM standard that meets the statutory requirements for promulgating this health standard as required under the Federal Mine Safety and Health Act of 1977 (Mine Act) in Section 101(a)(6)(A). We have presented and discussed with commenters in **Federal Register** notices, in preambles and at public hearings, the evidence supporting our decision to revise the existing rule restricting miner exposure to DPM.

With regard to the 2001 DPM risk assessment, we relied on peer-reviewed scientific studies. Of particular note, is that the two quantitative meta-analyses of lung cancer studies supporting our risk assessment were peer reviewed and published in scientific journals. (Bhatia, Rajiv, *et al.*, ''Diesel Exhaust Exposure and Lung Cancer,'' *Journal of Epidemiology,* 9:84–91, January 1998, and Lipsett M., and Campleman, Susan, ''Occupational Exposure to Diesel Exhaust and Lung Cancer: A Meta-Analysis,'' *American Journal of Public Health,* (89) 1009–1017, July 1999). We informed the public as early as September 25, 2002, in the 2002 ANPRM for the 2005 final rule at M/NM

mines, in the 2003 NPRM, in the 2005 final rule and again in the 2005 proposed rule that we would incorporate the existing rulemaking record into the record of this rulemaking, including the 2001 risk assessment. In that risk assessment, we carefully laid out the evidence available to us, including shortcomings inherent in that evidence. Although not required by law to do so, we had the 2001 risk assessment independently peer-reviewed, published the evidence and tentative conclusions for public comment, and incorporated the reviewers' recommendations. We were open to considering any new scientific data relating to the risk assessment. Commenters were encouraged in the instant rulemaking to submit new scientific data related to the health risk from exposure to DPM. Some commenters did submit new evidence and we have included those documents in the record for consideration.

Other commenters stated that we need to stay the interim and final limits and wait for completion of the NIOSH/NCI Study. They believe that any regulatory effort before the completion of the study is not in compliance with the DOL Guidelines that define influential information: ''In rulemaking, influential information is scientific, financial, or statistical information that the agency believes will have a clear and substantial impact on the resolution of one or more key issues in an economically significant rulemaking, as that term is defined in section 3(f)(1) of Executive Order 12866 (DOL Guidelines, p. 6).''

We have a statutory obligation to consider in a rulemaking the best available evidence. (Section 101(a)(6)(A)). Though the NIOSH/NCI Study is ongoing, at this time, we are confident that the current rulemaking record includes credible scientific data to establish occupational exposure limits for DPM. The scientific basis for the health risk of exposure to DPM is supported by the rulemaking record in both the 2001 and 2005 rules. We will continue to closely monitor the progress of the NIOSH/NCI joint study, and when the results of this study become available, we will carefully consider them.

Commenters stated that our statement that TC cannot be measured accurately and our change to a new surrogate, EC, undermines our 2001 justifications for our diesel rules, including the exposure limits. They reasoned that we regulated TC, and that we based our 2001 determinations of risk, benefits, impacts and feasibility on TC as a surrogate for DPM. In response, our rules limit miners' exposures to DPM, not to TC. TC was chosen as the surrogate for measuring that exposure in the 2001 final rule. In concert with the Second Partial Settlement Agreement, we proposed in 2003 to ''[r]evise the existing diesel particulate matter (DPM) interim concentration limit measured by total carbon (TC) to a comparable permissible exposure limit (PEL) measured by elemental carbon (EC) which renders a more accurate DPM exposure measurement.'' (68 FR 48668). As proposed, our 2005 final rule (70 FR 32868) establishes the measurement of DPM using EC as a direct measure of total DPM. The 2001 risk assessment establishes a material impairment of health or functional capacity to miners from exposure to DPM and does not distinguish between adverse health effects specific to either the EC or OC fractions of DPM. The measurement of that exposure, whether using TC, EC or OC as a surrogate, is not related to the material impairment of health endpoints identified in the 2001 risk assessment and in subsequent literature updates. Our discussion in Section VIII.A. of this preamble of the variability of the EC:TC ratio addresses total adverse health risks of DPM. The analysis of the EC:TC ratio is presented in that section, and in the preamble to our 2005 final rule (70 FR 32894–32899). The 2001 risk assessment discusses possible mechanisms of carcinogenesis for which both EC and OC would be relevant factors (66 FR at 5811–5822). Multiple routes of carcinogenesis may operate in human lungs, some requiring only the various organic mutagens in DPM and others involving induction of free radicals regardless of whether the source is the EC fraction, OC fraction, some other unidentified component, or a combination of components. We recognize that identifying the toxic components of DPM, and particulate matter in general, is an important research focus of a variety of government agencies and scientific organizations (see, for example: Health Effects Institute, 2003; Environmental Protection Agency, 2004b).

We are still considering various alternatives for converting the 350_{TC} μg/m³ and 160_{TC} μg/m³ final limits to commensurate EC limits. We will consider all comments in this rulemaking record concerning the relationship between EC, OC and TC in a separate rulemaking to determine the most appropriate conversion of the final TC limits. Presently, we believe that the DPM rulemaking record is inadequate for us to make determinations regarding a more appropriate conversion factor other than 1.3 for the 350_{TC} μg/m³ final PEL.

Some commenters suggested that the data used in the 31-Mine Study and the analytical method used (NIOSH Method 5040) should be subjected to peer review. However, MSHA, organized labor, and the mining industry, through the negotiations process, jointly developed the protocol for conducting the 31-Mine Study. All of the parties agreed on the protocol following numerous discussions among industry, labor, and government experts, and had an opportunity to comment and make changes to the document. Thereafter, we conducted the study, following the agreed upon protocol, and published its results. Industry was given an opportunity to publish their separate results simultaneously with the government. During this rulemaking, industry submitted to us through the notice and comment process their conclusions on the 31-Mine Study in a report titled, ''Technical and Economic Feasibility of DPM Regulations.'' The industry report is contained in the rulemaking record, and we considered it in reaching determinations for the 2005 final rule. We have been transparent about the design of the study and methods of analysis.

Commenters also stated that we disseminated information that relies on non-representative sampling and is therefore in violation of the Information Quality Guidelines. The information they refer to was obtained in the previously discussed 31-Mine Study and also during our baseline sampling. Under the Second Partial DPM Settlement Agreement, we agreed to provide compliance assistance to the M/NM underground mining industry for a one-year period from July 20, 2002 through July 19, 2003. As part of our compliance assistance activities, we agreed to conduct baseline sampling of miners' personal exposures at every underground mine covered by the 2001 final rule.

A total of 1,194 valid baseline samples were collected. A total of 183 underground M/NM mines are represented by this analysis. We used the results of this sampling in our preamble to the 2005 final rule to estimate current DPM exposure levels in underground M/NM mines using diesel equipment (70 FR 32873–32883) and in the risk assessment for this final rule. The sampling results also assist mine operators in developing compliance strategies based on actual exposure levels. Most commodities were well represented in this analysis with the average number of valid samples per mine ranging from 6.0 to 8.2 (average

across all mines is 6.5 samples per mine).

MSHA compliance specialists collected baseline samples in the same manner they have been instructed to use for collecting samples for enforcement purposes. It is expected that personal exposure to DPM will fluctuate due to variations in day to day operations in a mine. Reported levels of DPM are representative of the exposures of miners identified as having the highest risks of overexposures to DPM during our compliance assistance work. In an ideal situation, and with unlimited resources, every potentially exposed miner would be individually sampled. It is not necessary or practical, however, to sample all miners on a mine property in order to evaluate personal exposures. Suspected and potential health hazards may be reasonably and adequately evaluated by sampling the maximum risk miner in a work area. Compliance specialists strive to characterize the higher exposure levels during typical work shifts. The baseline samples are representative of the conditions experienced on work shifts during the defined compliance assistance period. MSHA has obtained the best available information for characterizing recent activities at the relevant M/NM mines.

Commenters questioned the accuracy and validity of the NIOSH Analytical Method 5040. NIOSH validation criteria state that the NIOSH Analytical Method 5040 provides a result that differs no more than ±25% from the true value 95 times out of 100. The NIOSH Analytical Method 5040 validation is documented in several publications. See our discussion of this in Section VIII.A. of this preamble for additional peer-reviewed studies providing evidence that the NIOSH Analytical Method 5040 method is valid. In a study published by Noll, et al., in January 2005 evaluating sampling results of DPM cassettes, the authors report a 95% upper confidence limit Coefficient of Variation (CV) of 7% when analyzing samples for EC and 6% for TC. In this same study, NIOSH reported good agreement and precision between EC for DPM samples using SKC impactor and respirable samples in both laboratory and field studies. Two studies published in 2004 (Noll, et al., 2004 and Birch, et al., 2004) reported results from investigating sampling for EC in the presence of coal dust using submicron impactors. The results show good agreement between submicron EC and respirable samplers for collecting DPM samples.

Commenters also stated that we calculated the error factors for our analytical method assuming no related methodological inaccuracies. We develop method-specific error factors to assure that a personal exposure result is more than likely to represent an overexposure. These error factors account for normal and expected variability inherent in any analytic method and sampling protocol and provide a basis for interpretation of sampling results. When we interpret sampling results and make a determination of compliance, we apply the error factor to the result to gauge whether the sample indicates a true overexposure. We use the validated NIOSH Analytical Method 5040 for diesel particulate matter to analyze our personal exposure samples collected for compliance determinations.

The NIOSH criteria and guidelines used for method validation do not directly apply to the development of error factors. However, similar statistical procedures to develop analytical methods can also be used to develop error factors. The commenters fail to recognize other differences between validation of methods and development of error factors. We discuss our error factor in detail in Section VIII.A. of this preamble.

Commenters further questioned whether the NIOSH Method 5040 has been commercially tested. As in the preamble to the 2003 NPRM, we discussed in detail our findings regarding the NIOSH Method 5040 in the 31-Mine Study discussion in the preamble to the 2005 final rule (70 FR 32870–32871) and in Section VIII of this preamble. NIOSH's peer review of the 31-Mine Study also concludes that the analytical method specified by the diesel standard gives an accurate measure of the TC content of a filter sample and that the analytical method is appropriate for making compliance determinations of DPM exposures of underground M/NM miners. NIOSH confirmed this position by letter of February 8, 2002, in which NIOSH stated that,

> MSHA is following the procedures of NIOSH Method 5040, based on our review of MSHA P13 (MSHA's protocol for sample analysis by NIOSH Method 5040) and a visit to the MSHA laboratory.

Commenters stated that MSHA's former chairman of the DPM Rulemaking Committee had a conflict of interest as he was also author of the ACGIH diesel TLV. In response, our 2001 final rule includes the basis for our interim limit of 400_{TC} μg/m³ and final limit of 160_{TC} μg/m³, and states the following:

> Because of the lack of a generally accepted dose-response relationship, some commenters questioned the agency's rationale in picking a particular concentration limit: 160_{TC} μg/m³ or around 200_{DPM} μg/m³. Capping DPM concentrations at this level will eliminate the worst mining exposures, and bring miner exposures down to a level commensurate with those reported for other groups of workers who use diesel-powered equipment. The proposed rule would not bring concentrations down as far as the proposed ACGIH TLV^R of 150_{DPM} μg/m³. Nor does MSHA's risk assessment suggest that the proposed rule would completely eliminate the significant risks to miners of DPM exposure.
>
> In setting the concentration limit at this particular value, the Agency is acting in accord with its statutory obligation to attain the highest degree of safety and health protection for miners that is feasible. The Agency's risk assessment supports reduction of DPM to the lowest level possible. But feasibility considerations dictated proposing a concentration limit that does not completely eliminate the significant risks that DPM exposure poses to miners.
>
> The Agency specifically explored the implications of requiring mines in this sector to comply with a lower concentration limit than that being adopted. The results, discussed in Part V of this preamble, indicate that although the matter is not free from question, it still may not be feasible at this time for the underground metal and nonmetal mining industry as a whole to comply with a significantly lower limit than that being adopted. The Agency notes that since this rulemaking was initiated, the efficiency of hot gas filters has improved significantly, the dpm emissions from new engines continue to decline under EPA requirements, and the availability of ultra-low sulfur fuel should make controls even more efficient than at present.
>
> The Agency also explored the idea of bridging the gap between risk and feasibility by establishing an ''action level''. In the case of MSHA's noise rule, for example, MSHA adopted a ''permissible exposure level'' of a time-weighted 8-hour average (TWA_8) of 90 dBA (decibels, A-weighted), and an ''action level'' of half that amount—a TWA_8 of 85 dBA. In that case, MSHA determined that miners are at significant risk of material harm at a TWA_8 of 85 dBA, but technological and feasibility considerations preclude the industry as a whole, at this time, below a TWA_8 of 90 dBA. Accordingly, to limit miner exposure to noise at or above a TWA_8 of 85 dBA, MSHA requires that mine operators must take certain actions that are feasible (*e.g.*, provide hearing protectors).
>
> MSHA considered the establishment of a similar ''action level'' for DPM— probably at half the proposed concentration limit, or 80_{TC} μg/m³. Under such an approach, mine operators whose DPM concentrations are above the ''action level'' would be required to implement a series of ''best practices''—*e.g.*, limits on fuel types, idling, and engine maintenance. Only one commenter supported the creation of an Action Level for DPM. However, this commenter suggested that such an Action Level be adopted in lieu of a rule incorporating a concentration limit requiring mandatory compliance. The

Agency determined it is feasible for the entire underground mining community to implement these best practices to minimize the risks of DPM exposure without the need for a trigger at an Action Level (66 FR 5710).

Consequently, MSHA did not rely on data from ACGIH in establishing its 2001 final rule.

Commenters leveled several other criticisms at the Estimator and the 31-Mine Study which they believe violate Data Quality Act requirements and invalidate our conclusions regarding the feasibility of the 2001 and 2005 final rules. The computer program in question, referred to as the Estimator, is a Microsoft® Excel spreadsheet program that calculates the reduction in DPM concentration that can be obtained within an area of a mine by implementing individual or combinations of engineering controls. This program was the subject of a Preprint published for the 1998 Society of Mining Engineers Annual Meeting (Preprint 98–146, March 1998), and it was fully described in a peer reviewed article in a professional journal (Haney and Saseen, Mining Engineering, April 2000).

Commenters objected to the use of input data for the Estimator which they characterized as ''assumed ventilation air flows that do not reflect reality or actual MSHA measurements,'' and ''assumptions regarding perfect mixing of ventilation air to achieve dilution of exhaust particulate,'' which they further characterized as ''another assumption that does not reflect reality or actual measurements.'' The commenters stated that these failures are violations of the Data Quality Act's reproducibility and transparency requirements, and that MSHA admitted to these failures in the preamble to the 2005 final rule.

Regarding the use of ''assumed ventilation flows that do not reflect reality,'' all data used in Estimator analysis for the 31-Mine Study were obtained by MSHA M/NM industrial hygienists or Health Specialists. The ventilation inputs were either measured or estimated by these MSHA personnel. As stated in the final report of the 31-Mine Study, ''Each mine was evaluated individually, based on the DPM concentration data obtained for that mine through sampling, coupled with the mine-specific equipment, operating practices, and ventilation observed at that mine.''

Of the 31 mines addressed in the study, ventilation changes were specified for only five, and those changes were limited to auxiliary ventilation systems only. This fact is very important because when using the ''Column A'' option of the Estimator, which was the only option used in the 31-Mine study, if ventilation changes are not specified, the prevailing ventilation in a given area of the mine is irrelevant to Estimator analysis. The engineering rationale for this effect was explained thoroughly in the final report for the 31-Mine Study (p. 96):

It is significant to note that when ventilation remains the same before and after DPM controls are specified in the Estimator (*i.e.* the DPM control chosen was *not* a change in ventilation), the actual ventilation value used is irrelevant. This characteristic of the Estimator applies to any mine ventilation scheme, but it is particularly important where ventilation velocity is low, and ventilation flow is difficult to accurately measure. Mine ventilation velocity is very low in large parts of many room and pillar mines with large cross-section mine openings. This situation suggests two possible problems with DPM measurement—difficulty measuring mine airflow rates, and non-homogeneous mixtures of DPM in mine air. DPM concentrations in the ambient air at these mines can be profoundly affected by near-stagnant conditions in some areas, as well as by localized air movement that is independent of the overall mine ventilation flow. Such localized air movement can result from pressure differences created by wind from moving vehicles, natural ventilation, diesel engine cooling fans, heat-induced stratification, etc. In these situations, perfect mixing of mine air with DPM emissions would not be expected, hence, the DPM concentration in ambient mine air could not be reasonably estimated by simply dividing the DPM emission rate by the ventilation flow rate.

In its Column A option, the Estimator does not calculate DPM concentration by dividing the DPM emission rate by the ventilation flow rate. Thus, in MSHA's view, neither the difficulty of measuring airflow nor the imperfect mixing of DPM and mine air is important. The Estimator accounts for complex and imperfect mixing of ventilation air and DPM emissions by assuming that this mixing, in whatever manner it occurs when DPM samples are initially collected, would remain unchanged after DPM controls are implemented. MSHA considers this to be a reasonable assumption unless the DPM control that is specified is itself a major ventilation change. Since ventilation changes were not specified for any of the mines where complex and imperfect mixing was likely to occur, MSHA considers it reasonable to estimate a final DPM concentration at these mines based on applying a proportionality factor to the DPM concentration originally measured. The proportionality factor is simply the ratio of the DPM emission rate after controls are implemented to the DPM emission rate before controls are implemented, and is independent of the actual airflow present at that location. Although the Estimator makes simplifying assumptions, MSHA considers its results reasonably accurate. The Estimator's calculations have been compared to actual in-mine data, and good agreement has been achieved.

The differences between the Estimator's user-selectable ''Column A'' and ''Column B'' options are addressed in Section V.A of this preamble and previously were thoroughly discussed in the preamble to the 2005 final rule (70 FR 32920):

The Estimator actually incorporates two independent means of calculating DPM levels: one based on DPM sampling data for the subject mine, and one based on the absence of such sampling data. Where no sampling data exist, the Estimator calculates DPM levels based on a straightforward mathematical ratio of DPM emitted from the tailpipe (or DPF, in the case of filtered exhaust) per volume of ventilation air flow over that piece of equipment. This is referred to in the Estimator as the ''Column B'' option for calculating DPM concentrations. The commenters' observation that the Estimator fails to account for imperfect mixing between DPM emissions and ventilating air flows is a valid criticism of the ''Column B'' option. For this and other reasons, the Estimator's instructions urge users to utilize the ''Column A'' option whenever sampling data are available.''

In the ''Column A'' option, the Estimator's calculations are ''calibrated'' to actual sampling data. Whatever complex mixing between DPM emissions and ventilating air flows existed when DPM samples were obtained, are assumed to prevail after implementation of a DPM control. This is an entirely reasonable assumption, and in fact, there is no engineering basis to assume otherwise. Indeed, comparisons of ''Column A'' Estimator calculations and actual DPM measurements taken in mines before and after implementation of DPM controls have shown good agreement, indicating that Estimator calculations do adequately incorporate consideration for complex mixing of DPM and air flows when the ''Column A'' option is used. The Estimator was originally developed with both the Column A and Column B options because at the time it was developed (1997), the specialized equipment required for reliable and accurate in-mine DPM sampling, such as the submicron impactor, was not widely available. Consequently, few mine operators were able to obtain the in-mine DPM sample data required for utilizing the Column A option.

The commenter refers to the ''Column A option'' as an alternative use of the Estimator. However, we have always recommended that the Column A option be used if sampling data are available. As noted above in the excerpt from the 31-Mine Study, we explained fully at the time the study was released in January 2003 exactly how the Estimator was used in that study, and we also explained its use in the preamble to the June 2005 final rule. The commenter states that the sample data used in Estimator analysis were ''non-representative of routine mining conditions that can vary greatly at each mine from day to day, and from mine

to mine throughout the industry.'' However, we stated in the 31-Mine Study final report that we followed standard MSHA enforcement sampling procedures to obtain the DPM samples at the 31 mines. These procedures are public information, and were well known by the labor and industry representatives that collaborated on the study protocol.

Regarding the question of whether the data obtained in the 31-Mine Study were representative of the industry as a whole, the mines in the study were jointly selected by MSHA, labor, and industry representatives. A reasonable attempt was made to achieve a cross-section of the industry in terms of commodities and mine sizes. The MSHA, labor, and industry personnel who collaborated on the study protocol were all fully aware at that time that the study was never intended to be statistically representative of the industry as a whole, and this fact was explicitly stated in the 31-Mine Study final report.

The commenter suggests that the study is ''suspect'' because 25% of the samples were voided. As was explained in the 31-Mine Study final report, of the 464 samples obtained at the 31 mines, 106 were voided. A key consideration in the sampling conducted at the 31 mines was to ensure, to the extent possible, that samples were not contaminated by non-diesel sources of airborne carbon. Testing had verified that the submicron sampler would remove mineral dust contamination (limestone, graphite, etc.), but tobacco smoke, drill oil mist, and possibly vapors from ANFO loading could contaminate a sample filter with non-diesel organic carbon. Thus, in accordance with the study protocol that had been jointly developed and approved by both us and the litigants, any sample that was known to have been, or could potentially have been contaminated with such an interferent was voided. Of the 106 voided samples, 61 were voided due to interferences. There were also some samples that were voided for other reasons, such as laboratory error (2 samples), sample pump failure (22 samples), or incomplete sample or sampling the wrong location (21 samples). Including any of these 106 voided samples in the data analysis would have cast doubt on the validity of the study. The study methodology that resulted in voiding questionable samples was part of the mutually agreed upon study protocol, the rationale for voiding these samples was well known and supported by all parties, and it was fully explained in the study final report.

For 26 of the 31 mines, ventilation flow rates did not factor into Estimator analysis because, as explained above, they were not relevant to the computations. For the remaining five mines, we continue to believe our estimates of ventilation flow rates were sufficiently accurate for the purposes of the study. Both our methods and data sources were explained thoroughly and we have responded previously on the record to these same criticisms of the Estimator.

Some commenters questioned the quality of reports of MSHA's compliance assistance work at mines covered under the standard, and requested that they be stricken from the rulemaking record because these studies were conducted without an apparent protocol or independent peer review. Also, commenters stated that these studies have not been published nor submitted for publication in any scientific journal. In response, the compliance assistance reports in the DPM rulemaking record are not intended for publication in a scientific journal, but instead, are accounts of our experiences at mines where mine operators requested help from MSHA in reducing DPM exposures. Under the second partial DPM settlement agreement, MSHA agreed to provide compliance assistance at underground mining operations using diesel-powered equipment from July 20, 2002 through July 19, 2003.

The Technological Feasibility section of this preamble, Section V.A, discusses the information and data related to feasible engineering and administrative controls currently available for the mining industry as a whole. Mines have implemented many of these DPM controls to meet the interim DPM limit as shown by our enforcement sampling. As further discussed in that section, we expect the industry as a whole will continue to learn more about the available control technologies and implement these control strategies in order to meet the final limits specified in this final rule. We recognized that implementation issues were making it difficult for some mines to use DPFs and obtain alternative fuels such as biodiesel. The extension of time allowed by this final rule was justified due to the greater availability of biodiesel fuels, the variety of DPF systems available, and the cleaner on-highway diesel engines that are becoming available.

The data presented in the Feasibility sections of this rulemaking support the feasibility of the various DPM control technologies. This data were derived from sources such as NIOSH, MSHA, and the Biodiesel Board. The NIOSH work provided mine operators with data that showed expected DPM reductions in a diesel laboratory, an isolated zone, and in production areas. The expected reductions were presented to assist mine operators with choosing DPM controls for implementation in their mines. We discussed information on DPFs that can achieve EC reductions above 90% and informed mine operators of other products that gave very minimal reductions. This was done to give mine operators the ability to choose a single control or combination of controls that would be technologically and economically feasible and appropriate for their particular situation to implement in order to meet the interim limit and the final limits specified in this final rule.

All of the data collected during the 31-Mine Study and subsequent studies performed by NIOSH were gathered using transparent methods, with protocols agreed upon by industry and union representatives. NIOSH performed extensive isolated zone studies that were developed and performed through the M/NM Diesel Partnership (the Partnership). NIOSH's reports were reviewed by the industry and revised based on comments in the record. Our compliance assistance work discussed previously in this section and the data obtained from those studies were developed with industry assistance.

The commenters state that our feasibility determinations for individual mines and for the industry were based in part on the results of Estimator analysis that calculated compliant DPM concentrations after installation of DPM filters, thus demonstrating that such filters could be used by mine operators to attain compliance with the interim and final DPM limits. The commenters object to the use of the Estimator for this purpose because they believe such filters did not exist. They charge that since appropriate filters did not exist, the methodology for our feasibility determination failed to meet our Data Quality requirements.

We disagree with the commenter's statement that our, ''assumptions [regarding the availability of filters] do not reflect reality.'' We have provided extensive discussion throughout the rulemaking record supporting our position that diesel particulate filters suitable for any size diesel engine were commercially available at the time the 2001 final rule was issued, and that a greater variety of such filters have become commercially available since 2001. The commenter states that we were, ''forced to admit'' in the 2005 final rule that there was ''insufficient

evidence of feasibility,'' thus contradicting the Estimator and 31-Mine Study feasibility determinations. The sentence from the preamble to the 2005 final rule quoted by the commenter states, in full, ''MSHA acknowledges that the current rulemaking record lacks sufficient feasibility documentation to justify lowering the DPM limit below 308_{EC} μ/m³, at this time.'' This statement was not meant to imply that either the 2001 or 2005 final rule was infeasible, and it is irrelevant to the final DPM limit. It states that at that time, which was June 2005, we did not believe it was feasible for the industry as a whole to achieve DPM levels lower than the interim DPM limit, 308_{EC} μ/m³, which was the DPM limit in effect at that time.

The commenter stated that our explanation for many filter failures reported by Stillwater and other companies was that the user or the manufacturer was at fault, and that if MSHA had selected the filters, we would have selected or used them differently. We have extensively discussed in our preambles in this rulemaking record that the user of a DPF must evaluate and monitor each application in order to verify that the DPF is working properly at all times. We have continually stated that the majority of the DPF failures that have been reported have been related to DPF regeneration. We believe that better choices in selection and maintenance of DPFs would result in greater successes. However, these regeneration issues are not related to the capability of DPFs to effectively collect DPM. All of the data that we have presented on DPFs show that DPFs effectively collect DPM. Tests that were performed in the mining industry have consistently supported the same conclusions and agree with data given in the literature. Again, the failure of the regeneration scheme is the main cause of a clogged filter. The proper selection of DPFs has been discussed in the literature, and NIOSH's Filter Selection Guide extensively provides the information needed for selection.

The commenter also discusses the NO_2 issues related to DPFs. The data presented from studies show that catalyzed DPFs can increase NO_2. This data have been developed with the Partnership. However, we continue to believe that the NO_2 problems reported have been ventilation issues and not specifically a DPF issue. In fact, as discussed in the Technological Feasibility section, NIOSH stated that NO_2 elevations experienced were a result of poorly or marginally ventilated areas. Our data from the Greens Creek study that were developed and reviewed with industry showed no NO_2 issues on production machines in well ventilated areas.

Commenters raised several Data Quality issues relating to our determinations that the 2001 and 2005 final rules were economically feasible. They include whether the data used to make these determinations were representative of the industry, that industry annual revenue is an inappropriate measure of economic feasibility, that erroneous commodity prices were used in the 31-Mine Study to estimate revenue for at least one of the mines in the study, and that the 31-Mine Study incorrectly assumed that none of the mines in the study required major ventilation upgrades. They believe our economic feasibility conclusions were based on improper sampling, and inaccurate and incomplete data.

Each of these issues is discussed in detail in the Economic Feasibility section of this preamble. The key information from that section that relates to commenters' Data Quality concerns is summarized here. Regarding the first issue, that the subject mines in the 31-Mine study were not representative of the industry, this issue has already been addressed above. MSHA, labor, and industry collaborated on the study design, and all parties were aware at the time that the study mines were not randomly selected. Thus, the study results would reasonably accurately reflect feasibility of the subject mines, but would not be statistically representative of the industry as a whole. The entire process was transparent, reproducible, and based on valid assumptions and sound methods.

Regarding the second issue of whether industry annual revenue is an inappropriate measure of economic feasibility, commenters indicated that this method ignores the fact that international commodity markets determine the viability of mines by setting market prices for their production, and that annual revenues of hundreds of millions, if not billions, of dollars have not prevented the domestic underground M/NM mining industry from shrinking in recent years.

We believe that the method we used to determine economic feasibility is valid. We have customarily used compliance costs of greater than 1% of industry annual revenue as our screening benchmark for determining whether a more detailed economic feasibility analysis is required. The commenter correctly points out that despite hundreds of millions, if not billions, of dollars of industry annual revenue, business failures can and do occur, and over a period of decades, the characteristics of an industry can change markedly. However, by utilizing the 1% of annual revenue screening benchmark, we assure that a complete feasibility analysis will be conducted to determine whether a new MSHA rule could potentially affect the viability of an industry.

While it is true that individual business failures can and do occur, and that over a period of many years, substantial portions of a domestic industry can be adversely affected by, for example, international competition, it is highly improbable that such events would be set into motion by a rule imposing costs equal to or less than 1% of industry annual revenue. Threats to an entire industry's competitive structure and resulting large scale dislocations within an industry sector are typically caused by fundamental changes in technology, permanent downward pressure on demand for a commodity due, for example, to the introduction of a superior substitute material, world-wide or regional business cycles, etc. Our practice of utilizing compliance costs of greater than 1% of industry annual revenue as our screening benchmark for determining whether a more detailed economic feasibility analysis is required is reproducible and transparent, and is based on reasonable assumptions and sound economic principles.

The third issue raised by the commenter relating to economic feasibility was that erroneous commodity prices were used to estimate annual revenue for one of the mines in the 31-Mine Study. The commenter states that our revenue estimates suggest we used a price of $50 to $70 per ton for rock salt for highway de-icing, when a more reasonable estimate would have been $20 to $25 per ton.

The commenter did not explain how they inferred a $50 to $70 per ton price for rock salt from our analysis, so we are unable to respond directly to this comment. However, we did not base our economic feasibility determination for the subject mine on this inflated price for rock salt. For the 31-Mine Study, we did not have access to actual annual revenue data for any of the 31 individual mines in the study, so we indirectly estimated annual revenues using our data on the number of employee work hours in 2000 for each mine, the total number of employee work hours reported to us in 2000 by all mines producing that commodity, and data from the U.S. Geological Survey on the industry-wide value of mineral

production by commodity for the year 2000. We estimated annual revenues for a particular mine by determining the industry-wide production value per employee hour for the specific commodity each mine produced, and multiplying that amount by the number of annual employee work hours reported to us for that mine. This methodology assumes that each mine's annual revenues would be roughly proportional to each mine's share of the industry's total employee work hours. Thus, our estimates, while not necessarily exact for each mine, were a reasonable approximation for those mines based on industry averages. Our analytical methods and data sources were fully explained in the final report to the 31-Mine Study. The process was transparent and reproducible, and the method was sound. This methodology does not explicitly incorporate a cost per ton factor. Implicit in this methodology, based on the U.S. Geological Survey's estimates of rock salt production in 2000 of 45,600,000 metric tons valued at $1,000,000,000, would be a cost per metric ton of $21.93 (equivalent to $19.89 per short ton), which is actually slightly less than the commenter's estimated price of $20 to $25 per short ton.

The final issue relating to economic feasibility raised by the commenter also concerns the 31-Mine Study. The commenter suggests that our methodology underestimated compliance costs by failing to recommend major ventilation upgrades for any mine in the study. They point out that a total of only $234,000 was recommended in the study for minor ventilation upgrades, whereas the operator of one of the mines in the study estimated at least $4.4 million in ventilation upgrades would be required at that mine alone to attain compliance.

In response to a similar comment on our 2003 NPRM, we noted in the preamble to the 2005 final rule that we did not specify any major ventilation upgrades in the 31-Mine Study because, based on the study methodology, the analysis did not indicate the need for major ventilation upgrades in order to attain compliance with either the interim or final DPM limits at any of the 31 mines. We went on to explain that the purpose of specifying controls for each mine in this study was simply to demonstrate that feasible controls capable of attaining compliance existed, and to provide a framework for costing such controls on a mine-by-mine basis. We explicitly stated in the 31-Mine study final report that the DPM controls specified for a particular mine did not necessarily represent the only feasible control strategy, or the optimal control strategy for that mine.

The fact that the operator of one of the mines in the study estimated costs of $4.4 million for ventilation upgrades to attain compliance with the rule does not invalidate the methodology we used, or the results we obtained in the 31-Mine study. It is impossible for us to verify whether $4.4 million for ventilation upgrades is a reasonable estimate for the subject mine because we don't know which mine the commenter is referring to, and no additional supporting documentation was provided by the commenter. However, even if this figure is accurate, it would not necessarily invalidate our methodology or results. We have received numerous comments throughout the rulemaking process that ventilation upgrades alone would not be a cost-effective DPM control at many mines. These comments support our position that mine operators need to carefully analyze all DPM control options in order to select the most cost-effective control or combination of controls to implement at a particular mine. Although a $4.4 million ventilation upgrade may be required to attain compliance at the subject mine, if ventilation alone was used to attain compliance, it is more likely that compliance could be achieved at this mine at a lower cost if an optimal combination of controls were implemented, including low DPM-emission engines, environmental cabs with filtered breathing air, DPM filters, alternative fuels such as biodiesel, work practices and administrative controls, as well as ventilation.

With respect to ventilation upgrades for the 31 mines, the study methodology and the sources of all data we used in performing the feasibility analyses were thoroughly explained in the 31-Mine Study final report. The process was transparent and reproducible, and the study protocol was developed jointly by MSHA, labor, and industry representatives.

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XV. Regulatory Text

List of Subjects in 30 CFR Part 57

Diesel particulate matter, Metal and nonmetal, Mine safety and health, Underground miners.

Dated: May 9, 2006.

Robert M. Friend,

Acting Deputy Assistant Secretary of Labor for Mine Safety and Health.

■ For reasons discussed in the preamble, MSHA amends 30 CFR part 57 as follows:

PART 57—SAFETY AND HEALTH STANDARDS—UNDERGROUND METAL AND NONMETAL MINES

■ 1. The authority citation for part 57 continues to read as follows:

Authority: 30 U.S.C. 811 and 813.

■ 2. Section 57.5060 is amended by:
■ A. Revising paragraph (b);
■ B. Removing (c)(3)(i); and
■ C. Redesignating paragraphs (c)(3)(ii), (c)(3)(iii), and (c)(3)(iv) as (c)(3)(i), (c)(3)(ii), and (c)(3)(iii) respectively.

The revision reads as follows:

§ 57.5060 Limit on exposure to diesel particulate matter.

* * * * *

(b)(1) Effective May 20, 2006, a miner's personal exposure to diesel particulate matter (DPM) in an underground mine must not exceed an average eight-hour equivalent full shift airborne concentration of 308 micrograms of elemental carbon per cubic meter of air (308_{EC} μg/m³).

(2) Effective January 20, 2007, a miner's personal exposure to diesel particulate matter (DPM) in an underground mine must not exceed an average eight-hour equivalent full shift airborne concentration of 350 micrograms of total carbon per cubic meter of air (350_{TC} μg/m³).

(3) Effective May 20, 2008, a miner's personal exposure to diesel particulate matter (DPM) in an underground mine must not exceed an average eight-hour equivalent full shift airborne concentration of 160 micrograms of total carbon per cubic meter of air (160_{TC} μg/m³).

* * * * *

■ 3. Effective August 16, 2006, § 57.5060 is amended by revising paragraph (d) introductory text and adding paragraphs (d)(3) through (d)(8).

§ 57.5060 Limit on exposure to diesel particulate matter.

* * * * *

(d) The mine operator must install, use, and maintain feasible engineering and administrative controls to reduce a miner's exposures to or below the applicable DPM PEL established in this section. When controls do not reduce a miner's DPM exposure to the PEL, controls are infeasible, or controls do not produce significant reductions in DPM exposures, controls must be used to reduce the miner's exposure to as low a level as feasible and must be supplemented with respiratory protection in accordance with § 57.5005(a), (b), and paragraphs (d)(1) through (d)(8) of this section.

* * * * *

(3) The mine operator must provide a confidential medical evaluation by a physician or other licensed health care professional (PLHCP), at no cost to the miner, to determine the miner's ability to use a respirator before the miner is required to be fit tested or to use a respirator at the mine. If the PLHCP determines that the miner cannot wear a negative pressure respirator, the mine operator must make certain that the PLHCP evaluates the miner's ability to wear a powered air purifying respirator (PAPR).

(4) The mine operator must provide the miner with an opportunity to discuss their evaluation results with the PLHCP before the PLHCP submits the written determination to the mine operator regarding the miner's ability to wear a respirator. If the miner disagrees with the evaluation results of the PLHCP, the miner may submit within 30 days additional evidence of his or her medical condition to the PLHCP.

(5) The mine operator must obtain a written determination from the PLHCP regarding the miner's ability to wear a respirator, and the mine operator must assure that the PLHCP provides a copy of the determination to the miner.

(6) The miner must be reevaluated when the mine operator has reason to believe that conditions have changed which could adversely affect the miner's ability to wear the respirator.

(7) Upon written notification that the PLHCP has determined that the miner is unable to wear a respirator, including a PAPR, the miner must be transferred to work in an existing position in an area of the same mine where respiratory protection is not required. The miner must be transferred within 30 days of the final determination by the PLHCP.

(i) The miner must continue to receive compensation at no less than the regular rate of pay in the classification held by that miner immediately prior to the transfer.

(ii) Increases in wages of the transferred miner must be based upon the new work classification.

(8) The mine operator must maintain a record of the identity of the PLHCP and the most recent written determination of each miner's ability to wear a respirator for the duration of the miner's employment plus six months.

* * * * *

■ 4. Section 57.5075 is amended by revising paragraph (a) and paragraph (b)(3) to read as follows:

§ 57.5075 Diesel particulate records.

(a) The table entitled ''Diesel Particulate Matter Recordkeeping Requirements'' lists the records the operator must maintain pursuant to §§ 57.5060 through 57.5071, and the duration for which particular records need to be retained.

TABLE 57.5075(a).—DIESEL PARTICULATE RECORDKEEPING REQUIREMENTS

Record	Section reference	Retention time
1. Approved application for extension of time to comply with exposure limits.	§ 57.5060(c)	Duration of extension.
2. Identity of PLHCP and most recent written determination of miner's ability to wear a respirator.	§ 57.5060(d)	Duration of miner's employment plus 6 months.
3. Purchase records noting sulfur content of diesel fuel	§ 57.5065(a)	1 year beyond date of purchase.
4. Maintenance log	§ 57.5066(b)	1 year after date any equipment is tagged.
5. Evidence of competence to perform maintenance	§ 57.5066(c)	1 year after date maintenance performed.
6. Annual training provided to potentially exposed miners	§ 57.5070(b)	1 year beyond date training completed.
7. Record of corrective action	§ 57.5071(c)	Until the corrective action is completed.
8. Sampling method used to effectively evaluate a miner's personal exposure, and sample results.	§ 57.5071(d)	5 years from sample date.

(b) * * *

(3) An operator must provide access to a miner, former miner, or, with the miner's or former miner's written consent, a personal representative of a miner, to any record required to be maintained pursuant to § 57.5071 or § 57.5060(d) to the extent the information pertains to the miner or former miner. The operator must provide the first copy of a requested record at no cost, and any additional copies at reasonable cost.

* * * * *

[FR Doc. 06–4494 Filed 5–17–06; 8:45 am]

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Federal Register

Thursday,
May 18, 2006

Part III

Department of Transportation

Federal Aviation Administration

National Environmental Policy Act (NEPA) Implementing Instructions for Airport Actions; Notice

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2004–19058; FAA Order 5050.4B]

National Environmental Policy Act (NEPA) Implementing Instructions for Airport Actions

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of publication of the Preamble to Order 5050.4B.

SUMMARY: The Federal Aviation Administration's Office of Airports (ARP) is responsible for reviewing and deciding on projects airport sponsors propose for public-use airports. ARP revised its National Environmental Policy Act (NEPA) implementing instructions for those airport projects under its authority and placed those instructions in Order 5050.4B, National Environmental Policy Act (NEPA) Implementing Instructions for Airport Actions. The Order's effective date was April 28, 2006.[1]

ARP announced the availability of that Order and its Preamble in the April 28, 2006, **Federal Register** (71 FR 25279). There, ARP noted that it would publish the text of the Preamble in the **Federal Register** shortly after the April 28th Notice of Availability. Today's publication of this document satisfies ARP's commitment to publish the Preamble in the **Federal Register**.

The Preamble presents a summary of the major changes ARP has included in Order 5050.4B . The Preamble also discusses the many changes and additions ARP has made in response to comments on draft Order 5050.4B that ARP published in the December 16, 2004, version of the **Federal Register** (69 FR 75374). The Preamble also discusses other changes ARP judged necessary since publishing the draft Order.

Order 1050.1E Environmental Impacts: Policies and Procedures sets FAA's agency-wide environmental protocol. Order 5050.4B supplements Order 1050.1E by providing NEPA instructions especially for proposed Federal actions to support airport development projects. Order 5050.4B follows the Council on Environmental Quality's (CEQ's) NEPA implementing regulations at 40 CFR 1500—1508. It also follows DOT's Order 5610.C, Policies for Considering Environmental Impacts, and FAA Order 1050.1E.

ARP has made Order 5050.4B as consistent with FAA Order 1050.1E as possible. Users of Order 5050.4B must interpret it in a manner consistent with FAA Order 1050.1E. Exceptions to this rule apply to internal FAA coordination and review of environmental documents. For those actions, users follow the instructions in Order 5050.4B. If specific questions about the instructions in Orders 1050.1E and 5050.4B arise, users should call the contact person noted below for clarification. The contact will notify FAA's Office of Environment and Energy (AEE), the FAA organization responsible for developing general NEPA procedures for all FAA organizations, about identified conflicts. This will provide a transparent system to resolve legitimate conflicts and ensure NEPA conformity within all FAA organizations.

Cancellation: Order 5050.4B, replaces Order 5050.4A, Airports Environmental Handbook, dated October 8, 1985.

DATES: *Effective Date:* Order 5050.4B is effective April 28, 2006.

FOR FURTHER INFORMATION CONTACT: Please e-mail or call: Mr. Ed Melisky (*edward.melisky@faa.gov*), Environmental Specialist, Federal Aviation Administration, Office of Airport Planning and Programming (APP–400), 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–5869; fax (202) 267–8821.

SUPPLEMENTARY INFORMATION: The National Environmental Policy Act (NEPA) and CEQ's regulations implementing NEPA provide Federal agencies with instructions on protecting the quality of the human and natural environments. NEPA and its implementing regulations require Federal agencies to carefully evaluate and consider the environmental effects of actions under their respective authorities before the agencies make decisions on those actions.

Section 102(B) of NEPA requires Federal agencies, in consultation with CEQ, to develop procedures to carry out NEPA and CEQ's regulations for activities under the agencies' respective purviews. Although FAA Order 1050.1E presents FAA's agency-wide instructions to complete the NEPA process, ARP is issuing Order 5050.4B to supplement those instructions. ARP has traditionally published Order 5050 to provide detailed NEPA instructions specific to airport actions under its authority. Readers wanting to know how other FAA organizations address NEPA requirements for non-airport projects should see FAA Order 1050.1E.

As noted earlier, Order 5050.4B replaces Order 5050.4A dated October 8, 1985. That Order served FAA personnel, airport sponsors, airport consultants, Federal, State, local, and tribal governments and the public well for over 20 years. However, changes in Federal laws and regulations, FAA policies and procedures (*i.e.*, Order 1050.1E), and evolving environmental processing and evaluation for airports occurring since 1985 signaled the need to issue Order 5050.4B.

Distribution: ARP is distributing this Order to ARP personnel and other interested parties by electronic means only. ARP has placed this Order for viewing and downloading at its Web site.[2] Anyone without access to the Internet may obtain a compact disk (CD) containing the Order. Please make that request to the Federal Aviation Administration, Office of Airport Planning and Programming (APP–1), 800 Independence Avenue, SW., Washington, DC 20591. Those unable to use an electronic version of the Order, may obtain a photocopy of the Order by contacting FAA's rulemaking docket at: Federal Aviation Administration, Office of Chief Council, Attn: Rules Docket (AGC–200)—Docket No. FAA–2004–19058, 800 Independence Avenue, SW., Washington, DC 20591.

Summary of changes: FAA Order 5050.4B includes information from the draft Order published in the **Federal Register** on December 16, 2004, and additions or changes to that draft. The re-organization and addition of material to respond to comments on that draft have caused changes to the Order's organization and chapter titles. Because of these organizational changes, this Preamble discusses comments referencing specific paragraphs in the draft Order, but ARP's responses refer to the final Order's revised paragraph and subparagraph numbering system. This Preamble presents a summary of the major changes to the draft Order that may be of interest to airport sponsors, the public, other governmental agencies and organizations. The Preamble also presents ARP's responses to public comments on draft Order 5050.4B.

Major changes in final FAA Order 5050.4B: a. The Order deletes the summary of requirements and procedures under special purpose environmental laws, regulations, and executive orders outside NEPA. Order 5050.4A addressed these topics in paragraphs 47.e.(1) thru (20) and 85.a through t. Those paragraphs addressed various requirements protecting sensitive environmental resources such as wetlands, federally-listed endangered

[1] The Order and Preamble are available electronically at ARP's Web site, *http://www.faa.gov/airports_airtraffic/airports.*

[2] *http://www.faa.gov/airports_airtraffic/airports/resources/publications/orders/environmental_5050_4/.*

species, or historic properties. However, Order 5050.4B, Table 7–1 keeps information from those paragraphs that ARP and commenters found helpful in determining impact intensity and the proper NEPA review. In addition, this information will help users integrate the review, analyses, and consultation requirements of applicable special purpose laws with NEPA requirements.

ARP will issue a separate document entitled, Environmental Desk Reference for Federal Airport Actions (Desk Reference) to provide its staff and interested parties with information to integrate and comply with Federal environmental laws, regulations, and executive orders other than NEPA. ARP plans to issue the Desk Reference as soon as possible. Meanwhile, FAA personnel and other interested parties should use Appendix A in Order 1050.1E for guidance.

ARP is making this change to address recommendations FAA received when it published a draft version of Order 1050.1E for comment. Some commenters recommended that FAA delete Appendix A of that Order to focus that document on NEPA's implementing instructions. ARP's review of NEPA implementing instructions published in the **Federal Register** during 2004 shows none of the six Federal agencies publishing NEPA instructions included substantial information about Federal environmental laws, regulations, or executive orders outside NEPA.

ARP's removal of requirements outside NEPA from Order 5050.4B does not reflect a lack of FAA commitment to meet those requirements or absolve airport sponsors from complying with them. Compliance with those special purpose laws does not depend on their presence or absence in Order 5050.4B because many of them have their own compliance requirements. ARP will continue to integrate compliance with applicable environmental laws, regulations, and executive orders outside NEPA with its NEPA process to the fullest extent possible to streamline the overall environmental review process.

b. When compared to the draft version of Order 5050.4B, ARP has made organizational changes to more logically and clearly present information about the NEPA process and how ARP implements it. Chapter 2 of the final order focuses on special NEPA requirements and responsibilities for airport actions. Formerly, Chapter 5 (''Special Instructions'') presented that information, but ARP decided to place that information earlier in the Order. ARP made that change to provide an early alert to airport sponsors, ARP personnel, and State Block Grant Program (SBGP) participants about the NEPA process and each entity's responsibilities in that process. Presenting that information earlier in the Order ensures those responsible for airport actions pay close attention to the subsequent chapters and their contents to ensure efficient, effective NEPA processing. ARP deleted the instructions about airport and noise planning grants in paragraphs 500 and 501, which simply explained the categorical exclusions in Chapter 6. ARP has kept information on agency and Tribal consultation and participation in Chapter 3, but has created new Chapter 4 to highlight the need for public involvement. Formerly, public involvement information was a portion of Chapter 3.

New Chapter 5 focuses on coordinating airport planning and the NEPA process. ARP includes that information to better promote coordination between airport planning and the NEPA process as CEQ regulations require. The draft Order devoted only one paragraph (paragraph 302.a) to this important topic. However, to promote streamlining and efficient analyses, Chapter 5 stresses the critical linkage between airport planning and the NEPA process. ARP based much of this chapter on valuable planning and environmental information in its Best Practices Web site [3] and Advisory Circular 150/5070–6, Airport Master Plans. Revised Chapters 6 through 13 provide information on categorical exclusions (CATEXs), environmental assessments (EAs), environmental impact statements (EISs), and Records of Decision (RODs), respectively. Chapter 6 incorporates the information on CATEXs that appeared in Chapter 4 of the draft Order. Chapter 7 incorporates information on EAs the draft Order discussed in Chapter 4.

Finally, Chapter 9 contains information on airport actions normally requiring an EIS. The chapter also discusses scoping and the EIS's purpose and content. Formerly, Chapters 4 and 10 of the draft Order provided that information. Finally, Chapter 15 of the final Order retains information on streamlining the environmental process for airport capacity enhancement projects at congested airports or airport safety and security projects that ''Vision 100—The Century of Aviation Re-Authorization Act of 2003'' (Vision 100) discusses.

[3] (*http://www.faa.gov/arp/environmental/5054a/bestpractices.cfm*)

c. Order 5050.4B provides definitions for important terms used during ARP's NEPA analysis for actions at airports. Among other definitions, the Order provides definitions for the term ''approving FAA official'' and notes decisions for actions at airports are delegated to various personnel. This reflects requirements in FAA Order 1100.154A, Delegation of Authority, dated June 1990, which notes the approving FAA official will vary due to the number of FAA organizations an airport action involves. Order 5050.4B also defines the term ''Federal action'' and how it applies to actions under ARP's authority. Since publishing the draft Order, ARP has added definitions in paragraph 9 for the terms ''Environmental Management System'' and '' 'NEPA-like' State or agencies.'' The Order also provides a revised, more comprehensive definition for the term ''reasonably foreseeable action.'' The definition, now at paragraph 9.q and presented in a short table, lists criteria for off-airport and on-airport actions. ARP developed this definition to help users better define ''reasonably foreseeable actions.'' The final Order also provides a revised definition for ''special purpose laws.'' The final Order at paragraph 9.t, now lists all the laws, regulations, and executive orders comprising that term.

d. Chapter 2 provides information on limits for conditional airport layout plan (ALP) approvals. Paragraph 202.c(4) (paragraph 505b(3) in the draft Order) has been revised to clarify that these limitations apply when a sponsor or its consultant is preparing an EA or FAA is preparing an EIS for a major airport development project. ARP limits such approvals to avoid the appearance that it is making decisions on proposed projects before it completes the required NEPA processes for those actions. ARP also modified paragraph 202c(4) to clarify that FAA may conduct and issue airspace determinations for those projects. The paragraph also clarifies that FAA may approve other actions at the same airport, provided those actions are independent of the actions that are the subjects of an EA or EIS being prepared.

e. Paragraphs 202.d(1), (2), and (3) provide suggested language for conditional, unconditional, or mixed airport layout plan (ALP) approval letters, respectively. ARP added the ''mixed ALP approval'' to the final Order to address those situations where ARP reviews ALPs depicting short-term and long-term projects that are and are not ripe for decision, respectively.

f. Paragraph 204 (paragraph 507 in the draft Order) discusses land acquisitions

by airport sponsors during the EIS process. ARP notes that 40 CFR 1506.1(a) and (b) state that, until a Federal agency issues its Record of Decision, neither the agency or the applicant may take an action concerning any proposal that would adversely affect environmental resources or limit the FAA's choice of reasonable alternatives.

g. Paragraph 205 discusses FAA's roles and responsibilities under NEPA when an airport sponsor wishes to participate in a joint-use program or program to convert a military airfield to civilian use. Joint-use occurs when the sponsor shares use of an airport with the U.S. Department of Defense. In these instances, FAA normally will be a cooperating agency for NEPA purposes.

h. Paragraph 208 (formerly paragraph 511 in the draft Order) provides instructions to the responsible FAA official on complying with Executive Order 12114, Environmental Effects Abroad of Major Federal Actions. The official must meet the Executive Order's requirements if NEPA analysis shows an airport action would cause a significant impact in a foreign land. Revised paragraph 208 includes the need for FAA to coordinate communications with the Department of State through the Department of Transportation's Office of Transportation Policy Development (P–100), per Order 1050.1E, paragraph 521f.

i. Paragraph 209 (paragraph 513 in the draft Order) has been revised to distinguish between: (1) FAA grant funding for development of wildlife hazard management plans (WHMPs) and approval of those plans based on safety factors; and (2) subsequent FAA actions to support implementation of measures in those plans. The instructions for NEPA review associated with WHMPs are now similar to the instructions for NEPA review regarding airport noise compatibility planning. Paragraph 303.b of draft Order 5050.4B noted that issuance of AIP grants for noise compatibility planning is categorically excluded under paragraph 307n of Order 1050.1E. Paragraph 209a of the Order 5050.4B clarifies that the grant to fund the development of a WHMP or the approval of that plan normally qualifies for a categorical exclusion under Order 1050.1E, paragraph 308e. Paragraph 209.b clarifies that airport layout plan approvals and/or approvals of grants for Federal funding to carry out measures in FAA approved WHMPs: (1) May qualify for a categorical exclusion; or (2) may require preparation of an environmental assessment or an environmental impact statement.

j. Paragraphs 212.e and 303 provide information on complying with Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The paragraphs discuss the need for government-to-government relations when a project may involve or affect federally-recognized Tribes, their trust resources, or other rights. The paragraph also notes FAA personnel must follow FAA Order 1210.20, American Indian and Alaska Native Tribal Consultation Policy and Procedures when addressing issues with those Tribes.

k. Paragraphs 210 through 214 provide detailed policies and procedures for FAA's State Block Grant Program (SBGP). ARP presents detailed guidance to fulfill a commitment FAA made in the Preamble to Order 1050.1E. Specifically, paragraph 210 of Order 5050.4B discusses the SBGP in general and the SBGP actions at non-primary airports that are the responsibilities of states participating in the SBGP. Paragraph 211 notes that these duties include completing the environmental requirements ARP would have normally fulfilled for an airport-specific project and associated Federal actions if ARP had retained discretion over the use of SGBP funds. Under 49 U.S.C. 47128, states participating in the SBGP assume administrative responsibilities for all airport grant amounts available under Subchapter 1 of Chapter 471 (49 U.S.C. 47101–47137) (the SBGP), except for amounts designated for use at primary airports. For purposes of paragraphs 210–214, Order 5050.4B distinguishes between apportionment of funds made available to the states under 49 U.S.C. 47114(d)(2) and (3) and discretionary funds awarded to airports under 49 U.S.C. 47115 and administered by states participating in the SBGP. Paragraph 212 notes that ARP does not have approval or funding authority for projects under the SBGP wholly funded through apportionments under 47114(d)(2) and (3). A state agency's assignment of SBGP money for specific airport actions to individual, non-primary airports is not a ''Federal action.'' Therefore, NEPA does not apply to those airport actions because FAA has no discretion over the use of the SBGP funds financing those actions. However, the paragraph notes that for policy reasons, ARP contractually requires states participating in the SBGP to fulfill the environmental duties ARP would have fulfilled if it had discretion over SBGP airport actions. This contractual commitment ensures that the participating states properly evaluate and consider the potential environmental impacts resulting from SBGP airport actions before deciding to fund those projects under the SBGP. Paragraph 212 further discusses how an SBGP agency must use this Order to prepare environmental documents for SBGP actions. Paragraphs 212.b and c note that contractual commitments under the SBGP depend on whether the participating state is subject to ''NEPA-like'' or ''non-NEPA-like'' state environmental laws. Paragraph 213 discusses the actions connected to SBGP airport actions that are outside the SBGP that remain under the authority of ARP or other FAA organizations. For those connected actions, the FAA organization having authority for the action outside the SBGP (*e.g.*, installing radars, NAVAIDS, lighting systems, etc.) remains responsible for complying with NEPA and other applicable environmental laws pertaining to those actions. The paragraph also notes that ARP retains responsibility where the SBGP agency requests AIP discretionary funding to supplement SBGP funding for a specific airport project at a specific location. Paragraph 214 provides information on environmental documents needed for SBGP projects and their connected actions and SBGP and FAA organization NEPA responsibilities for those actions.

l. As noted earlier, Chapter 4 is a new chapter on public participation. ARP includes it to highlight the importance of public participation in the NEPA process for airport actions. ARP decided to dedicate a chapter on this topic to make it easier to find instructions on this critical process. The draft Order inconveniently presented this information in different Chapters.

m. ARP includes Chapter 5 in the Order to highlight the need to closely coordinate airport planning and the NEPA process. Doing so allows airport sponsors to plan their projects efficiently and facilitate FAA's subsequent evaluation of an airport plan's environmental effects. CEQ regulations tell agencies to integrate planning and NEPA as early as possible. This chapter underlines this requirement by alerting airport sponsors, their planners, and ARP personnel to it. It significantly expands upon the information included in paragraph 302 of the draft Order that addressed coordinating airport planning and NEPA. This interdisciplinary coordination is not intended to be a substitute for the NEPA process. Instead, it encourages planners to work with environmental specialists to identify sensitive environmental resources and consider alternative ways to avoid or reduce a project's

environmental impacts early in the planning process when the greatest range of alternatives exists. If those alternatives do not exist, this coordination help ensure unavoidable environmental effects are justified and minimized as much as practical. The chapter adds paragraph 504d. The paragraph states that the range of alternatives FAA and the airport sponsor consider during airport planning may be limited to those actions within the sponsor's or FAA's purviews. This is different than the range of alternatives FAA considers during the NEPA process, since NEPA requires the lead Federal agency to examine alternatives that are outside the agency's jurisdiction. The chapter also discusses critical airport planning data for which the airport sponsor is responsible and the data's importance to effective and efficient environmental analyses. The chapter discusses key planning steps that help FAA and airport sponsors meet their responsibilities and streamline the planning and NEPA processes. ARP experience shows that failure to coordinate these processes causes delays in the preparing NEPA documents. Often, this is because important planning data needed to thoroughly evaluate environmental effects were not available when document preparation began.

n. Chapter 6 of the Order includes information on airport actions that are normally categorically excluded (CATEXs). The draft Order addressed CATEXs in Chapters 4 and 6, but to improve document organization, the final Order places information on CATEXs in Chapter 6. Tables 6–1 and 6–2 list those portions of the categorical exclusions in Order 1050.1E, paragraphs 307–312 discussing airport actions. Table 6–1 lists the CATEXs rarely involving extraordinary circumstances, while those listed in Table 6–2 involve those circumstances more often. ARP personnel must use the citations from Order 1050.1E as authorizations for the CATEXs Tables 6–1 and 6–2 summarize.

Table 6–1 does not add or alter any CATEXs. However, Table 6–2 Order includes a new categorical exclusion addressing categorically excluded actions in non-jurisdictional wetlands and a CATEX addressing voluntary airport low emission equipment (VALE). ARP proposed those categorical exclusions in the December 16, 2004, Notice of Availability of draft Order 5050.4B. Based on comments it received on those issues, ARP has inserted information to address those activities in Table 6–2.

Readers should recall that paragraph 310k of Order 1050.1E includes categorically excluded actions in jurisdictional wetlands qualifying for Corps of Engineers General Permits (GP). This is because the Corps issues GPs for the types of actions that do not normally cause significant environmental effects (*i.e.*, categorical exclusions). The new entry in Table 6–2 addressing non-jurisdictional wetlands uses similar rationale. That entry focuses on those actions that are normally categorically excluded, but that are not covered by GPs because the actions would not involve jurisdictional wetlands. Nevertheless, by designing projects to meet GP design standards, ARP contends those projects would not normally cause significant environmental effects, provided there are no extraordinary circumstances. Therefore, the actions qualify as categorical exclusions.

Turning to VALE, Table 6–2 includes actions addressing this equipment because paragraphs 309u, 310f, 310n, and 310u of Order 1050.1E address many of the actions associated with installing facilities needed for VALE. See Comments Addressing Table 2 at the end of this Preamble for more information on categorically excluding VALE.

Paragraph 603 emphasizes the need for airport sponsors to provide responsible FAA officials with specific environmental information when sponsors propose actions that may qualify for CATEXs. ARP highlights this step to encourage airport sponsors to collect information the responsible FAA official will need to review a potential CATEX. Doing so should quicken the responsible FAA official's review of a proposed CATEX because the sponsor's request comes to FAA with information the official needs to thoroughly review the proposed airport action. The paragraph also encourages sponsors to allot enough time in project schedules: to collect needed information; to verify that the sponsor or FAA, as appropriate, has complied with special purpose laws related to any potential extraordinary circumstances; and to enable the responsible FAA official to complete a timely review of the proposed action.

Table 6–3 alphabetically lists and annotates the extraordinary circumstances that FAA Order 1050.1E, paragraph 304 presents. Readers should note that ARP has added a footnote to this table defining the terms, ''dividing'' and ''disrupting'' communities. ARP did this to address many questions it received on these terms as they relate to airport-induced community impacts. The Order also provides instructions on special purpose laws and their relationships to extraordinary circumstances when determining if an action may be categorically excluded. Paragraph 606.b provides details on how the responsible FAA official must address extraordinary circumstances involving special purpose laws. Paragraph 607 highlights required and optional documentation for CATEXs with extraordinary circumstances that involve special purpose laws. The paragraph notes that FAA requires specific documentation before it issues a CATEX for a proposed action that possibly involves extraordinary circumstances associated with one or more applicable special purpose laws. That documentation is helpful in determining the level NEPA review, but it is not for NEPA purposes. Rather, it shows compliance with the applicable special purpose law. Paragraph 607 also tells the responsible FAA official to ensure that case files for CATEXs involving special purpose laws include documentation to show FAA has complied with the special purpose laws applicable to those CATEXs.

Paragraph 608 requires the responsible FAA official to inform the airport sponsor via a dated letter or dated e-mail that ARP has categorically excluded an action. ARP includes this instruction to ensure airport sponsors know that ARP has completed the NEPA process for a categorically excluded action, or that it has denied a CATEX for a proposed action. ARP makes this a formal step in its NEPA implementing instructions to address misunderstandings that have occurred concerning categorically excluded airport actions.

o. ARP revised Chapter 7 to place information about environmental assessments (EAs) in one chapter. Paragraph 405 of the draft Order expanded the list of airport actions normally requiring EAs. ARP did this to respond to a number of questions about a variety of actions that Order 5050.4A, paragraph 22 (''Actions normally requiring an Environmental Assessment'') did not address. Final Order 5050.4B adopts the list presented in paragraph 405 of the draft Order. The list appears at paragraph 702. Readers should also note that ARP has added paragraph 702.j (''Other circumstances'') to the list in the final Order. That paragraph states that the responsible FAA official should consider the need for an EA in circumstances not mentioned in paragraphs 702.a–i, particularly when controversy exists because the proposed action involves a special purpose law. Paragraph 703 discusses those situations where ARP

suggests that it, not the airport sponsor, selects the consultant who will prepare an EA for an airport project. ARP addresses this as a way to streamline the NEPA process, if an EA might later show indicate an EIS is needed. Paragraph 705 includes information on when scoping is helpful for an EA. Paragraph 706 provides information on EA format and content. Paragraph 706.b provides information on Purpose and Need. To conform to 1050.1E, paragraph 706.d.(5) provides details on when an EA must consider unresolved conflicts and the resulting need to expand the EA's Alternatives Analysis beyond the No Action and Proposed Action Alternatives. Paragraph 707.e discusses required and optional Regional Counsel reviews of EAs addressing airport actions. Paragraph 708 notes that a sponsor must coordinate EAs with FAA before issuing them for comment, including those the public will review when preparing for a public hearing. The paragraph notes that the sponsor must: (1) File the Draft EA with the FAA for review; (2) make the revisions the FAA reviewer notes; and (3) make the revised EA available to the public at least 30 days before the hearing occurs. ARP provides this information to ensure draft EAs are available to interested parties as they prepare for a public hearing, if one will be held. ARP provided that information in draft Order 5050.4B, at paragraphs 307c.(2) and (3).

ARP includes new table (Table 7–1) in this chapter. For convenience, Table 7–1 presents agency-wide, impact-specific significance thresholds that Order 1050.1E, Appendix A contains. In addition, ARP supplements those thresholds with helpful information from Order 5050.4A, paragraphs 47.e and 85. a through t that Order 1050.1E, Appendix A does not present. ARP provides this information from Order 5050.4A (called ''intensity factors'' in draft Order 5050.4B) because experience shows that it is very useful to ARP specialists and others evaluating environmental impacts associated with the land or water impacts airport projects may cause. During the past 20 years, ARP personnel have found that information very helpful in determining if a proposed airport action requires an EA or EIS.

Paragraph 712 refers the reader to Chapter 14 of the Order to ensure Order users know ARP is following the requirement in Order 1050.1E paragraph 411 fixing a 3-year ''shelf life'' for all FAA EAs. Paragraph 713 refers the reader to Chapter 14 of this Order for instructions on re-evaluating or supplementing an EA for an airport action.

p. Paragraph 800.a discusses the approving FAA official's use of significance thresholds when determining if a FONSI is appropriate for a proposed airport action. Paragraph 801 discusses the process when the approving FAA official prefers an alternative differing from the airport sponsor's proposed action. Paragraph 802 presents information a FONSI should contain and the specific wording reflecting the approving FAA official's environmental finding. Paragraphs 803 and 804 discuss the internal coordination and public reviews FONSIs undergo. In particular, paragraph 803.c discusses when a Regional Administrator will sign a FONSI. The paragraph also notes that before the Regional Administrator signs a FONSI, various FAA organizations responsible for a portion of the proposed project must review the FONSI.

Paragraph 805.a describes the factors the responsible FAA official should consider when determining if Record of Decision is needed for a FONSI (''FONSI/ROD''). As Order 1050.1E, paragraph 408 notes, a FONSI/ROD is a combined decision document and environmental determination FAA uses for controversial actions that are the subjects of EAs and FONSIs and other specified actions.

Paragraph 806 provides information on distributing approved FONSIs, while paragraph 807 discusses the process for notifying the public about a FONSI's availability. Paragraph 808 directs the approving FAA official to incorporate in a grant assurance or unconditional ALP approval letter the mitigation measures required to support a FONSI. It also suggests that FAA use an EMS to track compliance with mitigation commitments.

q. Chapter 9 provides information on EISs. Paragraph 902.c encourages the responsible FAA official to consult with interested parties and involved FAA organizations to establish schedules for preparing EISs. It notes that FAA officials must establish EIS schedules when requested by the airport sponsor. Factors an official and a sponsor should consider when developing a schedule include the proposed action's complexity and the complexity of the environmental analyses and processes needed to complete the analyses. However, interested parties should note even the most thoughtfully developed schedule is subject to events beyond FAA's control and those events may affect any projected schedule. FAA officials will notify and consult airport sponsors when the volume or nature of comments on a DEIS require schedule adjustments (paragraph 1200.c of the final Order). Otherwise, FAA officials exercise their discretion when revising the schedule to accommodate such unforeseen events.

Paragraph 903 lists those airport actions that normally require FAA to prepare EISs. Paragraph 904.b notes that FAA will begin the EIS preparation as soon as possible after the airport sponsor presents FAA with a proposal within the meaning of 40 CFR 1508.23. FAA will consider whether there is sufficient airport planning data and information when determining if a proposal exists. ARP will do so because during the past decade it has found that a lack of well-conceived and well-developed airport planning information or a failure to resolve planning issues have caused substantial delays in preparing EISs. Often, these delays were not NEPA-related, but, instead resulted from a lack of good airport planning data. This lack of data severely hampered FAA's subsequent ability to meaningfully evaluate project impacts and prepare EISs. Because scoping is so critical to efficient, effective EIS preparation, ARP included more information about the scoping process (paragraphs 905 and 906) than Order 5050.4A provided. Paragraphs 907 and 908 discuss the timing and content of a Notice of Intent (NOI), respectively. Paragraph 909 provides information on how the responsible FAA official may withdraw an NOI. ARP includes this information to address situations where, after anticipating significant impacts during the scoping process, ARP's analyses showed a proposed action or its reasonable alternatives, would not cause significant environmental effects. Paragraph 910 provides expanded information on the responsible FAA official's duties during scoping. ARP includes this information to highlight the varied roles the official fulfills during this critical stage in the EIS process. Paragraph 911 discusses the important roles an airport sponsor may fulfill during scoping due to its knowledge about the airport's operations and its relationship to the surrounding area. Paragraph 912 notes FAA may be a cooperating agency, not the lead agency, in certain situations warranting an EIS. For example, FAA is normally a cooperating agency for airport actions involving military base joint-use or re-use as a commercial airport or conveyance of Federally-owned land for airport purposes.

r. Chapter 10 discusses the process used to prepare an EIS. Paragraph 1001 discusses an EIS's purpose. That paragraph stresses the need to prepare clearly-written documents so the public

unfamiliar with aviation may understand the purpose and need, a sponsor's proposed project, reasonable alternatives, and the environmental impacts the project or alternatives may cause. Paragraph 1003 provides information on preparing EISs. The paragraph discusses ''NEPA-like'' states and agencies. It explains how FAA and states or their agencies that comply with laws similar to NEPA may work cooperatively during EIS preparation to reduce duplicating efforts. This paragraph also discusses ARP, airport sponsor, and environmental consultant roles during ARP's EIS preparation. It reflects the policy and procedures FAA has adopted for EIS preparation in response to *Citizens Against Burlington* v. *FAA,* 938 F.2d 190, (DC Cir. 1991). The paragraph notes that FAA decides EIS content, even though the airport sponsor pays the environmental consultant's costs for ARP's preparation of the EIS. Paragraph 1003.c provides information about a Memorandum of Understanding (MOU) governing ARP, sponsor, and consultant roles during EIS preparation. Paragraph 1003.d discusses the need for a Disclosure Statement environmental consultants must sign to work with ARP as it prepares the EIS. The paragraph also discusses the limits on consultant activities during EIS preparation.

Paragraph 1004 discusses limitations on FAA and airport sponsor activities during the EIS process. Paragraph 1004.a discusses limits on airport sponsor or FAA activities that would cause adverse effects or limit alternatives during the NEPA process. Paragraph 1004.c provides information on the steps FAA officials must take if FAA becomes aware that a sponsor is proceeding to final design while FAA is preparing an EIS. ARP provides this information to alert Order users about the requirements in CEQ regulations addressing limits on agency and airport sponsor actions during the EIS process. ARP also includes this information to address questions it has received about the level of planning and design activities a sponsor should normally develop for NEPA purposes. Conversely, paragraph 1004.d discusses the level of plans and design a sponsor may need to apply for permits or financial assistance. ARP recognizes the differences in design levels to streamline the NEPA process and to avoid duplicating paperwork or State or local procedures. Paragraph 1005 explains how ARP adopts another Federal agency's EIS as another way to streamline (*i.e.,* improve the efficiency of) the NEPA process and to reduce paperwork and duplication of efforts.

Paragraph 1007 provides re-organized and updated information on EIS format and content to more closely track information in FAA Order 1050.1E. The paragraph also includes information from the FAA Guide to Best Practices ARP has found important in preparing EISs. Paragraph 1007.b(8) clarifies instructions in the draft Order that discussed the environmentally preferred alternative. To correctly reflect 40 CFR 1505.2(b), the final Order encourages FAA to identify the environmentally preferred alternative in the final EIS. ARP makes this change to more accurately reflect 40 CFR 1505.2(b), which requires identification of that alternative in the Record of Decision, not the final EIS.

Paragraph 1007.e(5) in the final Order now states the criteria the responsible FAA official must consider when determining the ''prudence'' of an alternative per 49 U.S.C. 47106.(c)(1)(B). This section of 49 U.S.C. requires the Secretary of Transportation to consider a ''possible and prudent alternative'' when considering a grant application for a project involving a new airport, a new runway, or a major runway extension having significant adverse effects. Although criteria in paragraph 1007.e(5) apply to decisions for actions involving Section 4(f) resources (now, 49 U.S.C. 303), FAA is using that definition of ''prudent'' for major airport projects to aid its staff determine when an alternative is ''prudent.'' FAA worked with the Federal Highway Administration (FHWA) on the definition as presented in FHWA's March 2005 Section 4(f) guidance [4] and believes it is appropriate for FAA actions under 49 U.S.C. 47106.(c)(1)(B) as well as Section 4(f).

Paragraph 1007.h discusses the need to consult the airport sponsor, FAA organizations, Tribes, or resource agencies about conceptual mitigation measures that are not included in the proposed action. Paragraph 1007.m stresses the use of appendices and references to reduce EIS bulk. This promotes CEQ's intent to keep an EIS to a manageable size.

s. Chapter 11 provides information on processing draft EISs (DEIS). Paragraph 1100 discusses how ARP and other FAA organizations internally review preliminary draft EISs. The process varies with the proposed action and if it is subject to Vision 100's streamlining requirements. Paragraph 1101 explains how to distribute DEISs for public and inter-agency reviews. Various paragraphs provide addresses for headquarters' offices of the Federal departments that review FAA DEISs. The paragraphs also provide the number of hard copies (hard copies and CDs) of a DEIS ARP must send to those departments. Paragraph 1101.b.(1)(d) provides standard language certifying that ARP has issued DEISs to the public at the same time or before it has filed the documents with the U.S. Environmental Protection Agency (EPA). Paragraph 1104 provides instructions for re-circulating DEISs. ARP provides this information to answer questions it has received on this topic.

t. Chapter 12 discusses processing a final EIS (FEIS). Paragraph 1202 notes that CEQ requires an agency to identify its preferred alternative in the FEIS, unless a law prohibits the agency from doing so. This clarifies that FEISs must contain this information, if the approving FAA official did not identify a preferred alternative in the DEIS. Paragraph 1203.b requires the responsible FAA official to ensure the FEIS contains evidence that: (1) An airport sponsor has either certified that the airport management board has voting representation from the communities; or (2) the sponsor has advised communities they have the right to petition the Secretary of Transportation about a proposed new airport location, new runway, or major runway extension.

Paragraph 1203.b.(3) directs the responsible FAA official to ensure that on request, the airport sponsor has made available and provided to an existing metropolitan planning organization in the area where an action would occur, a copy of a proposed airport layout plan (ALP) amendment depicting a major proposed airport project at a medium or large hub airport and the master plan describing or depicting that project. ARP includes this assurance to meet the requirements of 49 U.S.C. 47106(c)(1)(A)(iii) so that ARP may include that information in its Record of Decision, if needed.

Paragraph 1206 discusses the need for an FEIS to include evidence to support necessary determinations addressing impacts to jurisdictional and non-jurisdictional waters and wetlands. Non-jurisdictional wetlands are waters or wetlands that are not ''waters of the United States'' under Section 404 of the Clean Water Act. Such wetlands do not fall within the jurisdiction of the U.S. Army Corps of Engineers. However, ARP includes information on non-jurisdictional wetlands to address many questions it has received about

[4] *http://enironment.fhwa.gov/dot/projdev/4fpolicy.asp.*

reviewing impacts to those resources. Paragraph 1206 clarifies that impacts on all wetlands, including non-jurisdictional wetlands, must be analyzed to comply with NEPA, Executive Order 11990, Protection of Wetlands; and DOT Order 5660.1A, Preservation of the Nation's Wetlands.

Paragraph 1208 discusses the need for an FEIS to include evidence to support determinations in a ROD for a proposed action that affects coastal resources, even if the action is not at an airport located within the boundaries of a designated coastal zone area. ARP includes this information to address amendments to the Coastal Zone Management Act (CZMA). Among other things, the amendments require Federal agencies to address impacts to coastal zone resources, even if a project occurs outside a state's coastal zone boundaries. Paragraphs 1208.a and b discuss the evidence that an FEIS must include to support determinations in a ROD regarding 15 CFR subparts C and D (regulations implementing the CZMA). Paragraph 1208.a provides information on CZMA consistency requirements for actions FAA does not undertake, but for which it has approval authority. Paragraph 1208.b provides information about consistency requirements for projects FAA itself undertakes, such as installing a NAVAID in a coastal zone. ARP includes this information to highlight the different CZMA requirements that may apply to airport actions.

Paragraph 1209 clarifies the evidence that an FEIS should include for actions involving disproportionately high and adverse impacts on minority and low-income populations. ARP includes this information in the final Order to ensure FEISs address this important issue when appropriate.

Paragraph 1210 discusses the delegation of authority within ARP to approve environmental documents and decisions under FAA Order 1100.154A, Delegation of Authority, dated June 12, 1990. The Order delegates approval authority for certain airport projects from the FAA Administrator to the Associate Administrator for Airports (ARP–1). ARP–1 may further delegate that authority, per Order 1100.154A, as paragraph 1210 explains.

Paragraph 1211 provides updated information on FEIS distribution to reviewing Federal agencies. Various subparagraphs discuss the number of FEIS copies (hard and CD) the responsible FAA official must send to various reviewers. Paragraph 1211.c discusses when FAA may extend the 30-day ''wait period'' between the time EPA publishes a notice of an FEIS's availability in the **Federal Register** and the time the agency issues a decision on a proposed action. Order 5050.4B provides this information for those rare occasions when FAA may wish to exercise this option under 40 CFR 1506.10(d).

Paragraph 1212 discusses more details concerning the process for referring EISs to CEQ under 40 CFR part 1504. ARP includes this information to ensure its personnel know about this little used, but important CEQ provision.

u. Paragraph 1301.g requires FAA to ensure the agency and the airport sponsor complete required mitigation. The paragraph suggests using an Environmental Management System (EMS) is an excellent way to track the sponsor's compliance with required mitigation and promote Executive Order 13148, Greening the Government Through Leadership in Environmental Management.

Paragraph 1304 discusses the requirement at 40 CFR 1506.6(b) to notify the public about ROD availability for major Federal actions. The paragraph urges ARP personnel to publish notices announcing FAA's issuance of a ROD for an airport project. Although this is not a CEQ requirement, ARP recommends this because this is an effective way to inform the public about ARP decisions significantly affecting the environment. It also provides a clear starting point for the 60-day statute of limitations for legal challenges under 49 U.S.C. 46110.

v. Paragraph 1401 provides guidance on the longevities of draft and final EAs and EISs, the need for re-evaluating those documents, and the need to supplement them. ARP provides that information to address questions about EA and EIS ''shelf-live'' it has received since issuing Order 5050.4A in 1985 and to comply with FAA Order 1050.1E, paragraphs 402.a and 514. ARP addresses these issues to ensure NEPA documents provide approving FAA officials with the best available information. ARP further clarifies that a written re-evaluation is required when the responsible FAA official determines an EIS must be re-evaluated.

Paragraphs 1401.b and c discuss the factors the responsible FAA official considers when deciding if he or she must re-evaluate a draft or final EIS, respectively. Readers should note that paragraph 1401.a also notes that the responsible FAA official may use discretion when determining the need for a written re-evaluation in other circumstances. The official may also use discretion when deciding if FAA will distribute the re-evaluation to the public. Order 5050.4B includes this requirement to address an oversight in Order 1050.1E that FAA corrected in Change 1 to Order 1050.1E (Notice of Adoption, Notice of Availability (71 FR 15249, March 27, 2006).

Paragraph 1402 provides information about supplementing EAs and EISs to address many questions ARP has received on this topic since issuing Order 5050.4A in 1985. It notes that FAA, and, therefore, ARP, is applying the standards it uses for EISs to EAs to ensure FAA NEPA documents provide accurate and timely information. Paragraphs 1403 and 1404 address tiering EISs and emergency situations and EIS preparation.

w. Chapter 15 provides information on streamlining the EIS process for certain airport projects to address Vision 100 requirements. Among other things, Vision 100 requires streamlining the environmental process for airport capacity projects at congested airports. These are airports that account for at least 1% of all delayed aircraft operations in the Nation. Vision 100 also applies to airport safety and airport security projects throughout the nation, regardless of their congestion levels.

x. ARP has deleted paragraph 407 in the draft Order addressing cumulative impacts. More extensive information on cumulative impacts now appears in paragraph 1007.i of the final Order. ARP will provide more detail on this topic in the Desk Reference. Until ARP issues that information, document preparers and reviewers should use information in paragraph 1007.i of this Order, paragraph 500c of Order 1050.1, and CEQ's guidance on assessing cumulative impacts, Considering Cumulative Effects Under the National Environmental Policy Act (*http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm*).

ARP has also deleted the examples of the third party Memorandum of Understanding and the ''short form'' Environmental Assessment that were included as appendices of the draft Order. ARP is deleting them because it has decided to place examples of documents and other information that ARP has found helpful but not required in the Desk Reference.

y. Appendix 1 includes updated flowcharts on completing the NEPA processes for categorical exclusions, EAs, FONSIs, EISs, and RODs.

Disposition of Comments: ARP has made additional changes, clarifications, and corrections to the final Order. It does so in response to comments received after publishing the **Federal Register** notice of December 16, 2004, announcing the availability of the draft Order for public review. The changes, clarifications, and corrections are

discussed in the following sections of this Preamble. ARP received comments from three primary sources: (1) An organization representing airport management; (2) an organization representing state, regional, and local governing bodies that own and operate the principal airports serving scheduled air carriers in the United States and Canada; (3) two individual airport sponsors; (4) an organization representing airport consultants; (5) two individual airport consultant corporations; (5) two Federal agencies; (6) various state and local governments; and (7) one member of the public. The term ''comment'' used in this Preamble refers to an individual issue a commenter raised. A commenter may have raised numerous issues in correspondence forwarded to ARP from the docket. This Preamble also discusses substantive comments resulting from deliberative discussions with the Office of the Secretary of Transportation, the Council on Environmental Quality, internal FAA elements and ARP personnel at regional and district offices.

ARP classified the comments received into three categories: (1) Comments that broadly cover the entire Order; (2) comments that relate to a paragraph or a portion of paragraph in the Order; and (3) comments on Tables 1–3. ARP has provided specific responses to those comments in that sequence, with the level of response commensurate with the degree of public interest expressed.

General Comments

The Order in general: FAA received several comments on the need to update FAA Order 5050.4A. One commenter noted the revised Order was long overdue. Many commenters applauded ARP's efforts to update instructions in a writing style that was clearer and easier to understand than the previous Order. Nevertheless, several commenters noted the document is a ''work in progress.'' Two commenters recommended that ARP conduct working sessions conducted with an open dialogue to address some of the comments of major concern. *ARP's response:* FAA notes the comment on the need to update FAA Order 5050.4A. It appreciates the comments on the effort to update the instructions in a plain writing style. ARP has adopted that style for this Order to help the public understand its NEPA procedures and to comply with FAA requirements to prepare documents in plain English. FAA acknowledges that the draft Order contained language and instructions that required further input to ensure the final version addressed major concerns and that it was a valuable tool in completing the NEPA process for airport actions.

Regarding working sessions, ARP personnel met with representatives of some of the commenting organizations at various times and locations. In these instances, ARP: (1) Discussed the major concerns the organizations had about the draft Order; (2) sought clarification of other concerns the commenting organizations expressed; and (3) answered questions about the Order. ARP believes the final Order is improved due to this and other efforts. This Preamble's General Discussion provides ARP's reasons for revising the Order to address general comments on the draft. The section of the Preamble entitled Beginning responses to comments on specific paragraphs of the draft Order addresses comments on specific paragraphs and provides ARP responses to those comments.

Best Practices: On commenter suggested adding information from The FAA Guide to the Best Practices for Environmental Impact Statement Management (Best Practices). The commenter seeks blending information from the Best Practices with the Order's text or placing it as an appendix to the Order. *ARP's Response:* Agree, in part. Chapter 5 of the Order is based on and incorporates much of the Best Practices' information linking airport planning and the NEPA process. However, ARP believes it is not necessary to include the entire Best Practices document as an appendix to this Order. ARP prepared the Best Practices material as internal guidance and appreciates the commenter's complements on it. Readers seeking additional information on those practices should visit the Best Practices [5] Web site.

Chapters addressing EISs: One reviewer states the Order would be more user-friendly if Chapters 9 through 12 were combined into one chapter addressing EIS preparation and processing. The reviewer is concerned that the draft Order's presentation could lead users to think that the instructions are not linked. Consequently, users will not realize these chapters provide details on the various steps the responsible FAA official and/or FAA's EIS contractor complete as they prepare an EIS. *ARP's Response:* Disagree. No other reviewers have voiced this concern. ARP retains the draft Order's presentation. It presents individual, successive chapters explaining how to: (1) Begin and finish preparing a draft and final EIS; (2) making those documents available for public review and comment; (3) responding to those comments in the final EIS; and (4) preparing and issuing a Record of Decision.

Consistency and redundancy with FAA Order 1050.1E: Many commenters stated the draft Order was inconsistent with Order 1050.1E. *ARP's Response:* ARP believes revisions to the draft Order have addressed this concern. ARP intends the instructions in Order 5050.4B to be substantively consistent with 1050.1E, differing only as necessary to provide more specific instructions tailored to airport actions and to legal reviews of environmental assessments and Findings of No Significant Impact.

Turning to redundancy issues, a few commenters noted that this Order repeated guidance in Order 1050.1E or relied on it. *ARP's Response:* Order 1050.1E addresses NEPA requirements for all FAA organizations. However, Order 5050.4B provides NEPA instructions tailored to airport projects. Readers should note that ARP cited paragraph from Order 1050.1E to address comments and underscore certain requirements germane to the agency (*e.g.*, 3-year ''shelf life'' for an environmental assessment; preparing a Record of Decision for a Finding of No Significant Impact, etc.). ARP did this to highlight new, agency-wide procedures.

Another commenter suggested deleting the tables in Order 5050.4B (Tables 6–1 and 6–2 of this Order) containing portions of CATEXs in paragraphs 307 through 312 of Order 1050.1E. (Tables 6–1 and 6–2 of the final Order provide alphabetically arranged, annotated sections of those paragraphs that apply to airport actions). The commenter stated that having to cite the paragraph in 1050.1E would ''tend to confuse'' many people. *ARP's Response:* ARP does not agree. This commenter was the only one noting possible confusion. To avoid this confusion and to stress there is only one list of FAA-wide categorically excluded actions, Order 5050.4B uses the citations from Order 1050.1E. Paragraph 602.c of Order 5050.4B clearly instructs the responsible FAA official to use information in column C of Tables 6–1 and 6–2 as the cites for the paragraphs in Order 1050.1E containing the annotated airport action under review.

Consultation with airport sponsors: A commenter urged ARP to include airport sponsors in the NEPA process. Although the commenter recognizes FAA's expertise in the national air transport system, it notes that airport sponsors have greater expertise than FAA personnel on local issues, financial

[5] *http://www.faa.gov/Arp/environmental/5054a/bestprac.cfm.*

resources, business arrangements with airlines, and other users specific to their respective airports. In addition, sponsors have the best knowledge of the goals and objectives they wish their airports to attain. They, better than FAA, can provide valuable information on those issues to ensure proposed airport actions address the problems sponsors face. The commenter stated it knows of instances where the airport sponsor was virtually excluded from the preparation and issuance of draft NEPA documents. The commenter stated that the exclusion of sponsors from participating in EIS preparation had potentially serious ramifications on the end product. Therefore, the commenter urges ARP to include airport sponsors in the NEPA process and to help reduce risks of error and delay in that process. The commenter notes sponsors can do so without compromising the independence FAA needs in making decisions about sponsor proposals. *ARP's Response:* ARP thanks the commenter for recognizing FAA's expertise and agrees airport sponsors provide valuable local and regional information about airports and proposed airport actions. For these reasons, ARP facilitates sponsor participation in the NEPA process. For decades, ARP shared pre-decisional drafts of EIS's with sponsors to achieve common goals, including, among others, the preparation of a complete, accurate, and comprehensive report on environmental impacts sufficient to survive judicial review. However, in response to a recent U.S. Supreme Court decision (*Department of the Interior* v. *Klamath Water Users Protective Association,* 532 U.S. 121 S. Ct. (2001)), ARP now limits sponsor participation in terms of access to pre-decisional, deliberative material more so than it did in the past. Today, as a result of the Supreme Court's decision, ARP, on a case-by-case basis, decides when sponsor participation in the NEPA process should include access to pre-decisional, draft documents such as preliminary draft EISs or draft technical reports. ARP staff typically limits sponsor access to draft versions or reports and documents during the NEPA process for two reasons. First, it does so where there is a high level of public distrust and concern about the NEPA process' integrity and objectivity. Second, it does so on controversial projects to help minimize delays in preparing a draft EIS that may arise when ARP staff must devote time to compiling and releasing documents in response to requests under the Freedom of Information Act (FOIA). Under the FOIA, FAA must release to the public the information it shared with airport sponsors. This is because under the Klamath Decision, the release of that information waives FAA's privilege to withhold information as deliberative in nature under Exemption 5 of the FOIA.

In response to this comment and concerns airport sponsors expressed in the past, ARP has identified what it considers to be a best practice already in use in some regional and field offices. When planning the EIS process and developing EIS schedules, ARP encourages its staff to seek agreement with airport sponsors about the types of preliminary EIS material they wish to see and when the sponsor wants to see it. ARP and the sponsor will not consider just the potential consequences under FOIA, but also state and local laws bearing on the release of deliberative NEPA documents, including sunshine laws and mini-NEPA laws that may apply to the airport sponsor. They will also decide if it makes sense for FAA to seek help from sponsors to accomplish needed tasks and minimize risks of analytical mistakes that could affect the quality of NEPA documents. In each case, ARP will also consider the quality of the relationship and the level of trust with the community. It will also consider the potential chilling effect on the internal deliberative process that may occur due to the release of documents under FOIA. ARP, in consultation with the airport sponsor, will then design the appropriate document review process.

Desk Reference. ARP received varied comments on its decision to publish a separate document entitled, Environmental Desk Reference for Federal Airport Actions. *ARP's Response:* Comment noted. Order 5050.4B focuses on the NEPA implementing instructions for airport projects under FAA's purview. However, the Desk Reference will be a compendium of special purpose laws outside NEPA that also apply to those projects. As a compendium, it simply places all of the environmental laws, regulations, and executive orders outside NEPA in one location for the use and convenience of those analyzing airport actions.

ARP is also issuing the Desk Reference to be more responsive to changes in the many non-NEPA laws and regulations that change more frequently than NEPA and the CEQ regulations implementing it. A lack of updated information on non-NEPA laws and regulations in Order 5050.4A has been a source of legitimate concern from ARP staff and other users of Order 5050.4A during the past decade. ARP believes the Desk Reference is the most flexible and best way to address this problem.

Since 1985, when FAA issued Order 5050.4A, many laws, regulations and orders outside NEPA have been amended or revised, while CEQ's regulations have had one minor change during that period. However, readers should note that since 1985, ARP has issued over 17 Supplemental Guidance Memos to its personnel. Those memos ensured ARP staff had updated instructions on non-NEPA issues resulting from new or amended laws, or regulations implementing them. Also, during training classes and via other methods, ARP issued many instructions to its environmental staff concerning procedural or analytical changes related to special purpose laws. When compared to these past practices, ARP believes the Desk Reference will be a more formal and efficient way to distribute updated information on special purpose laws and how they relate to airport projects.

ARP will issue the Desk Reference after it issues this Order. Until then, ARP staff and other interested parties must use Appendix A of Order 1050.1E for information on assessing resources outside NEPA. When ARP issues the Desk Reference, all parties should use the Desk Reference to analyze airport actions. ARP will make the Desk Reference and changes to it available to ARP's regional and district office personnel and the public. It will do so by placing it on ARP's Web site. In addition, ARP will contact groups representing airport sponsors about the updates and rely on those groups to help ARP announce those updates.

ARP made the decision to issue the Desk Reference after reviewing comments on Order 1050.1E's inclusion of Appendix A, which addresses many of the same Federal laws, regulations, and executive orders as the Desk Reference (69 FR 33810 June 16, 2004). In that **Federal Register**, FAA stated that Appendix A is a helpful attachment to the Order but that it, ''* * * will consider changing the format in subsequent revisions of the Order.''

Some reviewers stated that ARP should develop the Desk Reference in collaboration with industry stakeholders to ensure NEPA documents meet NEPA/CEQ objectives and how those objectives affect the daily operations of airports. *ARP's Response:* ARP appreciates and understands these concerns, but emphasize that the Desk Reference merely summarizes existing legal requirements. It contains no policy guidance implementing NEPA, so ARP sees little value in affording an opportunity for public review and

commend in advance. Nevertheless, after publishing this Order, but before issuing the Desk Reference, ARP will distribute selected chapters of the Desk Reference for public information purposes only.

In a related matter regarding the Desk Reference, one commenter stated that ARP's failure to prepare an order substantially covering the same material that Order 5050.4A contained (the Order had extensive information on non-NEPA requirements that the Desk Reference will provide) did not meet Congress' intent. *ARP's Response:* ARP respectfully disagrees. ARP notes that as the FAA office responsible for analyzing airport actions, it will consider input from stakeholders, but it has the discretion to decide the contents of Order 5050.4B, provided it meets CEQ, DOT, and FAA requirements. Readers should note ARP prepared this Order in consultation with CEQ. It has received a finding from CEQ that the Order conforms to NEPA; therefore, ARP is assured the Order meets the requirements of NEPA and its implementing instructions. Finally, concurrence of DOT's Acting Assistant Secretary for Transportation Policy indicates Order 5050.4B conforms to DOT requirements.

In another related matter, commenters further noted that ARP's failure to make the Desk Reference available for public review is inconsistent with Vision 100's mandate that FAA issue a revision to Order 5050.4A. *ARP's Response:* ARP appreciates and understands these concerns. Section 307 of Vision 100 set a date by which FAA was to publish a draft version of Order 5050.4B. It did not limit the agency's discretion to update the Order or specify any material that the Order had to include.

ARP wishes to highlight that the agencies responsible for the regulatory changes beyond NEPA often publish those changes in the **Federal Register** for public review and comment. ARP has the discretion to summarize environmental laws and regulations other than NEPA and how they typically apply to airport actions for ease of reference for its personnel in a Desk Reference. As noted earlier, ARP decided the Desk Reference affords a flexible way to stay apprised of the ever-changing regulatory landscape and how it applies to airport actions under FAA's purview. ARP will distribute selected chapters of the Desk Reference for public information purposes only.

Finally, some commenters agree with ARP's approach. However, they are concerned about placing instructions in a Desk Reference makes the instructions in that document difficult to legally defend. *ARP's Response:* ARP disagrees. Many if not most of the laws and information in the Desk Reference have their own enforcement provisions. ARP's decision to not include them in Order 5050.4B does not diminish those provisions.

Editorial and grammatical errors: Commenters noted the draft Order contained editorial, grammatical, and formatting errors. *ARP's Response:* ARP agrees. Readers should note that ARP has not prepared responses to comments on grammatical errors the draft Order contained. Doing so would make this Preamble far too long and cumbersome to read. ARP believes that the extensive re-organization and editing of the Order have addressed most of the organizational and grammatical concerns commenters noted.

Electronic distribution of this Order: A commenter indicated that ARP should distribute the Order in compact disc (CD) format or post it on the internet. *ARP's Response:* Agree. ARP will provide free copies of the Order on CD or paper when requested. However, it urges users to use Web access when possible. ARP has posted this Order on the ARP Web site mentioned in the Summary section of this Preamble.

Electronic distribution of NEPA documents and related materials: A commenter requests information on the electronic distribution of documents. *ARP's Response:* ARP has included this information in Chapters 7, 8, 11, and 12 of the Order.

FAA resources: A commenter states that the draft Order assumes the existence of FAA resources that are not present. Airport sponsors remain frustrated with the time FAA staff needs to address airport projects. The Order assumes the staff has the expertise and experience needed with airports, but many FAA offices do not have those abilities. Staff resources and experience must increase ''dramatically'' to meet the Order's instructions. The Order should candidly address the problem and provide procedures that that limited FAA staff can meet. The commenter states it has historically supported FAA efforts to get the resources needed to meet agency duties and will continue to do so. *ARP's Response:* ARP appreciates the commenter's support for adequate FAA resources. ARP also understands and appreciates the frustration of airport sponsors regarding staffing, but ARP does not agree that the Order is the place to resolve those issues.

In addition, as FAA discussed in its May 2001 Report to Congress on Environmental Review of Airport Improvement Projects [6] requirements under NEPA and other Federal environmental laws and local consensus play far greater roles than FAA staffing levels in determining the time needed to complete NEPA reviews for airport development projects. ARP has included in 5050.4B the practical lessons it has learned since 1985 about how to effectively prepare airport EISs. For example, ARP experience indicates airport sponsors will reduce FAA's workload if they complete good master planning and build local consensus before asking the agency to start the NEPA process.

Turning to staffing resources, we believe that many offices have the expertise and ability to address airport projects. Before 2003, ARP had environmental specialists and attorneys with proven track records of successfully completing environmental impact statements for airport development projects within an average of 3½ years. While ARP agrees that some regional and field offices have less expertise and/or higher workloads than others, FAA headquarters historically delivers additional project management, technical, and legal services as needed for a timely and effective EIS process as noted earlier. ARP also notes that its regional and district Airports offices share personnel to the extent permissible and practical to assist in EIS preparation.

ARP acknowledges the commenter's major role in Congress enacting the Department of Transportation Appropriations Act of 2003, part of which established and funded 30 additional positions in FAA to expedite environmental reviews for airport projects. ARP conducts regular training conferences, enrolling employees in reputable environmental training courses, and gradually increases the responsibilities of its newer employees in offices throughout the country. Those new employees are developing the skills and abilities needed to address multiple, complex airport projects concurrently and effectively. At the same time, when ARP anticipates that headquarters resources may not be sufficient to meet schedules for multiple ongoing complex airport projects, it has asked sponsors to fund additional FAA staff and trained consultants.

Independent Utility: A commenter requests information on independent utility. *ARP's Response:* Paragraph 202.c(4)(a) discusses ALP approvals for actions having independent utility.

[6] *http://www.faa.gov/arp/environmental/5054a/RTCenv.pdf.*

Information in Order 5050.4A: One commenter noted that in some areas the language in Order 5050.4B is improved over the language in Order 5050.4A. In other instances, neither Order 5050.4B or Order 1050.1E contains language adequately addressing specific airport actions. The commenter fears that these omissions will obscure the clarity of instruction for some of these actions that Order 5050.4A provided. *ARP's Response:* Agree. ARP has revised much of the discussion from Order 5050.4A that the commenter specifically recommended.

Instructions are not consistent with NEPA: One commenter voiced its extreme concern that the information in the Order is not consistent with NEPA, that it lacks scientific and factual basis, and that it exhibits a bias toward the aviation industry, while stating it presents environmental stewardship principles. The commenter provided specific examples of its concerns to ensure the Order more accurately reflected NEPA requirements. Some examples the commenter included were: (1) A DNL 3 dBA increase in the DNL 60–65 dBA contour should be a significant effect, (2) FAA should, ''* * * produce peer-reviewed scientific research that investigates the effects of a 3 dBA increase in 60–65 DNL contour;'' (3) that the DNL metric is the only acceptable noise metric to the exclusion of others; (4) that FAA should seek input of a local advisory board in selecting its EIS consultant; and (5) that FAA should not consider the need to relieve airport congestion as an emergency per CEQ'a emergency procedures at 40 CFR 1504.(b)(2). *ARP's Response:* FAA disagrees with the commenter's statements on consistency with NEPA. ARP notes that Order 5050.4B must be and is consistent with Order 1050.1E. Since the latter Order presents agency-wide NEPA implementing instructions, Order 5050.4B's consistency with Order 1050.1E means it is consistent with NEPA. ARP requests that the commenter review the Significant noise impact threshold portion of this Preamble for FAA's definition of significant noise, the use of the DNL metric, and other noise concerns the commenter noted. ARP also suggests that the commenter review responses to comments on in this Preamble addressing paragraphs 1003 and 1404 for issues related to consultant selection and FAA's compliance with NEPA during emergencies, respectively. Regarding the Order's consistent with NEPA, ARP reminds the commenter that CEQ has reviewed Orders 5050.4B as well as 1050.1E. FAA has revised both Orders to ensure they meet CEQ concerns. CEQ's reviews and certifications of those both Orders indicate CEQ has determined that both Orders conform to CEQ regulations.

Instructions on ''NEPA-like'' states or agencies: Two reviewers sought more information on these issues in general. They request instructions on what to do when state rules specifically require discussions of certain issues and prohibit discussions of others. Of particular note, they seek information on how to handle the topic of human health risks (*i.e.*, hazardous air pollutants) in joint Federal-State documents. They note that Orders 5050.4A and 5050.4B seem to encourage separating State and Federal environmental documents. The commenters note there may be statutory or regulatory limits on combining documents, nevertheless, they request more information on the ''NEPA-like'' issue. *ARP's Response:* For information on aviation-related air toxins and human health risk assessments, readers should use FAA's **Federal Register** ''Notice of Adoption and Availability of Order 1050.1E'' (No. 69. FR No. 115, p. 33784, 6/16/2004). However, since preparing that notice in June 2004, the Federal Highway Administration (FHWA) has issued its Interim Policy on Mobile Source Air Toxins, and FAA has addressed this topic in EISs it prepared for airport actions at Los Angeles (LAX), O'Hare, and Philadelphia International Airports. In these EISs, FAA estimated air toxin emissions but did not prepare human health risk assessments.

Regarding the comment on handling the topic of hazardous air pollutants in a joint Federal and State document, the LAX Final EIS illustrates one way of handling that issue. That joint document was prepared to meet NEPA/CEQA (California Environmental Policy Act) requirements. In the Environmental Justice section of FAA's FEIS for LAX's master planning effort, FAA notably included, for disclosure purposes, the human health risk assessment (HHRA) the City of Los Angeles prepared to comply with the California Environmental Quality Act. In that FEIS, FAA explained that it presented the HHRA results as follows: ''* * * however, to the extent that fulfillment of the purposes of Executive Order 12898 [on Environmental Justice] would be furthered by such an analysis, presented below are the results of the [Los Angeles World Airports] Human Health Risk Assessment, which was prepared in compliance with CEQA and based upon CEQA thresholds of significance and provides a qualitative comparisons [sic] of potential health risks.'' [7]

Turning to the statement that FAA encourages preparation of separate, documents consistent with 40 CFR 1506.2, FAA NEPA guidance encourages preparation of joint Federal and State documents. FAA recognizes that preparing joint documents is often more complex and time-consuming initially, but joint documents may save time in the long-term by eliminating sequential Federal and State reviews. On the other hand, separate documents may be more efficient and effective where Federal and State requirements and timing differ substantially or the Federal and State agency cannot agree on proper analytic methodology. If separate documents are prepared, FAA and the State should attempt to conduct their environmental review processes on parallel tracks within the same time frames using common databases to the best of their abilities. This will avoid end-to-end sequential processes that often lengthen document preparation times. FAA encourages readers to review the Best Practices' Web site mentioned earlier for more information.

References should be available: A reviewer requests that ARP provide copies of all FAA and DOT documents and orders noted in Order 1050.1E and 5050.4B, or that FAA routinely uses during its NEPA process. The reviewer suggests providing that information via appendices or FAA's Web site. *ARP's Response:* Most of the Department of Transportation (DOT) and FAA information and other references used to prepare the Orders is available on DOT, FAA, or ARP Web sites. Interested parties may also obtain that and other information via Internet ''search engines'' by searching on key words in the item of interest.

Saving time during the NEPA process and streamlining the NEPA process: A few commenters expressed appreciation for ARP's efforts to improve its NEPA processes and recognize constrained resources lead many people to perceive that ARP has inefficient NEPA processes. Nevertheless, the commenters urge ARP to save time during the NEPA process by incorporating many measures in that process. These measures include: Parallel, rather than sequential reviews; conducting earlier and frequent coordination with agencies to address purpose and need and alternatives; disclosing EIS data before publishing

[7] FAA's FEIS for the Proposed LAX Master Plan Improvements, Los Angeles International Airport, Los Angeles, Los Angeles County, California, Volume A, page A.2–88.

draft EISs; making faster legal decisions; and establishing firm deadlines or milestones and emphasizing Vision 100's streamlining terms. The commenters also urge ARP to limit analyses to the requirements of laws or regulations and include words (*i.e.*, milestone, schedule, deadline) in the Order to stress the need to process information in a timely fashion. The commenters believe the Order should instill greater urgency within the agency about the need to reduce processing times. Another commenter argues that FAA should codify performance deadlines. *ARP's Response:* ARP appreciates the commenters' recognition of ARP's efforts to make its NEPA process more efficient. ARP recognizes that there is room for improvement; however, ARP notes that it has a long and proven track record of expediting EISs successfully by using the measures noted in the comment such as parallel processing of environmental requirements and reaching consensus with resource agencies. Chapter 15 of Order 5050.4B expressly addresses requirements for streamlining certain projects under Vision 100 and Executive Order 13274, while other chapters discuss administrative streamlining initiatives and ways to improve the NEPA process for other projects. ARP will continue to use these proven, effective methods to make the NEPA process more efficient.

Regarding the extent of analyses, ARP reminds the commenters that ARP, as the lead Federal agency, not the airport sponsor, is ultimately responsible for meeting Federal legal requirements and preparing an EIS. Therefore, ARP staff, in consultation with expertise agencies, must determine the extent of analyses needed to meet applicable laws and regulations. But airport sponsors sometimes disagree with these ARP decisions. When sponsors disagree with ARP in these matters, they may want to consider if the time spent to resolve disagreements with FAA and resource agencies about impact analyses might be better used to complete the NEPA process. ARP urges sponsors to realize that the analyses are those ARP, in consultation with its legal counsel and agencies having expertise, determines necessary to provide an adequate interdisciplinary analysis as NEPA requires and to comply with applicable laws and regulations. ARP's failure to do so would compromise the sponsor's schedule and the agency's Airports Program. Since FAA is responsible for providing a safe, efficient air transport system, and ARP is responsible for a program that supports that system, it, in consultation with its counsel, must make the final decisions on the levels of analyses an airport project requires.

Regarding the commenters' recommendations for milestones, deadlines, and schedules, ARP maintains that FAA senior management and agency managers and staff have consistently demonstrated a sense of urgency in addressing major airport development projects. As explained in the response to the comment above relating to FAA Resources, sponsors have the ability to do a great deal to reduce NEPA processing times. Among other things, they should work to build local consensus to support their proposed projects and complete sound master planning before asking the FAA to begin the NEPA process. Expedited EISs for projects that do not come to fruition are frustrating for FAA staff and divert limited resources better invested elsewhere. Further, in its May 2001 Report to Congress on Environmental Review of Airport Improvement Projects, FAA described the administrative initiatives that it uses to improve its processing of airport actions. Many of these initiatives are required for projects selected for streamlined review under Executive Order 13274, Environmental Stewardship and Transportation Infrastructure. In 2003, Vision 100 codified into law the initiatives relating to expedited, coordinated reviews for projects at congested airports. And, within a span of two years, FAA notably issued final EISs and RODs for four major projects: (1) The Runway 17/35 at Philadelphia International Airport; (2) the O'Hare Modernization Program at O'Hare International Airport: (3) Runway 1/19W at Dulles International Airport; and (4) the Master Plan development at Los Angeles International Airport. FAA's performances on these complex and needed projects show that FAA is utilizing existing streamlining initiatives and measures for airport projects. Those efforts show that ARP and FAA work diligently to meet milestones, deadlines, and schedules without compromising the agency's environmental responsibilities. ARP constantly strives to make the NEPA process for airport actions more efficient and effective. ARP believes Order 5050.4B provides instructions that will help expedite environmental reviews.

ARP sees no need to include additional instructions about milestones, deadlines, and schedules in the final Order. ARP has not included specific deadlines for certain NEPA process steps in the Order or to define or codify deadlines as commenters have suggested. ARP has not done so because each airport action has unforeseen problems that would make a defined deadline contrary to NEPA, unworkable, and unrealistic. ARP urges the commenters and others to note that it will continue to work smarter, more efficiently, and more effectively, but it will not compromise adequate environmental analyses to meet desired schedules. Therefore, ARP will establish tentative schedules for EISs and, if requested, will apply techniques to streamline the NEPA process for airport actions as much as possible without compromising its duty to properly analyze and consider action-related environmental effects. It will do so based on: (1) Scoping and consultation with airport sponsors and involved agencies; (2) the completeness and accuracy of sponsor-provided master planning data; and (3) public concerns. These and other efforts show ARP will establish realistic schedules to properly scope its EISs, but it reminds interested parties that unforeseen issues or problems may alter any well-conceived schedule.

In summary, ARP will establish EIS schedules for projects under Executive Order 13274 and Vision 100, and if requested, projects not under those requirements. But in developing these schedules, ARP will apply techniques to streamline the NEPA process, provided they do not compromise ARP's responsibilities to properly analyze, consider, and disclose action-related environmental effects.

Significant noise impact threshold: Some reviewers note that FAA's insistence that there are no significant noise impacts below the DNL or CNEL 65-dB level is unjustified. They contend that FAA should consider impacts below that level, especially in the DNL or CNEL 60 to 65-dB noise contours significant in the Order. One commenter disagrees that DNL is the only metric to measure noise impacts and asserts that its validity is being questioned worldwide. Commenters further state that FAA's assumption that there are no negative health impacts inside this contour is wrong. Finally, FAA is wrong in assuming aircraft noise occurring 3,000 feet above ground level does not cause significant noise effects. *ARP's Response:* FAA addressed the commenters' noise concerns in its **Federal Register** Notice of Adoption and Availability of Order 1050.1E (No. 69. FR No. 115, 6/16/2004, pages 33780–33783, 33812, 33813, and 33816 –33820). ARP urges the commenters to review that information for responses to these comments.

Special purpose laws vs. special protection laws: One commenter noted the draft Order used these terms interchangeably, but this may confuse the reader. *ARP's Response:* Agree. The final Order uses the term, ''special purpose laws'' as a ''catch-all'' term for the Federal environmental laws, regulations and executive orders outside NEPA that apply often to airport actions (Table 1–1 in the Order). Paragraph 9.t defines the term for purposes of the Order.

State Block Grant Program: In responding to comments on FAA Order 1050.1E, FAA stated Order 5050.4B would provide details on the State Block Grant Program (SBGP) that ARP manages (69 FR 33788 June 16, 2004). One commenter noted that Order 5050.4B makes a state participating in the SBGP responsible for addressing an airport action's environmental impacts under the SBGP, except for those actions remaining under FAA's purview. The commenter notes there are often no ''Federal actions'' associated with the state's activities under the SBGP. The commenter further notes that there are no Federal environmental requirements, except for the contractual provisions to comply with NEPA the SBGP agency made with FAA to comply with NEPA when the SBGP agency became a SBGP participant. Those provisions make the participating state responsible for analyzing the environmental effects of actions under the state's SBGP purview. The Order should clarify that for SBGP purposes, references to ''FAA'' responsibilities mean SBGP agency responsibilities, unless the Order notes otherwise. Another commenter urges FAA to seek opinions from CEQ and EPA about the way FAA conducts the SBGP. The commenter contends that FAA cannot delegate its responsibilities to SBGP participants and that FAA's approach differs significantly from the Federal Highway Administration's (FHWA) local assistance programs. In no instances may State and local requirements substitute for Federal requirements. Following ''NEPA-like'' laws instead of NEPA will cause many inconsistencies in the SBGP. Therefore, FAA should follow Federal requirements. The commenter suggests that FAA use the commenter's program as an example of delegating responsibilities to a modal entity. *ARP's Response:* Order 5050.4B ARP, paragraphs 210–214 clarify how environmental requirements apply under the SBGP. FAA made a commitment to provide that information in its preamble for Order 1050.1E. Those paragraphs explain how participating states and various FAA environmental effects of SBGP airport projects and FAA actions associated with those projects.

Regarding the clarification of responsibilities under the SBGP, ARP has revised the Order's Introduction and included new paragraph 212. The revisions clarify that for SBGP actions, participating state agency personnel assume the roles a responsible FAA official or an approving FAA official would normally fulfill, unless Order 5050.4B specifies differently.

Addressing a commenter's note that FAA should seek CEQ and EPA opinions on the way FAA conducts its SBGP, CEQ has determined that 5050.4B procedures,''* * * comport with NEPA.''[8]

Addressing the comment on delegating responsibilities to SBGP participants, ARP wishes to again clarify a misconception that it is ''delegating'' its NEPA responsibilities in SBGP cases. ARP is not delegating those responsibilities because it has no major Federal action to delegate. Paragraph 211 of the final Order clearly states that upon distributing SBGP funding, which is categorically excluded under paragraph 307o of Order 1050.1E, ARP has no discretion in deciding the use of that funding. That decision is solely the SBGP agency's. As a result, ARP has no NEPA responsibilities since it lacks authority over the airport projects the SBGP monies finance. However, readers should note that paragraph 213.a clearly states that ARP does retain NEPA responsibilities for that portion of an SBGP airport action for which an SBGP agency requests AIP discretionary funds to supplement SBGP funding. In this case, ARP must meet its responsibilities under NEPA and other applicable special purpose law because it is exercising discretion regarding the allocation of the additional funds.

Regarding the commenters concern about ''NEPA-like'' laws, ARP notes that paragraphs 212.b and c address this concern. Paragraph 211 underscores that once ARP issues the SBGP funds to participating states, ARP has no discretion on the airport projects on which the States spends their SBGP funding. Therefore, Federal environmental requirements do not apply to those actions. However, to maintain environmental stewardship, FAA imposes a contractual agreement on states participating in the SBGP. The agreement requires the SBGP state to meet applicable environmental requirements to ensure the SBGP participants use a rational, interdisciplinary, and proven method to analyze airport project impacts on environmental resources. Paragraph 212.b notes, a ''NEPA-like'' SBGP participant may use the State's NEPA-like requirements in lieu of this Order. This practice is consistent with CEQ policy regarding integration of procedures (40 CFR 1500.2) and requirements addressing reductions of paperwork and delay (40 CFR 1500.4 and 1500.5, respectively). States not having ''NEPA-like'' laws must comply with the requirements of Order 5050.4B. In both instances, the participating SBGP state must also meet special purpose laws outside NEPA.

ARP appreciates the commenter's suggestion that ARP use the commenter's program delegating environmental responsibilities to states. But because ARP is not delegating any of its responsibilities, there is no need to develop a delegation agreement with its SBGP participants. Once ARP approves the grant of block funds to a participating state under 49 U.S.C. 47128, that state assumes administrative responsibility for all airport grant amounts available under Subchapter 1 of Chapter 471, except those funds for primary airports. However, ARP does oversee the SBGP to ensure participants are meeting their contractual agreements.

Streamlining: A commenter does not think any streamlining rule that rushes the NEPA process is a good one. The commenter considers the rule as a ''euphemism used to conceal and deceive the public'' about aviation's environmental destruction. The commenter opposes every proposal the Order contains because the Order's main purpose is to promote aviation's benefit and destroy the environment. The commenter also states that wildlife hazard management is intended to kill wildlife. The commenter also requests a copy of the Best Practices. *ARP's Response:* ARP prepared the streamlining instructions in Chapter 15 of the final Order to address Congressional and Presidential requirements in Vision 100 and Executive Order 13274, respectively.

ARP stresses sponsor-prepared and implemented wildlife management plans help reduce injuries and deaths to millions of passengers, birds, and other wildlife species resulting from aircraft-wildlife collisions. ARP's requirements for airport sponsors to control wildlife species, especially those that have regularly been involved in aircraft-

[8] Comments on Order 5050.4B Preamble, personnel communication from Edward A. Boling, Council on Environmental Quality to Edward Melisky, FAA, dated April 9, 2006.

wildlife collisions, are parts of the agency's airport certification program. This program is needed to address the agency's mission to provide safe, efficient air transportation for the nation. It also helps to reduce wildlife populations near airports. This, in turn, helps to reduce wildlife mortality, which often occurs when these animals collide with aircraft.

Surface transportation and cumulative impacts: Two commenters note these topics have become important for airport actions. They recognize Order 5050.4B provides greater guidance on cumulative impacts than Order 1050.1E, but suggest Order 5050.4B include more information on these topics. One commenter notes that surface transportation issues have become major EIS and EA topics due in part to associated air quality impacts on National Ambient Air Quality Standards and community concerns about road congestion. The commenter requests that the Order provide more information on these topics and notes Order 1050.1E does not address them. The commenter further notes induced secondary impacts typically address these issues, because they are among the most complex an EA or EIS addresses. Another commenter states the Order should explain the airport sponsor's role during scoping. *ARP's Response:* ARP agrees these are topical, difficult subjects. Paragraph 1007.i of the Order provides a summary of information on cumulative impacts, but ARP will provide more detail on this topic in the Desk Reference. Until ARP issues that information, document preparers and reviewers should use information in paragraph 1007.i, paragraph 500c of Order 1050.1E, CEQ's guidance on assessing cumulative impacts, Considering Cumulative Effects Under the National Environmental Policy Act (*http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm*) and CEQ's June 24, 2005, memorandum addressing cumulative effects and past actions. The Desk Reference will address the topic of surface transportation and its relationship to air quality effects.

Beginning Responses to Comments on Specific Paragraphs of the Draft Order

Preface comments: Two commenters suggested adding language to the Preface to note the Order provides NEPA guidance for ARP. If conflicts between this Order and Order 1050.1E exist, users are to follow the instructions in 1050.1E. In that case, FAA personnel may follow the instructions in Order 5050.4. The commenters note that Order 5050.4A lacked a process for updating its content, so the commenter suggested that the Preface explain how FAA would update Order 5050.4B. *ARP's Response:* ARP agrees. ARP has placed the information the commenters suggest in the Order's revised Introduction.

Introduction comments: A commenter suggested adding a clarifying statement about reasonable alternatives. Those alternatives should meet the purpose and need and FAA's mission to provide safe, efficient air transportation for the Nation. *ARP's Response:* We agree in part and respectfully disagree in part. ARP has revised the text addressing this topic and placed it in paragraph 504.d of the Order. That paragraph notes that the range of alternatives developed during airport planning differs from that FAA examines during the NEPA process. As paragraph 504.d(2) notes, the range of reasonable alternatives FAA considers during NEPA must include alternatives developed during project planning and those reasonable alternatives outside the airport sponsor's and FAA's jurisdiction. Therefore, FAA agrees that these alternatives should meet purpose and need, but it disagrees with the commenter's clarification due to the requirements of 40 CFR 1502.14(c). That would be inconsistent with 40 CFR 1502.14(c), which states agencies: ''shall include reasonable alternatives not within the jurisdiction of the lead agency.'' Including the statement regarding FAA's statutory mission in the final Order could be misconstrued. Doing so could mean that FAA has adopted the statutory objectives test to narrowly define a purpose and need that would exclude reasonable alternatives from NEPA analysis.

Chapter 1 comments: ARP received no general comments on this chapter. Regarding paragraph 1, one commenter stated the paragraph extends NEPA's reach. Another commenter stated that this description of objectives is incomplete because it omits important detail from 40 CFR 1500.1 and focuses solely on public disclosure. Both commenters recommend using different text to more accurately describe NEPA's intent. One commenter suggested using the entire statement of objectives from 40 CFR 1500.1(a) or paragraph 10a from Order 5050.4A, the other recommended the text from paragraph 200.a of draft Order 5050.4B. *ARP's Response:* Agree. ARP revised paragraphs 1 and 2 to better reflect NEPA's intent using information in 1500.1(a). ARP deleted paragraph 200.a. as written in the draft Order because it was somewhat duplicative.

Two commenters state that paragraph 3.d should note the Order should strengthen the explanation of how ARP addresses special purpose laws. The Order should relate that presentation to the laws' application in a NEPA context. *ARP's Response:* Agree. Paragraph 9.t explains this.

Comments on paragraph 8 varied. This paragraph contained several subparagraphs defining many of the terms the Order uses. Another commenter sought definitions for ''mitigated FONSI'' and ''special protection laws.'' Other commenters sought definitions for or clarifications of the terms: ''Airport Improvement Program;'' ''day-night average level;'' ''expertise agencies;'' ''joint lead agency;'' ''major Federal action;'' ''major runway extension;'' ''reasonably foreseeable action;'' ''responsible FAA official;'' ''significant impact;'' ''special purpose laws;'' ''special protection laws;'' ''supplemental EIS;'' and ''written-re-evaluation.'' Another commenter urged the use of ''highly controversial action'' as defined in Order 1050.1E. *ARP's Response:* Readers should note that the final Order now presents definitions in paragraphs 9a.–9v. Document re-organization caused this paragraph re-numbering. ARP has enhanced many of the definitions these paragraphs provide. Readers should note that the draft Order used the terms, ''special purpose laws'' and ''special protection laws'' synonymously. For consistency, the final Order uses only ''special purpose laws.'' Also, the final Order contains a more complete list of laws, regulations, and executive orders comprising the term, ''special purpose laws.'' Order 5050.4B has incorporated Order 1050.1E's definition of the term, ''highly controversial action'' and more information on ''written re-evaluations.'' Paragraph 1402 provides a more comprehensive discussion for supplementing NEPA documents.

Chapter 2 comments: General Chapter 2 Comments: A commenter stated the text in the draft Order was not clear regarding NEPA's applicability to ALP changes not involving Federal funding. *ARP's Response:* ARP addresses this issue in paragraph 202.b of the final Order. The paragraph states FAA must comply with NEPA and other applicable special purpose laws when unconditionally approving ALPs whether or not the approval involves Federal funding (paragraph 9.g (3)).

Another commenter suggested the note on the Desk Reference following paragraph 200.d of the draft Order stress that ARP will provide the Desk Reference to clarify applications of significance thresholds in Order 1050.1E, Appendix A. The commenter suggests that Order 5050.4B modify

thresholds to eliminate their ambiguity. *ARP's Response:* Order 5050.4B deleted the note. Readers should see that Table 7–1 presents the agency's significance thresholds per Order 1050.1E, Appendix A. ARP is not authorized to modify any of the thresholds because Order 1050.1E, as the agency-wide document, provided those thresholds for public review and they are the thresholds FAA established for all FAA organizations. Although ARP can petition the Office of Environment and Energy (AEE) to change the thresholds, only AEE is authorized to do so. But before making changes, AEE will provide the public an opportunity to review changes or additions to the thresholds because they would change the agency's Order implementing NEPA. Readers should note that column 3 of Table 7–1 presents information to help Order 5050.4B users determine airport-related impacts relative to the stated thresholds. These factors are based on information in paragraphs 47.e and 85.a –t of Order 5050.4A that ARP staff and others have found valuable in determining impact significance for airport actions during the past 20 years. Because airport actions often physically disturb more land or water areas than most other FAA actions, ARP includes that information for convenience and because of its analytical value. Doing so also addresses a comment from some reviewers who noted that Order 5050.4A contains useful information that Order 5050.4B should include.

Regarding paragraph 200.c, a commenter states that FAA must evaluate more than environmental factors in its NEPA process. Other commenters ask if NEPA applies to ALP and Passenger Facility Charges (PFC). *ARP's Response:* ARP concurs and has revised the wording. Paragraph 200.a(2) notes the agency considers other factors (*e.g.,* economic, technical, safety) as well as environmental factors. The intent of the sentence was to stress that FAA must weigh environmental factors in its decisions. That paragraph also uses the term, ''Federal actions,'' a term including PFC and ALP approvals per paragraph 9.g of the final Order.

Addressing comments on paragraph 201.b(1), a commenter recommends deleting ''FAA-funded'' master plans. *ARP's Response:* Concur. Revised paragraph 201.b(1) tells airport sponsors to consider environmental factors in master planning, regardless of the funding source used to develop that planning. This should help enhance the subsequent NEPA process ARP would complete to make a decision on the planned airport projects master plans address.

Regarding paragraph 201.b.(4), a commenter seeks clarification on the need for a SBGP participant to consult with federally-recognized Tribes on a government-to-government basis. The commenter notes if a SBGP agency is authorized to conduct direct consultation after initial FAA/Tribal contact, the Order should state so. Another commenter notes a public hearing or meeting is not needed for all NEPA actions. *ARP's Response:* Paragraph 212.e of the final Order clarifies SBGP and Tribal consultation. The paragraph states if an FAA organization is involved in an action associated with an SBGP airport action, the responsible FAA organization will conduct the Tribal consultation. If there is no FAA involvement, the SBGP agency should follow instructions in paragraph 303 of the Order, to ensure Tribal consultation occurs in a respectful manner. SBGP agencies should note that regional and district ARP office personnel are available to aid the SBGP agency in this consultation. That paragraph and other paragraphs in new Chapter 3 (Agency and Tribal Coordination) developed for the final Order discuss how FAA personnel will conduct Tribal consultation according to FAA Order 1210.20, American Indian and Alaska Native Tribal Consultation and Policy and Procedures.

ARP concurs with the comment that public hearings are not needed for all NEPA actions. Revised text in paragraph 201.b(4) adds the words ''* * * if one is appropriate'' to clarify that not all NEPA actions require a hearing.

Concerning paragraph 203.a, a commenter requests information regarding the need to consult with FAA when an SBGP action requires an EIS. The commenter wants to know if the airport sponsor or the state agency is responsible for consulting with FAA regarding EIS preparation in this case. *ARP's Response:* Paragraph 214.d(2)(a) of the final Order clarifies this issue. When ARP or another FAA organization has an action connected to a SBGP project, the FAA organization responsible for the connected action will be a joint-lead agency with the SBGP agency to ensure the document also meets the requirements of Order 1050.1E and Order 5050.4B. As needed, the SBGP and/or the FAA organization may request assistance from the appropriate regional or district ARP office or ARP's Airports Planning and Environment Division (APP–400). Although these ARP offices are not responsible for preparing EISs for all SBGP connected actions, they have experience that may aid the SBGP agency and other FAA organizations in document preparation. This involvement may also help ensure efficient information exchanges and proper consultation among the SBGP, agencies, and interested parties occurs. In those rare cases, where there is no FAA organization involved, the state agency follows instructions in paragraph 214.d(1) of the final Order.

Regarding paragraph 205, a commenter complimented ARP for recognizing the public's participation in airport review. Another commenter requests more information on obtaining public involvement during EA scoping or for categorically excluded actions. *ARP's Response:* The agency appreciates the comment. Now, this information is part Chapter 4 of the Order, which focuses on public involvement. Also, paragraph 704 discusses public involvement in EA preparation. Paragraph 606.b discusses public involvement requirements of special purpose laws and categorically excluded actions. The reader should note that FAA must complete public involvement requirements before categorically excluding an action, if the potential extraordinary circumstances relating to the proposed action involve special purpose laws having public involvement requirements.

Chapter 3 comments: General Chapter 3 Comments: A commenter states ''one reason some environmental reviews take so long is the disconnect between physical/facility planning and environmental review. Projects are not sufficiently defined before the NEPA process begins. FAA is revising the advisory circular (AC) concerning master planning. There needs to be close integration between this chapter, particularly 302, and the revised master planning AC. If master plan analysis more closely resembled NEPA analysis on such major issues as project purpose, alternatives and environmental impacts, planning, projects and environmental reviews would be improved. This chapter should encourage that planning. ARP's Response: ARP agrees it sometimes begins the NEPA process prematurely. However, ARP wishes to note that this ''premature start'' is often in response to airport sponsor desires or demands to force ARP to begin the NEPA process before the sponsor completes the planning for which it is responsible.

ARP agrees that Order 5050.4B should reflect some of the concepts on critical NEPA and planning issues like project purpose, alternatives, and other topics that the master planning AC discusses. The draft Order had some information on the NEPA/planning connections, but ARP has greatly enhanced this

information in the final Order. New Chapter 5 addresses early airport planning and NEPA. The chapter contains planning information from the master planning AC and ARP's Best Practices Web site. ARP hopes that the new chapter and AC improve the coordination between airport planners and environmental specialists so airport planning and NEPA processes are more efficient and effective.

Regarding paragraph 300.a, another commenter stated the Order should clarify that the approving FAA official must evaluate an airport action's environmental effects and issue a ''NEPA decision'' approving that action. *ARP's Response:* Agree. New paragraph 500.b highlights the need for the approving FAA official to issue a FONSI or ROD or categorically exclude an airport action before an official approves the action.

Concerning paragraph 300.b, another commenter suggested that the Order reinforce the requirement that the NEPA process is an independent process, not intended to justify a proponent's action. *ARP's Response:* Agree. New paragraph 500.a enforces critical NEPA principles of objectivity and good faith.

Regarding paragraph 300.c, the same commenter disagreed with the paragraph's requirement for the responsible FAA official to work more closely with airport planners early in the planning process. The commenter stated this would commit FAA to expanded roles that would have to be embraced to make the process work smoothly. *ARP's Response:* ARP realizes that earlier involvement places a workload on FAA personnel. However, this involvement should reduce delays during the subsequent NEPA process by addressing flaws and gaps in planning data that could delay that process. Chapter 5, particularly paragraph 501, emphasizes the need for better coordination between planners and environmental specialists. This will improve the efficiency and effectiveness of the planning process and the subsequent NEPA process.

Two comments on paragraph 301.b sought a definition for the term ''practicable alternative.'' Another stated the Order should tell airport sponsors to tell the surrounding communities about the sponsor's proposed actions. *ARP's Response:* The final Order deleted this term. Instead, paragraph 706.d(6) of the Order notes that ''reasonable alternatives'' are those choices the airport sponsor (or FAA) has developed to address the problems the sponsor faces. That section also states that agencies must include reasonable alternatives not within the jurisdiction of the lead agency (see response to Introduction). Those alternatives would also include Paragraph 706.d provides more information on alternatives. It emphasizes that an EA must address reasonable alternatives in addition to the No Action and Proposed Action when there is an unresolved conflict regarding alternative uses of available resources (paragraphs 706.d (5) and (6)).

Regarding the comment on telling surrounding communities about proposed actions, paragraph 501.a of the final Order notes the importance of considering community concerns about aircraft noise during the planning process. In addition, new Chapter 4 on public participation provides more information on how airport sponsors and FAA alert and engage surrounding communities about proposed airport projects. As Chapter 4 of the final Order and the AC on master planning emphasizes, the airport sponsor is responsible for informing and engaging the public during the sponsor's planning efforts.

Starting comments on paragraph 302. Another commenter made a general comment about the statement that a sponsor identifies its proposed actions during master planning. According to the commenter, this ''* * * could appear that FAA encourages sponsors to make a decision too early in the NEPA process.'' The commenter notes this may give the appearance that FAA encourages sponsors to make decisions before FAA complete the NEPA process. The commenter also argues the purpose and need should be part of master planning. *ARP's Response:* ARP appreciates the comment on using the words, ''proposed action,'' but we see no conflict with NEPA. Many airport sponsors identify a proposed action during master planning to address the issues the airport sponsor is attempting to solve. ARP sees no harm in the airport sponsor identifying a proposed action, provided sponsors and the public realize ARP is not obligated in any way to approve the sponsor's proposed action. The ''proposed action'' may be, but is not necessarily the agency's ''preferred alternative.'' The proposed action may be a proposal in its initial form before undergoing analysis in the NEPA process, ''* * * a proposed action may be granting an application to a non-federal entity for a permit'' (Forty Most Asked Questions (46 FR 18025, March 23, 1981, as amended 51 FR 15619, April 25, 1986, Question 5a). As ARP may not have a preferred alternative until it issues a draft or final EIS, ARP is able to rebut any claims of bias that may result from a sponsor identifying a proposed action.

In response to the comment that, ''purpose and need'' during planning, should be part of the master plan, we respectfully disagree. ''Purpose and need'' is a term of art under NEPA. Although the master plan considers environmental factors, it is not the NEPA process nor should it be. Master planning is the sponsor's responsibility, while NEPA is FAA's. To avoid confusing planners and others preparing master plans and NEPA documents, ARP avoided using the term ''purpose and need'' for planning purposes in Chapter 5.

A commenter recommended revising paragraph 302.a to include some discussion about the need to compare a sponsor's airport master plan forecasts and FAA's Terminal Area forecasts. *ARP's Response:* Agree. The final Order discusses the need for reasonable consistency between a sponsor's forecasts and FAA's Terminal Area Forecast (TAF) to ensure the scientific integrity of the discussions and environmental analyses in NEPA documents for airport actions. Paragraph 706.b(3) of the final Order provides instructions for handling variations in forecasts.

Regarding paragraph 302.b one commenter suggested deleting the discussion of airport noise compatibility planning because 5050.4B was not the place to define master plan requirements except to the extent that they facilitate NEPA processing. This commenter also indicated that paragraph 303 was ample to address noise compatibility planning. Another commenter indicated that the text as drafted suggested that noise issues should be addressed in the master plan, not an airport noise compatibility program. *ARP's Response:* Agree. Although Order 5050.4A discussed airport noise planning under 14 CFR part 150 (Airport Noise Compatibility Planning), we have eliminated it from this Order. Revised paragraph 503.c notes that airport planners should consider noise when planning an action because noise is often the public's primary concern regarding airport actions. Knowing the locations of noise sensitive land uses relative to a proposed action's environmental impacts provides valuable information during the subsequent NEPA process.

Concerning paragraph 303 in general, a few commenters disagreed with the following language in the draft Order dealing with project specific noise impacts and part 150, '' the sponsor may not delay the proposed action's mitigation for inclusion in an NCP that would be prepared after the EA or EIS is completed.'' One commenter noted

that this would obligate sponsors to mitigate for actions that FAA might approve, while the other stated, ''meaningful noise mitigation cannot be defined during the NEPA process, particularly when litigation is expected.'' *ARP's Response:* ARP has revised paragraph 706.g(3) to clarify that FAA may not rely upon a commitment by an airport sponsor to conduct a study under 14 CFR part 150 as mitigation measure in an EA or an EIS. Rather, a part 150 study may only be used to identify mitigation measures if the study is completed concurrently with the EA or EIS. Contrary to the first commenter, the mitigation measures would be identified not in advance, but at the same time that FAA makes its decision concerning the proposed action. We believe that meaningful noise mitigation can be identified during the NEPA process. Mitigation measures approved in an environmental Record of Decision for an airport development project may now be funded using amounts available under the noise set aside in the discretionary fund under 49 U.S.C. 47117(e). Therefore, there is no need for airport sponsor to prepare noise studies under 14 CFR part 150 with EISs to gain access to noise set aside funds.

One commenter stated that paragraph 303.b should require public involvement for categorically excluded actions. *ARP's Response:* Agree in part. Paragraph 606.b of the final Order discusses public involvement and CATEXs. The reader should note that ARP must complete all public involvement requirements for CATEXs if the actions involve extraordinary circumstances based on special purpose laws having public involvement requirements.

A commenter noted that paragraph 303.c should include the California Noise Equivalent Level (CNEL) metric. Another commenter noted the DNL 65 dB level is not always FAA's significant noise threshold, especially for Section 4(f) or historic resource impacts. Yet another commenter noted that FAA should use noise levels below the DNL 65 dB level to determine noise effects. *ARP's Response:* ARP agrees with the comment on CNEL. The revised Order references CNEL as an acceptable metric in paragraph 9.n. Regarding the significant noise threshold, readers should review FAA's response to this issue in its **Federal Register** Notice of Availability of Order 1050.1E (69 FR 33818–19, June 16, 2004). As stated in Order 1050.1E, Appendix A, section 14.3, ''[s]pecial consideration needs to be given to the evaluation of the significance of noise impacts on noise sensitive areas within national parks, national wildlife refuges and historic sites, including traditional cultural properties. For example, the DNL 65 dB threshold does not adequately address the effects of noise on visitors to areas within a national park or national wildlife refuge where other noise is very low and a quiet setting is a generally recognized purpose and attribute.'' Order 1050.1E, Appendix A, section 14.5g states that ''the FAA will consider use of appropriate supplemental noise analysis in consultation with the officials having jurisdiction'' over such areas. Table 7–1 of final Order 5050.4B incorporates this information.

Concerning paragraph 304, two commenters seek clarification of the objectives noted in the paragraph. *ARP's Response:* As written, the paragraph indicated that ARP would analyze the data provided and determine if more information were needed to address issues or problems. The second objective was to determine the proper environmental analyses. ARP has revised this paragraph, which is now paragraph 506 of the final Order. The paragraph states that during project planning the responsible FAA official will determine, via an interdisciplinary approach and working with the airport sponsor, the probable environmental evaluation a proposed action warrants.

Concerning paragraph 304.b, a commenter suggests ARP review Tables in the draft Order listing CATEXs to ensure they include all airport actions listed in paragraphs 307–312 of Order 1050.1E. The commenter noted the Tables did not contain all actions and this could mislead the public about airport actions that are categorically excluded. *ARP's Response:* Agree. ARP has revised Tables 6–1 and 6–2 to include airport actions the draft Order inadvertently omitted.

Regarding paragraph 304.b(1), a commenter rightly noted this paragraph was not consistent with paragraph 403.b, which provided clearer guidance on when FAA may CATEX an action similar to ones listed. The commenter notes some FAA offices have categorically excluded an action if it fits into a category. This appears to be counter to the instructions in Order 1050.1E, paragraph 303c, which that states FAA may categorically exclude only listed actions. *ARP's Response:* Agree. The draft Order did not properly convey the instructions in Order 1050.1E. Paragraph 601 of the final Order clarifies the draft's instructions. In particular, paragraph 601 addresses other actions that may be categorically excluded provided they are similar to those listed in paragraphs in Order 1050.1E.

A general comment on paragraph 305 emphasized the need for clearer instructions on minimum public involvement for actions an EA addresses. The commenter wants to know if all draft EAs are subject to public review and if the sponsor must respond to comments on a draft EA the way FAA must respond to comments on a draft EIS. Another commenter suggested deleting the word, ''Environmental Assessment'' from the section title because information in the paragraph also pertains to EISs. *ARP's Response:* Agree in part, disagree in part. We agree with the commenter about the section title. ARP replaced the words ''Environmental Assessment'' in the title of paragraph 301 with ''the Environmental Review Process.'' We included paragraphs 301 and 704 to emphasize requirements under 40 CFR 1501.4 for Federal agencies to involve the public to the extent practicable in preparing EAs. As to whether comments on a draft EA have to be responded to in the way FAA responds to comments on a draft EIS, the approach depends upon the complexity of the matter involved. Generally, responses to comments on a draft EAs may be less comprehensive and detailed.

For paragraph 305.b, a state agency noted that cooperating agency status applies only to EISs. The paragraph is wrong in stating cooperating agency status is warranted for EAs and warns ARP about using CEQ terms in the wrong context. Another commenter objects to public review before the final EA is submitted to FAA. The implication is comments on the draft EA are used in preparing the final EA. The commenter seeks clarification on the need for a draft and final EA for all actions. Finally, although involving the public in the EA process is prudent, requiring drafts, comment periods and final EAs in all circumstances is ''resource intensive.'' *ARP's Response:* Disagree with the comment addressing cooperating agencies and EAs. Although the commenter is correct in stating that CEQ regulations only address adoption of EISs, the objectives of reducing delays and eliminating duplication underlying the adoption provisions apply to adopting EAs. ''Consequently, the Council encourages agencies to put in place a mechanism for adopting environmental assessments prepared by other agencies.'' (See Memorandum: Guidance Regarding NEPA Regulations, at 48 FR 34263, July 28, 1983). FAA established agency-wide procedures for adopting EAs in paragraph 404d of 1050.1E and 5050.4B must conform to those procedures. Regarding the second

commenter's input, ARP agrees with the commenter's interpretation of the instruction that, ''public review for draft EAs is important and should be considered when preparing the final EA.'' Regarding the need for a draft and final EA for all actions, typically this is the case. Rarely does ARP accept the initial EA as a final. Finally, readers should note ARP is not requiring public review for all draft EAs. That review is warranted when a public hearing will occur (see paragraph 708 of the final Order), but the need for such review in other situations is left to the responsible FAA official's discretion.

Concerning paragraph 306, a commenter suggests that state and local review processes should include local municipalities. *ARP's Response:* Agree. The draft text assumed readers would include affected municipalities in their consultations. Paragraphs 301 and 302 of the final Order note that the term, ''local agencies'' includes municipalities and why their input can be important.

Addressing a comment on paragraph 306c, a commenter notes, in its opinion, there are five steps to realize a project. These are planning, engineering, environmental review, financing, and construction. The commenter states the first and last steps are clearly defined, but the others are not, so it recommends the Order address them. It should address the 20% limit on engineering drawings noted later and the fact that infrastructure projects can have a logical purpose and need, but won't occur if they are not AIP eligible or financed. Another commenter believes requesting review agency consultation is excessive. *ARP's Response:* Addressing the ''five steps,'' ARP agrees they are critical. Readers should note the Order addresses how four steps relate to the NEPA process (actual construction is not discussed). Chapter 5 of the Order addresses the relationship between planning, which includes cost estimates and construction plans, and environmental review. Paragraph 1004 addresses the relationship between engineering (the level of engineering drawings) and environmental review. ARP recognizes that there is a need to consider financial costs in identifying reasonable alternatives under NEPA. Eligibility for federal funding or use of passenger facility charges could affect the range of alternatives studied under NEPA. However, ARP does not agree with the commenter that this Order, prepared for NEPA compliance, should address planning, engineering, financing or construction as distinct topics. Beyond the manner in which they bear upon NEPA review, instructions concerning these matters are outside the scope of this Order. ARP's Financial Division (APP–500) has issued guidance for financial assistance, including Order 5100.38, Airports Programming Handbook and FAA Policy and Final Guidance Regarding Benefits Cost Analysis on Airport Capacity Projects for FAA Decisions on Airport Improvement Program Discretionary Grants and Letters of Intent, (64 FR 70107, December 15, 1999). ARP's Engineering Division (AAS–100) is available to help sponsors and other interested parties with design and construction plans. Turning to ''excessive'' agency consultation, ARP disagrees. When reviewing an EA or information supporting a CATEX, agency input is critical to ARP's determination of impacts and the proper NEPA document. These instructions ensure the responsible FAA official has the agency input needed to complete the NEPA process efficiently and effectively.

Concerning paragraphs 306.c(1) and (2), a commenter noted the 60-day and 45-day periods signaling the start of agency or Tribal consultation are inconsistent. Another commenter suggests the time frames are too short and seeks to tie the consultation to Capital Improvement Plan data sheets or grant application submittal. Non-agency commenters sought clarification of the 45-day period regarding ALP approvals that do not involve Federal funding. The commenters think this requirement will unnecessarily delay approvals of certain categorically excluded actions and needs to provide some flexibility. Another commenter wants ARP to omit the specified time frames and substitute ''reasonable timeframe.'' Another commenter urges ARP to include EISs in this discussion, since Order 1050.1E directs FAA personnel to ensure compliance with NEPA. The same commenter notes that agencies are reluctant to begin consultation before FAA has determined an EA or EIS is needed. The commenter suggests deleting the discussion when a sponsor is not seeking AIP funding, since the opening sentence addresses AIP funding. *ARP's Response:* Regarding the comment on timing consultation, ARP disagrees. The draft's paragraphs properly highlighted different time sequences, depending on the sponsor's need for AIP funding. The times are needed to ensure proper consultation occurs for the NEPA process. To better reflect AIP funding and review needs, paragraph 302.b(2) of the final Order clarifies the start of this consultation. After consulting with the Airports Programming Division (APP–500), ARP's office responsible for AIP financing, we revised paragraph 302.b(2) to meet financial reviewer needs as well as those of environmental specialists. The paragraph now states the sponsor should start consultation so there is sufficient time to enable the sponsor to file the final EA with ARP by April 30 of the fiscal year (FY) preceding the FY the sponsor seeks discretionary AIP funding for the action. If the sponsor seeks no AIP funds, paragraph 302.b(3) states the consultation should begin at a time that is sufficient for FAA to complete its NEPA review and accommodate the sponsor's schedule.

Addressing other comments on time frames, ARP declines to add EISs to this discussion. The intent of instructions in 302.b is simply to help airport sponsors schedule the start of consultation for documents they prepare. Since FAA is responsible for preparing EISs for most airport projects, ARP believes paragraphs 302.b(2) and (3) address the commenter's concerns. The new instructions highlight the need for airport sponsors to determine the ''reasonable timeframes'' to meet consultation requirements and their schedules. This provides the flexibility commenters sought. ARP emphasizes that sponsors should not delay consultation, since it is crucial to ARP completing the NEPA process.

Addressing the last comment, ARP disagrees with the commenter's suggestion to delete the information addressing ALP approvals not involving Federal funding. The Order should address common situations, so ARP includes the information in paragraph 302.b(3) of the final Order to address this rare scenario.

Regarding paragraph 306.d, a few commenters noted the confusing language this paragraph contains. One commenter suggests the 30-day period that must elapse between issuance of opportunity for a public hearing and the hearing itself is the maximum time allowed. The commenter also asks if the hearing must occur before or after the draft EA is published. Another commenter states that the instructions require punctuation and clarification. A third commenter states that requiring two notices (opportunities for a public hearing and document availability for the hearing) is unnecessary. One notice should be sufficient. A fourth commenter suggests that the FAA define what it means by ''expertise agency.'' Without this, the commenter is concerned NEPA documents would contain unnecessary information. The commenter also suggests the term is different from State, local and Tribal

entities mentioned elsewhere. *ARP's Response:* ARP agrees the draft instructions were confusing. The ''Notice of Opportunity for a Public Hearing'' tells the public that it may request a hearing for an action. The ''Notice of Public Hearing'' tells the public that the sponsor, in response to public's review of the ''Notice of Opportunity for a Public Hearing,'' has determined a hearing will occur. Paragraphs 404 and 406 of the final Order clarify these points. Paragraph 404.a(4) notes the draft NEPA document must be available to the public for a 30-day period to help people prepare for the hearing. Paragraph 406.b states that 30 days must elapse between the ''Notice of Public Hearing'' and the time the hearing will occur. Finally, regarding the term, ''expertise agencies,'' paragraph 9.f of the final Order defines this term. It means ''a Federal, State, local, or Tribal government agency with specialized skill or technical knowledge on a particular environmental resource.''

Concerning paragraph 307.f, an SBGP commenter seeks clarification on resolving issues at state levels. The commenter notes that sending unresolved issues to DOT's Secretary for Administration is excessive. The particular block grant agreement designates the State with the responsibility to resolve the SBGP issues. *ARP's Response:* Comment noted. Readers should review this Preamble's paragraphs b, k, and State Block Grant Program section for more information on the roles of State agencies participating in the SBGP. Participating state agencies should use instructions in paragraphs 210–214 of the final Order to help them address environmental effects SBGP actions may cause. They should also use those instructions to determine if FAA retains authority for any actions connected to the airport action under the SBGP.

Concerning non-state block comments on paragraph 307.f, to avoid confusion, another commenter mentions the paragraph should emphasize FAA reaching agreement with the sponsor before making the EA public and if agreement isn't possible, to advise the sponsor that FAA cannot accept the sponsor's EA. Another commenter states FAA should not be involved in resolving issues, unless there is a Federal tie and the intervention should not occur until an EA receives public review. The commenter also states elevation of an issue to the DOT is inappropriate, unless the issue has national importance. *ARP's Response:* ARP concurs that agreement on important issues is critical in preparing any NEPA document. It is the responsible FAA official's duty to work with the sponsor to reach that agreement. However, due to conflicting opinions on environmental issues, agreements do not always occur. To address this, the final Order (paragraph 707.d), as Order 5050.4A did, discusses how the responsible FAA official might be able to help resolve disagreements. This information is helpful in determining if an EA is appropriate for an action or if FAA must prepare an EIS.

Responding to the second commenter, ARP points out there would be no need for a NEPA document unless a ''Federal nexus'' existed. ARP disagrees that its personnel should wait until an EA is available for public review before it tries to aid in resolving a problem. That is not efficient or effective project or NEPA management. In addition, the public does not review all EAs, yet they may still require ARP assistance to resolve issues. Further, when possible, ARP prefers to work out solutions to problems before issuing an EA for public review. This provides the public with a more valuable document, shows that a disagreement existed, and the agencies worked to solve it, proving no one ''rubber stamps'' actions. Finally, citing the DOT Assistant Secretary in the instructions, shows the various governmental levels that may be needed to resolve an airport issue. Of course, it is the ARP official's decision to determine the process he or she will use in trying to resolve an issue. Knowing this, ARP doubts its personnel would contact DOT, unless the disagreement involved a matter of national significance or otherwise warranted DOT involvement.

Turning to comments on paragraph 307, a commenter suggested that the Order define the term, ''public hearing'' to reflect various ways to collect and exchange information with the public. Experience shows informal venues often provide the best flow of information between FAA and the public. The same commenter also notes that airport sponsors often conduct ''local public meetings to discuss future development.'' The commenter states the Order should discuss these meetings and how they relate to the ''FAA public forum.'' *ARP's Response:* ARP agrees with the comment that there are many informal and highly effective ways to involve the public in planning future airport development projects and in the NEPA process. However, the comment mistakenly assumes that public involvement is the same as a public hearing. NEPA requires opportunities for public involvement, including opportunities for review and comment in some cases, but not public hearings. ''Public hearing'' is a term of art under 49 U.S.C. 47106(c)(1)(A)(i), pursuant to which airport sponsors must certify that they have afforded the opportunity for a public hearing to qualify major airport development projects for federal grant funding. ARP recognizes that the most important aspects of a traditional, formal hearing are that a designated hearing officer controls the gathering and there is an accurate record of the major public concerns stated during the gathering. Such criteria are viewed by some as crucial to agency decision making because they provide the approving FAA official and other interested parties with information on topics of paramount concern to interested parties. ARP declines for the first time in this final Order to define the term public hearing for purposes of 49 U.S.C. 47106(c)(1)(A)(i) and NEPA, including whether a public hearing may take forms other than the traditional one. Addressing the request for information to distinguish ''local'' and ''FAA'' forums, ARP notes that it believes the commenter's request addressing ''local'' forum relates to public participation in master plan development (*i.e.*, ''future development''). In ARP's opinion, hearings for master planning are outside the NEPA process and are parts of airport sponsor planning responsibilities. Therefore, the sponsor may follow any procedures it wishes to inform and conduct those meetings. Readers should note the final Order's public hearing instructions at paragraph 404.b apply to those airport actions mentioned at 49 U.S.C. 47016.(c)(1)(A)(i) requiring the sponsor to provide opportunities for a public hearing. More instructions at paragraph 403.c discuss other actions that may warrant a hearing to help the sponsor and FAA address other public concerns.

In discussing paragraph 307.a, one commenter wants clearer instructions about giving out information to the public as it prepares for a public hearing. The commenter also suggests there should be two public hearings, one to provide information to the interested public, a second for comments after the public has thought about the information. *ARP's Response:* ARP agrees the public should have access to information to prepare for hearings or meetings. Paragraphs 404.a and 708 of the final Order discuss this. Paragraph 404.a states the ''Notice of Opportunity for a Public Hearing'' must provide information on various project issues and where and when the public may review the draft EA or EIS over a

30-day period. Paragraph 708 tells airport sponsors that the responsible FAA official should review a draft EA before the sponsor issues it to the public preparing for a public hearing. FAA's review ensures the draft EA the public will study adequately reflects FAA policy and concerns before the public sees the document. In addition, many draft EAs and EISs are on publicly accessible Web sites; this helps to further distribute information for public hearings and public reviews. ARP disagrees with the commenter's recommendation to conduct two public hearings. ARP believes distributing the ''Notice of Opportunity for a Public Hearing,'' the draft EA, and conducting the hearing satisfy the reasons the commenter cites for conducting two meetings. Reviewing the draft EA and other information provides facts to the public about an action. The meeting itself gives the public the opportunity to present its concerns about issues the EA discusses.

Concerning paragraph 307.b, one commenter seeks clarification on an obvious inconsistency regarding the draft Order's instructions addressing the opportunity for a public hearing. Another commenter states paragraph 307.a requires the sponsor to provide an opportunity for a public hearing, while paragraph 307.b appears to make the opportunity for a hearing optional. A third commenter suggested a revision to alert the public that a public hearing may be needed for reasons not addressed in paragraph 307a. *ARP's Response:* ARP does not agree an inconsistency in the paragraphs exists. The intent of paragraph 307.a is to alert the sponsor who intends to file a project grant application for a new airport, a new runway, or major runway extension that the sponsor *must* provide an *opportunity* for a public hearing. The sponsor must do so to comply with 49 U.S.C. 47106(c)(1)(A)(i). Paragraph 307.b (now paragraph 403) tells the sponsor and FAA they may provide an opportunity for a public hearing for other airport actions, after considering the specific factors mentioned in that paragraph. ARP sees no reason to modify these instructions.

A comment on paragraph 307.c noted that simply filing a draft EA with FAA before a public hearing occurs does not ensure the document would accurately reflect FAA policies and concerns. Modify the paragraph to ensure the draft EA addresses those policies and concerns. *ARP's Response:* Agree. Although we assumed the reader would understand the EA would need revision to address FAA concerns, we agree that statement is needed. Paragraph 708 of the final Order conveys the commenter's suggestion.

Starting paragraph 307.d comments. Two commenters note that the requirement in paragraph 307.d(1)(d) requiring the public to send written comments in response to a public hearing within 14 days of the hearing is new guidance or a new requirement. They state the specified time is unnecessary. Another commenter states that paragraphs 307.d and 307.d(1) addressing the timing of the hearing relative to notice of the hearing contradict each other. Still addressing hearing timing, another commenter disagrees with the requirement to provide 30 days between the time the notice that a hearing will occur and the date the hearing will occur. This period with the 30-day period given to the public to respond to an offer to conduct a hearing gives the public at least 60 days to review a NEPA document. The commenter suggests providing a 15-day period between the notice announcing the hearing will occur and the hearing date. *ARP's Response:* Regarding the concern about time limits for submitting public hearing comments, ARP disagrees with the commenters' statement. ARP believes that some reasonable time to file comments is appropriate. ARP contends that failing to set that time could cause inefficient NEPA processing and result in documents that fail to include important concerns arising during public hearings. Therefore, paragraph 406.b(4) of the final Order tells the public to submit written comments within a 10-day period following the hearing or by the end of the NEPA document comment period, whichever is later. ARP has set this period to alert the public that project managers need timely public input to ensure NEPA documents address public concerns. Although no CEQ or FAA-wide requirements addressing public hearing comment submittals exist, ARP has established a reasonable time frame to help make its NEPA process more efficient and effective.

Turning to the comments on the ''Notice of Opportunity for a Public Hearing'' and the ''Notice of Public Hearing,'' ARP has revised the information in paragraph 307.d (1)–(3) of the draft Order. ARP agrees the 60-day period between the ''Notice of Opportunity for a Public Hearing'' and the public hearing itself may be unnecessary. Therefore, paragraph 404.a(5) of the final Order provides a 15-day period for the public to decide if it wants a public hearing. Although, this time is 15 days less than the response time noted in draft Order at paragraph 307.c, ARP believes that 15 days is sufficient time for the public to review the information the ''Notice of Opportunity for Public Hearing'' contains and decide that it wants or does not want a public hearing. However, paragraph 406.b retains the 30-day period between the time the sponsor or FAA issues the notice that a public hearing will occur and the date of the hearing. ARP believes the 30-day period provides the public sufficient time to prepare for a public hearing.

Regarding paragraph 307.d(2)(c), a few commenters suggest deleting the reference to floodplain encroachment in the ''Notice of Public Hearing.'' Citing only one of many resource areas could confuse the public that floodplain encroachment is the only impact an action would cause. *ARP's Response:* ARP agrees in part. It has revised the text that appeared in the draft Order. To ensure the public is aware of an action's potential environmental effects, paragraph 403.b of the final Order suggests that the Notice highlight potentially affected environmental resources especially floodplain, wetland or historic property impacts. Special emphasis is placed on these resources to meet the public involvement requirements of the special purpose laws protecting those resources. The sponsor or FAA should base the list on information in the draft EA or EIS available for public review as noted in paragraph 406.b(3) of the final Order. This revision would highlight and provide a more thorough list of project-related impacts.

Addressing comments on paragraph 307.f, ARP reports that two commenters stated requiring transcripts for all public hearings, including informal workshops, is unnecessary and to do so is costly. They agree formal hearings (conducted by designated hearing officials) are appropriate venues for transcripts, but informal workshops do not lend themselves to court reporting techniques. Instead, they suggest using comment forms at workshops or other informal hearings. *ARP's Response:* Disagree. This change is not needed. Paragraph 406.d of the final order requires hearing transcripts to ensure decision makers have information about major concerns and issues raised during public hearings.

Chapter 4 comments. General comment: A commenter suggested placing all tables at the end of the chapter for easier reference and to aid in reading the text. *ARP's Response:* Agree. Tables 6–1 through 6–3 of the final Order (formerly Tables 1 though 3 in Chapter 4 of the draft Order) are now at the end of Chapter 6 in the final Order.

Chapter 6 provides information about CATEXs.

Another commenter had many comments on the assumptions FAA makes on assessing noise impacts and the applicability of the assumptions to categorical exclusions. *ARP's Response:* Please refer to this Preamble's Significant noise impact threshold section for ARP's response to the commenter's concerns.

Regarding the footnote on page 1 of the draft Order's Chapter 4, a few commenters noted the list of laws was incomplete. For example, it failed to include wetlands and the Clean Air and Clean Water Acts. *ARP's Response:* Agree. To correct this error, paragraph 9.t and Table 1–1, list the laws, regulations, and orders comprising the term, ''special purpose laws'' for purposes of this Order. The table includes information from Order 1050.1E, Appendix A, which discusses requirements outside NEPA.

Regarding footnote 2, a commenter wanted clarification of the Emissions Dispersion Modeling System (EDMS) model version one should use when conducting air quality analysis. The commenter also states it is concerned about EDMS's capability because EDMS doesn't provide for a particulate matter analysis and some default values are outdated. The commenter also asks for information about evaluating toxins * * * should one use State or Federal standards? The commenter also requests a discussion on air quality conformity. *ARP's Response:* In response to the comment on the EDMS version needed to conduct air quality analysis, Order users must use the most recent version of that model (see Order 1050.1E, Appendix A, paragraph 2.4d).

In response to the comment about EDMS's ability to predict particulate matter (PM), FAA recently developed the First Order Approximation (FOA) method to enable the EDMS users to estimate PM_{10} and $PM_{2.5}$ emissions for commercial, jet-turbine aircraft engines. The FOA only applies to aircraft engines having reported Smoke Numbers (SNs) and modal fuel flows for take-off, climb out, taxi/idle and approach. In cases where EDMS does not include aircraft PM emission estimates, analysts are to use the best available information. An example of this information is average the aircraft engine PM data from AP–42, Volume II, Mobile Sources, 4th edition, September 1985. Those interested in the FOA may learn more about it at: *http://www.faa.gov/about/office_org/headquarters_offices/aep/models/edms_model/*.

In addressing the issue of air toxins, ARP refers the reader to the discussion of aviation-related pollutants and health risks in FAA's **Federal Register** Notice of Adoption and Availability of Order 1050.1E (69 FR 33784, June 16, 2004). As to whether to use Federal or state standards for air toxins, the U.S. EPA has not established standards for hazardous air pollutants (HAPS). FAA policy is to disclose estimates of HAPS emissions for NEPA purposes, but not to assess human health risks due to the absence of Federal standards and acceptable data linking air toxins to human health (see this Preamble's Instructions on ''NEPA-like'' states or agencies for more information). FHWA recently issued an interim policy on mobile source air toxins on February 3, 2006, at *http://www.fhwa.dot.gov/environment/airtoxic*.

Turning to conformity instructions, ARP disagrees with the commenter's request to include instructions on conducting a conformity analysis. The Clean Air Act, not NEPA governs conformity requirements. The Desk Reference will address this topic. Until ARP completes the Desk Reference, users of Order 5050.4B should follow instructions on general conformity in the Air Quality section of Order 1050.1E's Appendix A.

Regarding draft Order Chapter 4's Tables 1 and 2, a commenter stated the Tables did not include certain actions that are categorically excluded. As a result, ARP could not CATEX certain actions if they did not appear in these Tables. *ARP's Response:* Agree in part. ARP admits that it unintentionally omitted certain airport projects and associated actions from the draft Order. To correct this, ARP has revised the Tables (now, Tables 6–1 and 6–2). Regarding the balance of the comment, ARP disagrees with that commenter's statement. ARP wishes to note that its personnel may categorically exclude an action even if it is not listed in Tables 6–1 and 6–2 of the final Order, provided the action is listed in Order 1050.1E, paragraphs 307–312. This is because those paragraphs list the categorical exclusions that all FAA organizations must use. ARP could have relied solely on those paragraphs for airport actions that may be categorically excluded. But for convenience and to avoid reading the extensive text in those paragraphs not pertaining to airport actions, ARP alphabetically arranged airport-specific portions of the agency's categorical exclusions in Tables 6–1 and 6–2 of Order 5050.4B. ARP has assembled and provided the CATEXs in these tables for ease of reference. Nevertheless, there may be actions that ARP may approve, but that the Tables inadvertently omitted. If there is any inconsistency, Order 1050.1E supersedes the Tables in Order 5050.4B.

Starting paragraph 403 comments, a reviewer states that CATEXs do not contain public disclosure requirements, a critical part of the NEPA process. In addition, the commenter objects to the instruction that ARP need not notify local officials that ARP is considering a CATEX. Further, no written report explaining assumptions on a CATEX is required. Finally, there is no way to legally appeal or challenge FAA's CATEX determination. *ARP's Response:* Disagree. ARP follows the agency-wide instructions in Order 1050.1E, Chapter 3 addressing CATEXs. In developing the instructions in Order 1050.1E at Chapter 3, FAA, in consultation with CEQ, determined there is no need to involve the public when impacts are so minimal that they don't trigger extraordinary circumstances. After public vetting of draft Order 1050.1E, CEQ certified and FAA adopted the instructions in that Order. For NEPA purposes, the Order does not include public disclosure requirements for CATEXs because these actions are to be so minor in impact that they rarely cause significant environmental impacts (40 CFR 1508.4). Therefore, FAA decided public notices of those actions are not needed. However, FAA believes the need to examine extraordinary circumstances provides an adequate level of public involvement for categorically excluded actions deserving public input. ARP emphasizes that if a potential CATEX involves an extraordinary circumstance associated with a special purpose law, the responsible FAA official must ensure FAA complies with the requirements of that law or Executive Order. Some special purpose laws require public involvement. Consequently, the responsible FAA official cannot CATEX an action without ensuring compliance with the applicable special purpose law's public involvement requirements. ARP wishes to point out, that anyone who believes ARP did not meet the requirements of the applicable special purpose law, may legally challenge the FAA's CATEX determination. Anyone believing that ARP did not fulfill the requirements of the applicable special purpose law may challenge in court FAA's decisions based on the CATEX. ARP notes this provision addresses the commenter's concerns there is no way to ''legally appeal or challenge FAA's categorical exclusion determination.''

Regarding alerting local officials, ARP has adopted a requirement that its responsible FAA officials inform the airport sponsor that ARP has or has not categorically excluded an action. No

CEQ regulation or agency instruction requires this, but ARP requires it to avoid past misunderstandings claiming ARP did not environmentally analyze CATEXs.

Concerning paragraph 403.f, one commenter stated the annotations in Tables 1 and 2 are too narrow and should be expanded to include other types of airport actions and ALP amendments. For example, Table 2 only allows ALP amendments for FAA-approved noise compatibility program measures. *ARP's Response:* Agree. We have revised the lead-in language for each type of Federal action Tables 6–1 and 6–2. The language may be to: Approve AIP funding; to approve an ALP; or to approval AIP funding and an ALP.

Addressing paragraph 403.f(2), a commenter suggested revising the text. The revision would allow the sponsor to provide available information to FAA so the responsible FAA official could analyze effects. If that information isn't sufficient, the official may request an EA or begin an EIS. *ARP's Response:* Agree. Paragraph 603 of the revised Order addresses this concept. It encourages an airport sponsor to provide information it has collected to the responsible FAA official to aid the official determine if a CATEX is appropriate.

Concerning paragraph 403.g(1)(a), a few commenters stated that requiring documentation to meet applicable legal requirements unnecessarily burdens sponsors to prepare evaluations for actions normally categorically excluded. The commenter suggests using telephone memos, e-mails or other communications to verify the requirements of special purpose laws have been met. Another commenter objected to the text that appeared to give other agencies veto power over FAA determinations on categorical exclusions. *ARP's Response:* Agree in part. If the applicable special purpose law does not require specific documentation, ARP agrees the sponsor may use emails, memoranda, faxes, or other correspondence to show it has contacted the appropriate agency. However, revised instructions at paragraph 605.b address documentation needs. Paragraph 606.b(3) of the final Order clearly states case files must contain the documentation an applicable special purpose law requires. This information is extremely useful to the responsible FAA official's decision to CATEX an action or require the airport sponsor (or its consultant) to prepare an EA or for FAA to prepare an EIS. Addressing the text regarding veto over FAA decisions, paragraph 606.b(4) clearly indicates the approving FAA official determines the proper NEPA process an action would require.

Beginning comments on Table 1 of the draft Order. In a comment that generally addresses Tables 1 and 2 of the draft Order, a reviewer states actions involving extraordinary circumstances require the sponsor to provide more documentation for a CATEX. For actions not involving these circumstances, the reviewer seeks instruction on how to document that situation. The reviewer suggests the sponsor prepare a short letter to FAA stating that fact. *ARP's Response:* See response to paragraph 403.g(1)(a).

Addressing paragraph 404, (the responsible FAA official notifies airport sponsors about CATEXs), another commenter stated this appears to be optional. Another commenter noted that sponsors are alerted when a categorically excluded action involves extraordinary circumstances, but sponsors are not notified when actions do not involve those circumstances. Another reviewer suggested that ARP adopt one form of notice. Finally, another commenter sought notice to local municipalities. *ARP's Response:* Paragraph 608 of the final Order makes the notification to airport sponsors mandatory. ARP declines the request to notify a local municipality regarding CATEX decisions, unless the municipality is the airport sponsor. To avoid past confusion some sponsors had about ARP's CATEX reviews, ARP voluntarily adopted the notification measure. Regarding the form of notice, paragraph 608 of the final Order requires an e-mail or dated letter. ARP is using either format to ensure this notification e does not place an undue burden on regional or district Airports office personnel.

Regarding Paragraph 405, a few commenters objected to the need for an EA if an action required moving people and/or businesses for any action. A commenter questioned the need for an EA if an action caused one resident to move. Another commenter stated that citing CEQ's regulation addressing preparation of an EA when an ARP official decides one is needed for agency planning or decision making would be confusing, especially for CATEXs sponsors view as not ripe for decision. Another commenter suggested deleting the phrase, * * * ''or its consultant'' from the instruction that stated FAA must ensure the airport sponsor or its consultant prepare an EA. The commenter stated that FAA cannot require the sponsor's consultant to prepare an EA and that the sponsor has discretion to decide if it or its consultant will prepare the document.

Another commenter recommended specifying the need for an EA if an action were near a historic site or national park. Lastly, a commenter suggested that this chapter include an ''Environmental Checklist'' such as the one in Order 1050.1E, Appendix 1, ''page 5,J.'' Using this aid should expedite the environmental review process. *ARP's Response:* Regarding the comment about the need for an EA due to relocating businesses or residents, text in paragraph 702.c of the final Order clarifies that if moving businesses or people are highly controversial actions, an EA is normally needed.

Addressing the comment on EA preparation for planning or decision making purposes, ARP has modified the instruction. As lead Federal agency, a regional or district Airports office may need to prepare an EA to make a decision on planning issues or for other actions needing an FAA decision. According to 40 CFR 1501.3(b), the offices may prepare an EA for agency decision making. Paragraph 701 reflects this response.

Addressing the use of consultants to prepare EAs, ARP believes the word, ''its'' caused confusion. In the draft, ''its'' referred to the sponsor, not FAA. To clarify the sponsor's right to prepare an EA or to hire a qualified consultant to do so, the text in paragraph 702 of the final Order states the sponsor or its qualified consultant prepares an EA.

ARP disagrees there is a need to specify the distance between an airport action and a historic resource or national park. If the action is normally a CATEX, ARP's analyses of extraordinary circumstances will determine the need for an EA or EIS to better decide the intensity of the action's effects on those resources. If the action is not normally a CATEX, the responsible FAA official would request that a sponsor prepare an EA, regardless of the project's distance from these resource. ARP has not revised the text to include the commenter's suggestion.

Finally, addressing the use of an ''Environmental Checklist,'' we were unable to find the page in Order 1050.1E, the commenter noted. ARP is discouraging encyclopedic EAs that do not focus on the specific environmental resources an action would affect and their resultant environmental consequences. Historically, EAs have contained much more information than ARP needs to make a finding on impact severity. ARP is encouraging its staff and others to be concise, yet accurate and complete when preparing EAs. This should expedite the NEPA process

without compromising document quality.

Addressing paragraph 405.d, a commenter suggested that the Order use the DNL 65 dB contour to more accurately define when new heliport operations cause noise over noise sensitive areas. *ARP's Response:* Agree in part. Paragraph 702.b of the final Order specifies the DNL 65–dB contour and the need to examine if the action may cause a DNL 1.5 dB noise increase over noise sensitive areas within the DNL 65 dB contour. The paragraph also notes in accordance with paragraph 9.n of the final Order that there are quiet settings where the DNL 65–dB standard may not apply. ARP made this change to reflect the definition of noise sensitive areas in Order 1050.1E, paragraph 11.b(8).

Addressing paragraphs 405.d and 405.f, a commenter asked clarification on the relationship between these paragraphs. Paragraph 405.d requires an EA for a new airport serving general aviation, while paragraph 405.f requires an EA for a new airport that is not located in a Metropolitan Statistical Area (MSA). *ARP's Response:* Disagree. Paragraph 702.d of the final Order clearly requires an EA for a new airport serving only general aviation, regardless of its location. Paragraph 702.e of the final Order requires an EA for a proposed new airport serving commercial service aircraft or commercial service and general aviation aircraft, provided that facility would not be located in an MSA. Airports serving commercial service aircraft that are proposed in an MSA require an EIS (paragraph 903.b).

Regarding paragraph 405.i, a commenter recommended adding a provision allowing ARP to adopt an EA if the Corps has accepted that document for a permit it has issued for the proposed action. Another commenter from Alaska wants ARP to issue an exemption regarding the need to prepare EAs for airport actions affecting wetlands in that state. The commenter notes that wetland involvement is a ''kick out'' to categorically excluding an action. Therefore, EAs will be the norm in Alaska for projects affecting wetlands due to Alaska's abundance of wetlands. *ARP's Response:* Regarding the first comment, ARP agrees, with the suggestion. Paragraph 707.b of the final Order provides information from Order 1050.1E, paragraph 404d, describing the responsible FAA official's duties when ARP will adopt another Federal agency's EA.

ARP disagrees with the comment from Alaska stating an EA is needed for all airport actions affecting wetlands. ARP cannot issue an exemption for the State of Alaska, nor other locales. If the commenter seeks that exemption, it should contact the Office of Environment and Energy, since that office is responsible for changes to agency-wide procedures. However, readers should note that Chapters 6 and 7 of the final Order clarify when EAs are needed for airport actions in compliance with Order 1050.1E. In preparing Orders 1050.1E and 5050.4B, FAA and ARP, respectively, streamlined the NEPA process for actions involving wetlands as much as possible. ARP informs the commenter that development of the CATEX for Order 1050.1E, paragraph 310k, addressed ''actions having minor impacts on U.S. waters and wetlands.'' This, indeed, was a streamlining measure FAA implemented in preparing Order 1050.1E, and ARP includes it in Order 5050.4B. FAA includes this instruction in these Orders to reduce the number of EAs prepared for actions that affect wetlands. Earlier instructions required EAs for all FAA actions affecting any amount of U.S. waters or wetlands. ARP contends this procedures in Orders 1050.1E and 5050.4B regarding wetlands are the most efficient and effective ways to address this issue. When an EA is needed, ARP reminds airport sponsors to work with the responsible FAA official early in the EA preparation process. This should focus the EA on information the FAA official needs to determine if the EA adequately addresses practicable alternatives, wetland impacts and their consequences, impact severity, and mitigation. This information is needed to meet FAA and other Federal requirements. Working early with the official should also reduce the EA's bulk. Too often, EAs include unnecessary and lengthy discussions about resources the action would not affect. Better vigilance and quality control to focus the EA on expected impacts and consequences should expedite the NEPA process for airport actions without compromising document quality.

Concerning paragraph 406.b, a commenter applauded the inclusion of language stating that FAA need not prepare an EIS if a sponsor's EA shows the action would not have significant environmental effects. *ARP's Response:* Comment noted. Paragraph 903.c of the final Order contains that text.

Concerning paragraph 407, which discussed cumulative effects, some commenters disliked the instructions the paragraph provided. They suggested that ARP provide much more information on this topic. *ARP's Response:* Paragraph 1007.i provides information on cumulative effects. ARP will provide more details in its Desk Reference. Until ARP that document is available, ARP urges readers to review paragraph 1007.i of this Order, paragraph 500c of Order 1050.1E, and CEQ's guidance on cumulative impact analysis, Considering Cumulative Effects Under the National Environmental Policy Act (*http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm*).

Addressing paragraph 408.a, a commenter objected to the statement, ''airport actions often disturb substantially more area than other FAA activities.'' The commenter noted that actions the Air Traffic Organization oversees often affect greater areas than do airport actions. *ARP's Response:* Agree. ARP has deleted the statement from the Order. However, ARP notes that noise impacts due to air traffic actions may affect greater areas than airport projects. However, item n of this Preamble's Final FAA Order 5050.4B section notes that the extent of physical disturbances due to airport actions is often greater than the physical disturbances other FAA actions cause.

Concerning paragraph 408.b(1), commenters argue the analysis needed to determine if an action would exceed a national ambient air quality standard requires costly, time-consuming dispersion analysis. This analysis creates an undue burden on airport sponsor. Instead, the commenter suggests using conformity applicability analysis for projects in non-attainment areas. *ARP's Response:* ARP disagrees with the commenter's request to replace the impact severity criteria of NAAQS violations with exceedances of *de minimis* levels for Clean Air Act general conformity in non-attainment areas. NEPA requires some type of air quality evaluation for most actions having potentially significant air quality effects. ARP notes that NEPA does not limit that analysis to non-attainment or maintenance areas as General Conformity does. FAA's upcoming ''presumed to conform'' list will provide further information on actions that have no potential to significantly affect air quality. The screening criteria in the FAA/Air Force Air Quality Handbook may also be considered in evaluating potential air quality impacts. It is not ARP's intent to require a dispersion analysis in every case.

Concerning paragraph 402.b.(2), a few commenters stated the terms, ''sizeable amount'' and ''small tract of sensitive habitat'' provided little, if any guidance and complicate the analysis. Consider deleting this section and use the simple reference in Order 1050.1E, Appendix

A. *ARP's Response:* Table 7–1 incorporates this and other thresholds from Order 1050.1E, Appendix A. ARP recognizes and agrees with the commenters' statements that Order 5050.4B should include useful information from Order 5050.4A. Table 7–1 incorporates some of the information from Order 5050.4A, paragraphs 47.e and 85. a–t in the Table's ''Factors to Consider'' column. Although Order 1050.1E does not include this information, ARP included it in Table 7–1 because ARP specialists, airport sponsors, and consultants have, for years, found the information useful in assessing airport actions. Readers should note the ''factors'' are not significance thresholds, but simply summarize past guidance that remains useful in determining if an action ''triggers'' a significant impact threshold in Order 1050.1E.

Chapter 5 Comments: ARP received no general comments on this chapter. Addressing comments on paragraph 500, a commenter suggested the text note that an EA or EIS is not needed if FAA CATEXs an action. *ARP's Response:* Agreed. ARP made a revision to paragraph 601.c of the final Order clarifying that item.

Addressing paragraph 500.d, another commenter sought clarification about ARP's role in preparing or reviewing environmental documents that State Block Grant Program (SBGP) participants prepare. The commenter sought information on ARP oversight of the SBGP. *ARP's Response:* Agree. Paragraph 213 of the final Order states ARP remains responsible for overseeing a participating state's activities under the SBGP, not reviewing every environmental document for adequacy. This oversight is to ensure the SBGP participant is complying with its SBGP contractual agreements.

Regarding a comment on paragraph 502, a commenter seeks provisions for ARP funding to communities that SBGP actions would affect. Particularly, the commenter wants funding to study airport-related noise, water, and air pollution impacts. A commenter from a participating SBGP entity, another commenter, and the U.S. EPA seek information on how Section 106 of the National Historic Preservation Act, Section 4(f), and other special purpose laws relate to the SBGP. The commenters question who is responsible for meeting NEPA and the special purpose law requirements outside NEPA. *ARP's Response:* In addressing the comment on funding for surrounding communities, ARP disagrees. This funding is not eligible under the Airport Improvement Program or the SBGP. Like all other airport actions, communities must fund their own studies. In response to the questions on SBGP responsibilities, ARP notes that its issuance of SBGP money is a CATEX (Order 1050.1E, paragraph 307.o). After issuing that money to SBGP participants, ARP has no discretion over the money. Therefore, financing of airport actions under the SBGP is not a Federal action and NEPA does not apply. However, ARP notes the participating SBGP states signed a contractual agreement that makes them responsible for completing an environmental evaluation of the airport action that will receive SBGP funding (paragraph 211 of the final Order).[9] According to that contract, the evaluation must be similar to the interdisciplinary analysis ARP would have done if it had responsibility for the action (recall that the SBGP participant has discretion over the action) States with ''NEPA-like laws'' comply with those laws when completing the environmental impact analysis SBGP actions would cause. They must also follow instructions in this Order and 1050.1E, Appendix A (and eventually the Desk Reference) to address the special purpose laws outside NEPA (paragraph 212.b of the final Order). States without ''NEPA-like laws must follow the NEPA implementing instructions in this Order and Appendix A (and eventually the Desk Reference) as noted previously (paragraph 212.c of the final Order). ARP requires this process not to comply with Federal regulations, but to provide SBGP personnel with information they contractually agreed to use to evaluate environmental effects of SBGP actions in a comprehensive, interdisciplinary manner.

Concerning paragraph 502.e(1), another commenter sought clearer instructions on ARP's role when it awards discretionary funding for an airport action under the SBGP. *ARP's Response:* Comment noted. Paragraph 213.a of the final Order addresses this situation. In this case, ARP, not the participating state, is responsible for completing the NEPA process. This is because ARP uses its discretion when reviewing requests for discretionary money for a specific SBGP action at a particular airport. Since ARP exercises discretion over a portion of the funds for the action, it must meet NEPA requirements.

Concerning paragraph 504, a commenter questioned the awareness of other FAA organization responsibilities for actions connected to SBGP airport actions. A commenter from an SBGP state notes the Order references the need for an airport sponsor to provide information to and consult with FAA for airport projects, but it doesn't discuss these issues relative to the SBGP. The commenter notes the Order should more clearly address how the sponsor should relate to SBGP agencies. The same commenter also wishes to know if SBGP participants will have access to the Desk Reference. *ARP's Response:* ARP discusses the concerns of the commenter in item k of this Preamble and in comments addressing paragraphs 203.a and 307.f of the draft Order. Readers should review those responses for information on the FAA organization's duties and SBGP projects. Additionally, ARP wants readers to know that it has coordinated the requirements of paragraph 213 (addressing FAA Actions connected to SBGP projects) with other FAA organizations who retain authority for actions connected to SBGP projects. Those organizations are aware of their continued involvement in these projects.

In addressing the comment about airport sponsor coordination for SBGP actions, paragraph 212.a of the final Order addresses this. It clearly states that participating SBGP State agencies should substitute the words, ''SBGP agency personnel'' when reviewing instructions their Federal counterparts would normally meet. This wording informs the reader that the State, not FAA, is taking an action or making a finding or decision regarding a particular airport action under the SBGP.

Regarding Desk Reference availability, ARP directs the commenter to the General Comments section of this Preamble discussing the Desk Reference.

Responding to a comment about paragraph 505, a reviewer objects to ALP approvals occurring without formally involving communities adjoining an airport. Three other commenters seek added text to show that ARP may conditionally and unconditionally approve an ALP. *ARP's Response:* ARP notes the comment addressing public involvement. ARP informs the commenter that NEPA and many of the special purpose laws applicable to airport projects require

[9] CEQ has stated that the Order's instructions on the SBGP: '' * * * comport [agree] with NEPA. In fact, FAA deserves credit for not simply categorically excluding the program [SBGP], as it can based on the limited authority over the distribution of funds by statutory apportionment (49 U.S.C 47114(d)), but furthering NEPA purposes through contractual commitments to meet NEPA requirements.'' Comments on Order 5050.4B Preamble, personnel communication from Edward A. Boling, Council on Environmental Quality to Edward Melisky, FAA, dated April 9, 2006.

public involvement. ARP cannot unconditionally approve an ALP or other Federal actions without meeting the requirements of these laws, including their public involvement provisions. Addressing the comments about issuing both types of approvals for an ALP, ARP agrees. To more clearly emphasize this, ARP has discussed those approvals in paragraph 202.c of the final Order. The paragraph notes the approving FAA official may not conditionally approve an ALP depicting a new airport, a new runway, or a major runway extension, when an EA or EIS is being prepared for any of these facilities and actions connected to them. Instead, the approving FAA official may unconditionally approve an ALP depicting those facilities and their connected actions only if FAA has issued a FONSI or ROD that is based on an EA or EIS, respectively, that addresses those airport actions.

Concerning paragraph 505.b(2), two commenters suggest noting that conditional ALP approvals apply to actions FAA deems ''not ripe'' for a decision (*i.e.,* tiering). *ARP's Response:* Agree. Paragraph 202.c of the final Order discusses how conditional, unconditional, and ''mixed'' approvals relate to tiering.

Regarding paragraph 505.b(3), a commenter objects to the limit on conditional airport layout plan (ALP) approvals. The commenter objects because ALPs often include actions, ''that do not require any type of federal approval.'' The limits proposed could jeopardize and delay projects not requiring that approval. Another commenter states this paragraph discourages sponsors from beginning the NEPA process early in project planning. A third commenter suggested adding the words, ''and not shown on an unconditionally approved ALP'' after the phrase, ''[t]he approving FAA official may not issue a conditional approval to a sponsor who has begun preparing an EA or if FAA has begun preparing an EIS addressing [an]action depicted on proposed ALPs.'' The same commenter also suggested adding text discussing ALP features that provide safe, efficient airport operations or airport use. *ARP's Response:* Agree in part. ARP has revised the wording in paragraph 202.c.(3)(a) of the Order to more clearly describe the limits on ALP approvals. The new text limits this provision to three types of projects'a new airport in a Metropolitan Standard Area, a new runway, and a major runway extension and any of their connected actions (paragraph 202.c(4)). FAA officials may not conditionally approve any ALP for any of those projects when the projects are subjects of EAs or EISs being prepared and the approving FAA officials have not yet issued a Finding of No Significant Impact (FONSI) or Record of Decision (ROD), respectively. This new text better reflects the instructions ARP issued to its staff in November 2003. ARP issued that guidance to address concerns that it was approving certain major Federal actions before it completed the NEPA process. ARP decided that guidance was needed to counter arguments that it was prejudging certain actions before it completed the NEPA process.

ARP declines to add the suggested wording addressing unconditional ALP approvals. ARP sees no value in doing so since an airport sponsor could not construct the project if it were not on an unconditionally approved ALP. To unconditionally approve an ALP, ARP must have completed the NEPA process for that project (paragraph 202.c(2)(b) of the final Order). However, it accepts the suggested text discussing ALP features that provide safe, efficient airport operations or airport use. That language is useful to airport sponsors because it helps them develop plans in a timely manner.

Regarding the comment on changing ALPs without FAA approval, ARP is unsure of the types of actions the commenter mentions. ARP reminds airport sponsors that changes to an ALP that would involve a Federal action (as defined in paragraph 9.g of the final Order) require FAA to complete the NEPA process for those actions. Upon completing that process, the approving FAA official may unconditionally approve the ALP depicting the actions. After FAA issues that approval, the sponsor may begin the projects depicted on that ALP.

Finally, addressing the comment that this ALP approval limit would discourage sponsor start-up of the NEPA process early in project planning, ARP understands the commenter's concern. To clarify this point, ARP urges readers to review Chapter 5 in Advisory Circular 150/5070–6, Airport Master Plans. That information discusses considering environmental issues during project planning before the NEPA process begins. ARP prepared this guidance to address the commenter's concern among other reasons. Chapter 5 of the final Order also discusses airport planning and the NEPA process.

Regarding paragraph 505.d, a commenter noted the purpose of the paragraph was unclear and did not relate to the rest of the text following it. The information on cumulative impacts was not considered useful. The commenter also sought some information on actions having independent utility. *ARP's Response:* Agree. ARP has deleted the paragraph. Paragraph 1007.i of this Order contains information on cumulative effects. (See item x, discussions of Surface Transportation and Cumulative Impacts, and responses to comments on paragraph 407 for more information).

Addressing comments on paragraph 507.a, three commenters stated the information in this paragraph simply repeats the unclear guidance that Order 5050.4A, paragraph 33 provided. As a result the final Order will continue the uncertainties that exist in Order 5050.4A. Two commenters requested clearer information on situations: (1) Where a sponsor does not use AIP or Passenger Facility Charge (PFC) charges to buy land and that does not change the use of the purchased tracts; (2) on land purchases done for land-banking purposes, even if the lands do not border an airport; and (3) to buy land that special purpose agencies or courts require for mitigation or remediation. Another commenter seeks information to address an airport sponsor's purchase of land for future airport development while using money from an unknown source or while using AIP funding to do so. *ARP's Response:* ARP notes the comment on Order 5050.4A. Regarding the actions noted above, ARP has addressed circumstances similar to the three of the four noted above in paragraph 204 of the final Order. The Order does not address the item on buying land other agencies or the court requires for mitigation or remediation.

Regarding purchases of land for reasons other than mitigation or remediation, paragraph 204.a of the Order references 40 CFR 1506.1. That regulation notes that, until a Federal agency issues its Record of Decision, neither the agency (40 CFR 1506.1(a)) or the applicant (40 CFR 1506.1(b)) may take action concerning any proposal that would adversely affect environmental resources or limit the agency's choice of reasonable alternatives. Paragraph 204.b of the Order discusses ARP responsibilities when it learns about a sponsor who is about to buy land before ARP completes the NEPA process. The approving FAA official will tell the sponsor that the sponsor's action could prejudice or preclude favorable ARP decisions addressing uses of the land. The official will also tell the sponsor that ARP will take appropriate actions to comply with NEPA and any other applicable Federal laws. Before FAA approves future actions involving the property, ARP will consider the manner in which the property was acquired,

paying particular attention to DOT Section 4(f) responsibilities and other special purpose laws applicable to the situation. The official will also carefully consider if the land acquisition would have adverse environmental effects or limit the choice of reasonable alternatives, based on the manner in which the sponsor obtained the property before ARP issued a decision for future FAA actions involving the property (paragraph 204.b(2)(a)). Finally, paragraph 204.c requires the sponsor to show to the approving FAA official that the purchase was consistent with this Order, and that the purchase did not prejudice ARP's objective analysis of alternatives or limited implementation of the preferred alternative.

Turning to the situation on buying land that other agencies or the courts require, the Order does not address this situation because ARP does not see that it has an action in these cases, unless the land borders an existing airport. In that case, as in the above situations, ARP would need to unconditionally approve the airport layout plan (ALP) under 49 U.S.C. 47107, if the airport would include the purchased land, even if the sponsor acquires the land with its own money. That approval is needed to show the land has been added to the airport. Paragraph 204 would also apply in this case. If no change to an ALP is needed or no Airport Improvement Program or Passenger Facility Charge funding is involved, the sponsor would buy the land to meet requirements of another Federal agency or the courts. Therefore, those purchases would occur outside FAA's purview.

Addressing comments on paragraph 507.b, a commenter seeks information on specific situations that would preclude ARP from reimbursing a sponsor. The commenter also seeks guidance on how ARP would determine if the purchase met the requirements of this Order and the NEPA process. The commenter also seeks information on the need for an Environmental Due Diligence Audit (EDDA). *ARP's Response:* Please see the response for paragraph 507.a, particularly the information regarding paragraphs 204.b and 204.c of the Order. ARP would reimburse a sponsor only if ARP could meet the requirements noted in those paragraphs. Turning to the comment on the need for an EDDA, ARP notes that the need for an EDDA depends on the land's present or prior uses. Actions involving lands having or that had commercial or industrial uses are good candidates for EDDAs. FAA's Order 1050.19, Environmental Due Diligence Audits in the Conduct of FAA Real Property Transactions, addresses the need for EDDAs when FAA will purchase land. Information in that Order is also useful to airport sponsors.

Concerning paragraph 507.b(1)(c), a commenter states the paragraph mistakenly describes and greatly expands the scope of Section 4(f). Countryside beauty is not mandated in Section 4(f). *ARP's Response:* Disagree. In highlighting the countryside, ARP was conveying Congressional policy regarding the resources Section 4(f) protects. 49 U.S.C. 303(a) clearly states: ''It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreational lands, wildlife and waterfowl refuges, and historic sites.'' By including that statement, ARP emphasized the philosophical as well as procedural requirements of 49 U.S.C. 303.

Concerning paragraph 512, an SBGP participating state sought information on how an SBGP participant is to consult with Federally-recognized Tribes. *ARP's Response:* Paragraph 212.e of the final Order clarifies SBGP and Tribal consultation. The paragraph states if an FAA organization is involved in an action connected to an SBGP airport action, the responsible FAA organization will conduct the Tribal consultation. Regional and district ARP personnel are available to assist the FAA organization if requested. If there is no FAA involvement, the SBGP agency should follow instructions in paragraph 303 of the Order. That paragraph notes that regional and district ARP personnel are available to assist the SBGP agency if requested. That paragraph and other paragraphs in Chapter 3 (Agency and Tribal Coordination) of the final Order discuss how FAA personnel (and SBGP personnel when appropriate) are to conduct Tribal consultation according to FAA Order 1210.20, American Indian and Alaska Native Tribal Consultation and Policy and Procedures. Paragraph 212.e notes that Order 1210.20 applies solely to FAA personnel, but urges SBGP agencies to use those instructions as a guide for conducting respectful, meaningful Tribal consultation when there are no FAA actions connected to an SBGP airport action.

Regarding paragraph 513, a commenter noted that extraordinary circumstances did not include consideration of Federally-listed endangered or threatened species. Therefore, the commenter noted that ARP's review of a wildlife hazard management plan (WHMP) might accidentally omit the need to comply with the Endangered Species Act (ESA). The commenter also urged ARP to include flexibility in its is NEPA procedures to allow it to CATEX WHMP approvals if Section 7 consultation under the ESA shows the WHMP would not affect or not jeopardize a Federally-listed endangered or threatened species. *ARP's Response:* The commenter is incorrect in stating that extraordinary circumstances do not include consideration of Federally-listed endangered or threatened species. In any event, paragraph 209.a clarifies that a grant to fund the development of wildlife hazard management plans (WHMPs) or the approval of those plans is categorically excluded under Order 1050.1E paragraphs 308e. Paragraph 209.b states that airport layout plan approvals and/or approvals of grants for Federal funding to carry out FAA approved WHMPs include items: (1) That may be categorically excluded; or (2) that may require preparation of an environmental assessment or an environmental impact statement. When reviewing airport sponsor requests for Federal funding to implement the WHMP or changing an Airport Layout Plan to depict approved WHMP projects, FAA must consider extraordinary circumstances, such as biotic communities and endangered species.

Chapter 6 Comments: ARP did not receive any general comments on this chapter. Addressing paragraph 600, two commenters noted that some FAA regions have prescribed formats for CATEXs. The commenters suggested that a standardized format would allow sponsors and their consultants to more easily provide needed information and documentation. A state block grant participant asks if SBGP participants must use regional or district Airport office-issued forms. Another commenter states, ''* * * it is completely wrong that no prescribed documentation or memorandum is required to support a categorical exclusion.'' *ARP's Response:* Disagree. ARP does not require standard forms for CATEXs. Turning to the comment that prescribed documentation should be required, ARP notes that: ''CEQ strongly discourages procedures that would require the preparation of paperwork to document that an activity has been categorically excluded'' (CEQ Memorandum: Guidance Regarding NEPA Regulations, 48 FR 34268, July 28, 1983). However, ARP requires documentation to verify compliance with any special purpose laws outside NEPA that apply to a proposed CATEX. Order 1050.1E, paragraph 304 requires this documentation and ARP reflects

that requirement in paragraph 607 of this Order. Therefore, case files for CATEXs must contain the documentation that applicable special purpose laws require. This procedure verifies that ARP has made the appropriate CATEX determinations for NEPA purposes and complied with applicable special purpose laws.

For information purposes, readers should note that paragraph 607.c addresses optional documentation. That paragraph states that if the categorical exclusion does not require documentation to address any special purpose laws, the responsible FAA official may choose to include information in the project file for reference or legal challenges that may occur. A note to that paragraph also states that ARP leaves the decision to include contractual requirements for SBGP participants to use forms to the discretion of Airports Division managers for the respective regions having participants in the SBGP. Readers should also note that paragraph 608 requires the responsible FAA official to notify an airport sponsor by letter or dated e-mail that ARP has categorically excluded an action. ARP requires this notice, not for NEPA purposes, but to ensure airport sponsors know that FAA has or has not categorically excluded proposed airport actions. ARP institutes this requirement to avoid misunderstandings that airport sponsors have had about ARP's environmental reviews of categorically excluded actions.

Concerning paragraph 601.a, one commenter states the sponsor should send a copy of the information it filed with FAA to the community adjoining the airport. *ARP's Response.* Comment noted. NEPA does not require documenting or sharing any information to support a CATEX. If an airport sponsor wishes to distribute information it may do so, but only after conferring with the responsible FAA official. This step ensures the information a sponsor distributes accurately reflects FAA policy and concerns. This is a step for EAs and EISs and is good management policy for CATEXs. The commenter should note that if a CATEX has an extraordinary circumstance that involves a special purpose law, distribution of information is likely. This is because some of those laws require public involvement. Therefore, the sponsor or the responsible FAA official, as appropriate, must distribute or inform the public according to the regulations implementing any special purpose law applicable to the proposed action (paragraph 607.b). This approach is reasonable, since CATEXs not involving special purpose laws or extraordinary circumstances typically have no or minimal adverse environmental effects.

Regarding paragraph 601.b, many commenters objected to the 30-day period the paragraph required. The draft Order proposed this time to enable the airport sponsor to obtain information from agencies to support a CATEX. One commenter noted 30 days may not be sufficient time for agencies to reply due to their respective workloads, while another commenter stated 15 days was sufficient time for an agency response. Two commenters noted the past practice allowing airport sponsors to provide documentation they have to support a CATEX should continue. One commenter noted that this information includes the documentation the sponsor believes it needs to meet an applicable special purpose law. Sometimes, agency consultation is not needed. Typically sponsors consult with the responsible FAA official to determine the needed documentation. *ARP's Response:* Agree in part. ARP has removed timelines for agency replies. Instead, paragraph 606.brequires the sponsor or FAA, as appropriate, to comply with the requirements of the special purpose law that applies to the proposed action. For example, if an applicable special purpose law has a 30-day review period, that is the time the responsible FAA official or sponsor must provide for the agency to reply. Paragraph 606.b(4) notes that the sponsor, if it is attempting to collect information from the agency, should immediately contact the responsible FAA official. That official should immediately contact the resource agency via telephone or e-mail to determine when the information will be arriving or to discuss alternative steps to meet the applicable law. The official should keep a record of that contact. If this step produces no information, the official should immediately contact the approving FAA official for a decision. The approving FAA official then decides if FAA should CATEX the action or require an EA or EIS. ARP believes this process will show it has made a good faith effort to comply with all applicable laws. To help ARP accomplish its duties and meet sponsor schedules, paragraph 603 urges airport sponsors or their consultants to develop realistic schedules. The schedules should consider the time needed to collect information needed to review a CATEX and any extraordinary circumstances it involves. The schedule should provide sufficient time for the responsible FAA official to review the proposed action. The intent of this instruction is to allow ARP to meet the requirements of special purpose laws that would apply to an action without infringing on the sponsor's desired schedule. Therefore, airport sponsors should consult responsible FAA officials as needed to determine the timelines and documents the official will need to determine if ARP may categorically exclude the action. If sponsors do not provide the information noted above, the responsible FAA official will have to collect it before the approving FAA official can make a decision on the project.

Another commenter on paragraph 605.b suggested adding some other resources to the list the paragraph notes. Two commenters also note that FAA may CATEX an action even it adversely affects a property on or eligible for the National Register of Historic Places. Another commenter stated that affected resource considerations for a CATEX should include national parks. A third commenter stated the Order should not require agency consultation if it is obvious that an action would not affect a resource. Requiring agency consultation would only delay the action. *ARP's Response:* Regarding the first comment, ARP disagrees. The paragraph listed the resources for illustrative purposes only. The final Order at paragraph 9.t defines the special purpose laws, while Table 1–1 lists those special purpose laws that apply most often to airport actions.

Addressing adverse effects on historic properties and CATEXs, ARP agrees. If the responsible FAA official meets the requirements of 36 CFR part 800 *et seq.* regarding adverse effects and the official decides an EA or EIS is not needed, the approving FAA official may CATEX the action.

Regarding the need to include national parks in a CATEX analysis, ARP agrees. The analysis would consider parks and other Section 4(f)-protected resources if they occur in a project's affected area. Table 6–3 listing extraordinary circumstances includes parks and other Section 4(f)-protected resources.

Addressing the last comment regarding agency consultation, ARP agrees in part. Agency consultation is not needed if the responsible FAA official decides it is obvious no extraordinary circumstance applies to the proposed action. However, those decisions are not always ''obvious.'' In these instances, the responsible FAA official should review any information about the action the sponsor provides information. Based on that information, the official should use his or her

discretion to decide if agency consultation is needed.

Concerning paragraph 605.b.(1)(e), a commenter states that this paragraph would require formal coastal zone consistency for each project in the coastal zone or affecting that zone. Most state agencies responsible for deciding if an action meets coastal zone standards require a formal review process, which according to the regulations could last 6 months. *ARP's Response:* Agree. To comply with Order 1050.1E, paragraph 304j (the likelihood an action is consistent with any Federal, State, or local law relating to the environmental aspects of a proposed action) would require a coastal zone consistency opinion from the appropriate State agency. However, ARP notes that state coastal zone management plans (CZMPs) list the specific Federal licensing, permitting, or approval actions to which that plans apply. ARP urges sponsors and responsible FAA officials to consult their respective CZMPs to facilitate overall airport development. As an alternative, sponsors should contact the CZMP agency early in project planning to determine if the agency lists any Federal actions in paragraph 9.g as actions the CZMP agency wants to review. Also, readers should note that if the CZMP does not list any of those actions, the State coastal zone agency must notify the sponsor and FAA that the State agency intends to review the proposed activity. That agency must make this decision within 30 days of receiving notice of the action. So, it is critical that the sponsor or its consultant contact the appropriate State agency early in project planning to ensure coastal zone requirements do not delay ARP's evaluation of the proposed action or the sponsor's intended schedule.

Discussing paragraph 603, a commenter states ARP notice to sponsors about the fate of a CATEX should be mandatory, not discretionary. *ARP's Response:* Agree. Paragraph 608 of the final Order requires the responsible FAA official to inform the airport sponsor via dated letter or e-mail. ARP includes this instruction to its personnel to ensure the airport sponsor knows that FAA has categorically excluded or has denied a CATEX for a proposed airport action. ARP makes this a formal step in its NEPA implementing instructions for CATEXs to address misunderstandings that have occurred regarding ARP environmental reviews of certain categorically excluded airport actions.

Chapter 7 Comments: Beginning general comments. A commenter noted the chapter does not provide information on public reviews of draft EAs. *ARP's Response:* Agree in part. Paragraph 307.c(3) of the draft Order required a 30-day public review of a draft EA if a public hearing would occur. However, the draft did not define any review period for other situations. ARP has corrected that oversight. Paragraphs 404.a(4) and 708 of the final Order discuss public availability and review of draft EAs for public hearings.

Regarding paragraph 700, a commenter from a state participating in the SBGP requests clearer procedures for processing EAs. The commenter asks what happens if the state decides an EIS is needed, but FAA does not agree. Will FAA prepare an EIS or will it issue a FONSI? *ARP's Response:* Regarding procedures for processing EAs, ARP refers the reader to paragraph 710 of the Order. Although this and other information throughout the Order refers to ARP personnel, the commenter should note paragraph 212.d. That paragraph tells SBGP participants to alter text and instructions regarding responsible FAA official and approving FAA official responsibilities as needed.

Addressing the comment about EIS preparation, as noted earlier, financing airport actions under the SBGP is not a Federal action, so NEPA does not apply. However, ARP notes the participating state signed a contractual agreement that makes the State responsible for completing an environmental evaluation of the airport action that will receive SBGP funding (paragraph 211 of the final Order). According to that contract, the evaluation must be similar to the interdisciplinary analysis ARP would have done had it retained responsibility for the action that is now the SBGP participant's responsibility. Therefore, FAA would not have any decision on a state's decision to prepare a document similar to an EIS, unless an FAA organization has authority over an action connected to the action under the SBGP. Paragraph 214 of the final Order discusses this situation. It notes although regional and district Airports offices are not responsible for preparing the EIS-like document, they have experience that may aid the SBGP agency in its document preparation. We recommend that readers seeking more information on the SBGP portion of the comment review item j of this Preamble and the sections addressing paragraphs 203.a; 307.f; 500; 502; and 504.

Regarding paragraph 701, a commenter states the 15-page limit noted here should be a recommendation. The most important thing is that the document provide information the responsible FAA official needs to independently review the proposed action. A few other commenters stated that although it's a good idea, a 15-page EA is unrealistic. They request a new paragraph suggesting ways to make an EA concise to help ''temper'' FAA requirements for more analyses and data, while another commenter suggests dropping the statement. *ARP's Response:* The Order retains CEQ's 15-page recommendation. The Order does not require that page length, but it notes the recommendation to convey information in question 36a of CEQ's Forty Most Asked Questions (46 FR 18026, March 23, 1981). ARP stresses that the page limit recommendation is for the EA itself. That page recommendation does not: Include proof of required consultation; material or data supporting the EA, or other information supporting statements the EA contains. Instead, appendices to the EA should present that information while the EA should cite the page numbers of the particular appendix supporting the conclusions the EA provides. Citing those pages in the EA facilitates reader review, while keeping the EA concise and focused on the most important information in the appendices pertaining to the potential environmental impacts. It is the information in the EA that the approving FAA official will likely use to determine the severities and contexts of environmental effects. Airport sponsors or their consultants should contact the responsible FAA Official to determine if the regional Airports office has developed EA examples. Although ARP includes this recommended page limit, the critical factor is ensuring the EA properly addresses potential impacts.

Addressing paragraph 701, a commenter seeks more information on the term, ''reasonable alternative.'' Paragraph 706.d.(5) notes that these are alternatives that may be achieved when one considers the technical, economic, and environmental factors associated with each alternative. Paragraphs 1007.e(4)(a) and (b) of the final Order also discusses the ''prudent and possible/(feasible)'' aspects of these alternatives.

Concerning paragraph 701.d, a commenter seeks clearer information on conflicts by suggesting the conflict be ''substantially grounded.'' *ARP's Response:* Section 102(E) of NEPA requires Federal agencies to study appropriate alternatives in any proposal involving unresolved conflicts concerning alternative uses of available resources. Paragraph 706.d(5)(a) of the final Order conveys this requirement and conforms 5050.4B with FAA Order 1050.1E. ARP agrees that there needs to be some evidence of various uses of an

environmental resource to show an unresolved conflict or resources. This ensures the responsible FAA official and others interested in the project do not spend time and effort resolving a conflict that has no basis.

Addressing 701.f, two commenters seek more explanation of the term, ''conceptual mitigation.'' One commenter notes 40 CFR 1502.14(a) and 1502.16(h) suggest the need for some level of detail for mitigation. The same commenter states language in 701.f is not consistent with Order 1050.1E, paragraph 405.g. *ARP's Response:* Comment noted. Paragraph 706.g explains this term and borrows some wording from Order 1050.1E. The paragraph describes the term as a preliminary, qualitative description of each mitigation measure's elements. The description should also allow the reader to understand the mitigation's benefits and how the mitigation would prevent or reduce expected adverse environmental effects.

Addressing paragraph 702, a state block grant participant recommends adding a note about preparing EAs. The commenter suggests the note direct Order users to realize that references to FAA in the chapter should also be construed to mean states under the SBGP. *ARP's Response:* Agree. New paragraph 211 of the final Order clarifies that for SBGP actions, the participating state agency assumes the roles a responsible FAA official or approving FAA official would normally fulfill, unless Order 5050.4B specifies differently.

Concerning paragraph 703, a commenter requests information on FAA's role in determining an adequate Purpose and Need. The commenter recommends including the requirement that the Purpose and Need meet accepted FAA airport design and planning standards. Another commenter states the responsible FAA official should seek local community input during EA preparation. *ARP Response:* Agree in part. Revised paragraph 707.a retains original text acknowledging FAA's role in reviewing the EA for adequacy under NEPA. We believe this clearly includes determining adequate purpose and believe no further guidance is needed. ARP has added to this paragraph the statement that the agency often helps the airport sponsor define Purpose and Need.

Turning to the recommendation to define purpose and need to include airport design and planning standards, ARP disagrees. Paragraph 502 of the Order states that ARP airport planners are responsible for reviewing proposed actions and reasonable alternatives for consistency with FAA's airport planning and design standards. ARP only approves projects meeting those standards, unless planners determine modifications to those standards are necessary to meet local conditions and that the modifications provide acceptable safety levels. Therefore, the responsible FAA official is assured that the proposed action and the reasonable alternatives that would achieve the purpose and need and that are analyzed in a NEPA document meet those standards or have qualified for modifications to those standards.

Regarding public input and EA preparation, paragraphs 301 and 704 emphasize that there shall be public involvement to the extent practicable in preparation of EAs, citing 40 CFR 1501.4. In addition, special purpose laws addressed as part of an EA may require public involvement. The responsible FAA official will ensure the required public involvement occurs as he/she complies with this final Order.

Addressing paragraph 703.b.(5), a state block grant commenter is unclear on an SBGP agency certifying that an EA is a Federal document and wants to know if the agency should forward the EA to FAA for signature. *ARP's Response:* As stated earlier in the responses to SBGP issues (item j; paragraphs 203a; 307f; 500; 502; 504; and 700), the document an SBGP participant prepares is *not* a Federal document because there is no Federal action, unless an FAA organization has authority for a connected action. Then, the document would be a joint Federal-State document. Therefore, SBGP agency should revise the adequacy statement in paragraph 707.f as noted in paragraph 212.d of the final Order.

Concerning paragraph 703.c, two commenters ask when a public hearing would be needed for a CATEX. *ARP's Response:* Paragraph 606.b(1) of the final Order addresses this point. Some special purpose laws such as Section 106 of the National Historic Preservation Act, or Executive Orders on floodplains and wetlands require public review. In some situations, the responsible FAA official may decide a public hearing is the most efficient way to get public review to comply with these special purpose laws.

Regarding paragraph 704, a commenter states the information on format and content does not match the information in Order 1050.1E. The commenter believes the intent to produce 10 to 15-page EAs and the ''substantially abbreviated description of the contents of an EA'' will lead to improperly prepared EAs. The commenter recommends including information similar to that in Order 5050.4A, paragraph 47. The commenter lists a number of items from that Order it believes Order 5050.4B should contain. Another commenter requests a better explanation of how the Desk Reference will link to the NEPA process and other processes such as those for general conformity and wetland permitting. A few commenters noted that the draft Order did not list Affected Environment as one of the EA sections. They asked if EAs no longer need that section. *ARP's Response:* Earlier sections of this preamble (item a, the Desk Reference, FAA Order 5050.4B; and Instructions on ''NEPA-like States'') discuss the Desk Reference. ARP refers the reader to those sections. Regarding the omission of the Affected Environment section, ARP notes that was an oversight. Paragraph 706.e of the Order provides information on this important EA section.

Addressing paragraph 704.a, a commenter asks if the EA cover sheet should list sub-consultants as well the prime consultant responsible for preparing the EA. *ARP's Response:* Sub-consultant names should not be on the cover sheet. A footnote to paragraph 706.a of the final Order states the List of EA Preparers should identify those people, including sub-consultants, who have prepared the EA and substantial background material used in to prepare the EA. The List will identify the person, the material he or she prepared, and his or her employer.

Concerning paragraph 704.b, a commenter noted that regulations implementing Section 106 of the National Historic Preservation Act allow agencies to withhold confidential information. The comment also notes that this paragraph states the reference material used to prepare the Purpose and Need must be available to anyone wishing to review it. *ARP's Response:* Agree. Paragraph 700.b of the final Order addresses this. It states all appendices and references must be available to anyone wishing to review them, unless another law prohibits disclosure of certain information or contains confidentiality provisions.

Regarding paragraph 704.c, a commenter states the discussion, ''splits the concept of purpose and need into two, distinct aspects.'' This could cause preparers to discuss this issue in two different EA sections. By focusing on the purpose, the commenter states NEPA documents could appear to be pre-decisional, rather than a document that takes a hard look at the proposed action an its alternatives. Another commenter suggests wording regarding the need to compare airport sponsor

forecasts to forecasts available from other sources. The section should discuss a reasonable range of deviation to support Purpose and Need and environmental analyses. *ARP's Response:* Regarding the Purpose and Need Statement, ARP agrees. Paragraph 706.b(2) of the final Order indicates this is one statement and should be one to two paragraphs long per CEQ's May 12, 2003, memorandum on Purpose and Need statements. ARP included the information to answer many questions it has received on this NEPA term since publishing Order 5050.4A.

Addressing the comment on comparing forecasts, ARP agrees. Paragraph 706.b(3) discusses the guidance ARP's Director of Airport Planning and Programming issued on this topic on December 23, 2004. That guidance lists acceptable forecast deviations between the sponsor's forecasts and FAA's Terminal Area Forecasts (*i.e.*, 10-percent and 15-percent discrepancy limits for 5 and 10-year forecasts, respectively).

Regarding paragraph 704.e(2), a commenter suggests revising the paragraph to emphasize integrating information special purpose law requirements into the EA to avoid duplicating information in a separate section of the EA discussing those laws. *ARP's Response:* Agree. The draft discussed this, but paragraph 706.f(2) provides further information on integrating these requirements. ARP notes combining NEPA and non-NEPA requirements helps the responsible FAA official determine impact significance for NEPA purposes and streamline other environmental reviews for airport actions.

Concerning paragraph 704.e(4), a commenter requested a definition of the term, ''Environmental Management System'' (EMS) and a statement about how an EMS would be helpful. *ARP's Response:* Agree. Paragraph 9.e of the final Order provides the definition. An EMS is a set of processes and practices designed to provide an organization with information about environmental impacts of its operations. An EMS is a tool to monitor and report on an organization's environmental practices and tracks measures used to mitigate environmental impacts due to organizational actions. For example, an environmental management system (EMS) may provide valuable information about airport facility designs and mitigation measures that have helped prevent or minimize significant environmental impacts. An EMS is also useful in tracking the status of environmental activities and to highlight those activities that may require change. Paragraph 706.g(4) discusses EMS use. It notes that reviewing other airport EMSs for similar actions could provide information on the effectiveness of various measures in minimizing environmental impacts due to airport construction and operation.

Concerning paragraph 705, a commenter states that public review of an EA is not mandatory, but it should be. *ARP's Response:* See the Response to the comment above regarding former paragraph 703 and public input and preparation of EAs. Various parts of the final Order discuss public involvement in EA preparation.

Addressing paragraph 705.b, a commenter requests information on NEPA compliance if a sponsor has completed a project but then decides to seek ARP funding for it. Another commenter states the approval of an ALP is normally a CATEX, so why does this discussion on EAs address that issue. *ARP's Response:* First, addressing the request for post project funding, the Order defines Federal actions to include ALP approvals . NEPA must be met before FAA issues an unconditional ALP approval. An airport sponsor operating a public-use airport under FAA's purview should not build a project unless and until FAA has unconditionally approved the ALP depicting the proposed facility (see paragraph 202.c of the final Order). In addition, this Order provides for compliance with NEPA and environmental requirements under the airport funding statute so that the agency may proceed to process a grant application. ARP reminds airport sponsors that NEPA applies to actions that would involve first time or altered ALPs, even if the actions will not receive AIP funding.

Addressing the comment about categorically excluding revised ALPs, ARP notes that approvals of some actions depicted on ALPs may be CATEXs, while others may be the subjects of EAs or EISs. It is the proposed action and the severity of its impacts that determine the NEPA process, not the review of the ALP. Certainly, actions depicted on an ALP may be categorically excluded if they are listed in Order 1050.1E, paragraph 307 thru 312 (Tables 6–1 and 6–2 of the final Order), and the responsible FAA official determines extraordinary circumstances do not warrant preparation of an EA or EIS. However, other actions that have more substantive adverse effects require more intensive NEPA processing. Paragraphs 702.a–j and 903.a and b, list actions depicted on an ALP that are normally subjects of EAs or EISs, respectively.

Regarding paragraph 706.g, two commenters state proposed conceptual mitigation must be coordinated with agencies having jurisdiction for an affected resource and those agencies must concur with the mitigation. *ARP's Response:* Agree in part. FAA as the lead Federal agency has ultimate discretion in deciding the mitigation needed for an action. To require that outside agencies must concur in the mitigation lessens FAA's authority as the agency responsible for the action. However, paragraph 706.g of the final Order notes the sponsor should work closely with the responsible FAA official and expertise or jurisdictional agencies. This allows the sponsor to use the agencies' expertise and try to ensure the mitigation meets the recommendations of the agencies. If substantial disagreement about mitigation or other issues exists between the sponsor or FAA and an expertise agency, the responsible FAA official should contact APP–400 as noted in paragraph 707.d. This will allow APP–400 to understand the issues and assist the responsible FAA official as needed to complete the EA process.

Chapter 8 Comments: ARP received no general comments on this chapter. Beginning paragraph 800 comments. A commenter suggests a comprehensive definition of the term, ''special purpose laws'' and deleting the partial list the paragraph presented. Another commenter from a state block grant agency recommends adding a note to provide state block grant participants an alternative approval process. The note should state references to FAA should refer to SBGP participants. *ARP's Response:* Concerning the comment on special purpose laws, ARP agrees. Paragraph 9.t of the final Order defines the term and provides a list of special purpose laws that apply most often to airport actions. The Desk Reference mentioned earlier in this Preamble will provide instructions on applying those laws to airport actions. Until ARP publishes it, readers should use Order 1050.1E, Appendix A for information on those laws. Paragraph 800 of the final Order no longer discusses special purpose laws.

Addressing the SBGP issue, paragraph 211 of the final Order notes that for SBGP actions, the participating state agency assumes the roles a responsible FAA official or approving FAA official would normally fulfill, unless Order 5050.4B specifies differently.

Concerning paragraph 801, a commenter states public health impacts need to be evaluated, but notes that Appendix A of Order 1050.1E contains the impact categories where this would

occur. Should ARP use this information? Also, a commenter states the paragraph should specifically require impact intensity determinations for national parks. *ARP's Response:* Addressing the comment on public health impacts, ARP generally agrees that Order 1050.1E, Appendix A, provides good information on assessing various impact categories that could affect public health. Users of this Order should use Order 1050.1E, Appendix A until ARP issues the Desk Reference. Readers should note that Appendix A of Order 1050.1E provides the information available on the seven criteria pollutants. At present, there is no reliable and scientifically-approved methodology available to conduct health risk assessments for air toxics (*i.e.*, hazardous air pollutants). In addition, EPA has not established standards or thresholds for evaluating air toxics. Regarding the comment on national parks, ARP requires the analysis to consider impacts on parks and other Section 4(f)-protected resources if they occur in a project's affected area.

Concerning paragraph 801.b, a commenter urges ARP to include the airport sponsor in discussions about mitigation because the sponsor is responsible for possible mitigation and project design. Two commenters recommend including a statement that expertise agencies should determine the adequacy of mitigation. Another commenter stated that the first two sentence of the paragraph conflict. *ARP's Response:* Disagree. Paragraph 801.c of the draft Order included the airport sponsor in discussions about mitigation. Paragraph 800.b of the final Order slightly revised the wording, but makes the sponsor a critical part of mitigation and design decisions.

Regarding expertise agency concurrence on mitigation, ARP disagrees. FAA, as the lead Federal agency for most airport actions, has ultimate discretion in deciding the mitigation the FONSI will require. To allow an outside agencies to determine that mitigation lessens FAA's authority as the lead Federal agency responsible for the airport action. However, paragraph 706.g of the final Order notes the sponsor, when developing mitigation, should coordinate with FAA and expertise or jurisdictional agencies. This allows the sponsor and FAA to use the jurisdictional agency's experience and expertise when developing mitigation that a FONSI would likely contain.

Addressing the final comment, ARP disagrees. The intent of the paragraph in the draft was to alert readers that the responsible FAA official will make an extra attempt to determine if any mitigation or project design change would reduce impacts below significant thresholds. To better clarify this point, ARP revised paragraph 800.b to note that this effort should occur before the responsible FAA official recommends preparing an EIS. The official does so in consultation with expertise agencies and the airport sponsor.

Addressing paragraph 802 comments, a commenter states public involvement should be compulsory and the process for it should be disclosed. The same commenter states the FONSI should be valid for only 3 years. *ARP's Response:* Addressing public involvement, ARP agrees in part. We have responded to this concern in responses to comments on various paragraphs (*e.g.*, 205; 303; 703). ARP stresses that 40 CFR 1501.4 requires public involvement to the extent practicable during EA preparation. In 1050.1E, paragraph 406.e(1) and paragraph 804 of this Order FAA has also adopted procedures for making FONSIs available for public review for 30 days before the agency makes its final determination on the severities of project impacts . These instructions provide multiple opportunities for mandatory and optional public involvement.

Regarding FONSI longevity, ARP agrees. ARP addresses this issue in paragraphs 1401 and 1402 of the Order, which discuss special instructions and re-evaluating and supplementing NEPA documents, respectively. Paragraph 809.c mentions when FAA may need to amend a FONSI.

Paragraph 802.i, a commenter requested an explanation of the term, ''mitigated FONSI.'' *ARP's Response:* ARP has added a footnote to the ''boilerplate statement'' in paragraph 802.g of the final Order. It states a ''mitigated FONSI'' is one conditioned upon mitigation measures that avoid or reduce otherwise significant effects below applicable threshold levels. Paragraph 805a of this Order recommends preparation of a FONSI /Record of Decision (FONSI/ROD) to provide the approving FAA official's reasoning in support of the FONSI in these instances.

Discussing paragraph 804.a comments, one commenter suggests clarifying that the Regional Administrator would sign a FONSI when ARP and at least one other FAA organization are involved in a proposed action. Another commenter states firm guidelines are needed for reviewing findings at each reviewing level. Another commenter notes that ARP cannot require other FAA organization to review FONSIs. Instead, ARP should provide the opportunity for that review. The same commenter notes that in a particular region, Airports Division managers have FONSI approval authority. The commenter recommends the paragraph allow re-delegation of the Regional Administrator's approval. *ARP's Response:* ARP agrees with the comment regarding clarification that the Regional Administrator signs the FONSI when the proposed actions involve more than one organization within the FAA. Paragraph 803.c of the final Order clearly states under FAA Order 1100.154A, Delegation of Authority, the Regional Administrator overseeing the FAA regional office responsible for the EA will issue the FONSI.

Regarding firm deadlines, ARP disagrees. It cannot set review schedules for other FAA organizations. ARP will discuss project importance with the reviewing organizations and urge them to review projects within 30 days of receiving the document.

Addressing the comment that this Order should re-delegate signature authority, ARP disagrees. FAA Order 1100.154A, Delegation of Authority, clearly describes the approval authority when more than one FAA organization is involved in an action. Order 5050.4B cannot modify the requirements of Order 1100.154A.

Concerning paragraph 804.b, a commenter states the Order does not require Regional Counsel review when special purpose laws beyond Section 106 and Section 4(f) are involved in an action. A state block grant participant states the Order should provide alternative review procedures or remove the internal coordination for SBGP actions. Another commenter states FAA Regional Counsel should not review actions, ''where the SHPO has issued a determination of no effect, a determination of no adverse effect, or a conditional determination of no adverse effect.'' *ARP's Response:* Paragraph 803.a of the Order discusses the internal review process. Required legal review occurs when actions involve: (1) Opposition by a Federal, State, or local agency or a Tribe on environmental grounds or a substantial number of people affected by the project; (2) resources protected under Section 106 of the National Historic Preservation Act; or (3) a determination of use of resources protected under Section 4(f) of the Department of Transportation Act (recodified at 49 U.S.C. 303c). In addition, the responsible FAA official may use his or her discretion for actions that affect other resources when deciding if Regional Counsel review is needed (paragraph 802.a(2)).

Addressing the SBGP issue, coordination within FAA would depend on the SBGP and its connected actions as discussed in item j. of this Preamble and responses to comments on paragraph 703.b(5). If there is no FAA organization involved, the action does not require FAA Regional Counsel review as noted in Order 1050.1E paragraphs 404e and 406c. However, ARP urges SBGP participants to contact their own State attorneys for legal reviews of those SBGP actions. Addressing the last commenter's statement, ARP wishes to alert the commenter that the SHPO is not responsible for making these determinations. According to 36 CFR 800.2(a) FAA is responsible for doing so. ARP has found Regional Counsel review of these determinations is helpful. ARP chooses to retain that review.

Concerning paragraph 805, a commenter objects to providing a 30-day review for a proposed FONSI in certain situations. *ARP's Response:* Comment noted. Paragraph 804.b of the final Order reflects agency-wide requirements in Order 1050.1E paragraphs 406e.(1)(a) and (b) and 406.2(2).

Addressing paragraphs 805.c and d, a commenter objects to the 30-day period for projects that include mitigation reducing an action's potential significant impacts or if the action is highly controversial. *ARP's Response:* Agree. We have deleted the 30-day review period. Paragraph 805.c discussing FONSI/ROD availability addresses this issue.

Regarding paragraph 808, a commenter requested guidance on when approved FONSIs would be available to the public. The commenter asks if FONSI/ROD availability should be similar to notice of a ROD prepared for an EIS. *ARP's Response:* Agree. Paragraph 805.c of the final Order refers the reader to paragraph 1402.b. Although information in that paragraph refers to EISs, it is appropriate for FONSIs and their accompanying EAs as well. That information will help ensure approving FAA officials use the most current environmental information in their decisions.

Concerning paragraph 810, a commenter suggests adding information saying when ARP would need to revise a FONSI. ARP's Response: Paragraph 809 addresses that issue.

Chapter 9 Comments: ARP received no general comments on this chapter. Regarding paragraph 900, a commenter requests that the state agency having Department-wide responsibilities for developing airport projects be able to prepare an EIS under FAA's direction. Another commenter suggests adding a sentence noting the importance of setting realistic milestones for completing EIS tasks, with milestones based on project complexity. *ARP's Response:* Addressing the first comment, ARP agrees. When a state or agency subject to NEPA-like laws is involved, it would prepare the equivalent of an EIS. In those instances, the State or agency will have expertise in complying with applicable mini-NEPA laws. In other instances where an EIS is called for, although ARP isn't responsible for preparing the document addressing the SBGP action, regional or district Airports office personnel are ready to answer questions and provide guidance to the SBGP agency. If there is a connected action remaining under the purview of an FAA organization, FAA would be a joint-lead agency, helping the SBGP prepare the EIS. Paragraph 214 of the final Order has been revised to include this new information.

Regarding the discussion of realistic milestones, ARP agrees. Paragraph 902.c discusses factors critical to establishing realistic schedules to complete EISs.

Addressing paragraph 901 comments, a commenter noted an EIS should address environmental impacts and should not be expanded by discussing other public concerns outside of environmental effects. *ARP's Response:* Agree. The intent of the paragraph as drafted was to include factors that had environmental connections. ARP has revised the discussion, which is now in paragraph 902.a of the final Order. The text states the EIS should properly analyze and disclose potential significant individual and cumulative environmental impacts a proposed airport action and its reasonable alternatives would cause. Paragraph 902.b notes that information must be clearly written so the public understands it.

Concerning paragraph 903, three commenters state a scoping meeting is not necessary for every EIS. *ARP's Response:* Agree. ARP has revised paragraph 906 in the final Order to clarify that scoping meetings are optional. ARP has removed text that confused the commenter.

Addressing paragraph 903.b, a commenter noted the paragraph discusses duties that should occur during master planning or feasibility engineering, both of which precede the EIS. *ARP's Response:* Agree. ARP has urged airport sponsors to complete most or all airport planning before ARP begins preparing its EIS. Experience has shown that when planning is delayed, EIS schedules are normally delayed. This ''domino effect'' occurs because FAA and other interested parties do not have the planning information that is critical to efficiently determine an EIS's scope and the analyses needed to address that scope.

To help airport sponsors complete airport planning with NEPA in mind, ARP has prepared a new Chapter 5 for this Order. That chapter outlines the connection between airport planning and how it affects timely NEPA processing. Chapter 5 of the Order incorporates information from Chapter 5 of ARP's recent advisory circular on airport planning (150/5070–6) and ARP's, Best Practices Web site. Readers may wish to review those documents for more information.

In addition, paragraph 904.b of the final Order discusses the timing of the start of an EIS. That paragraph states that FAA will start an EIS when it receives a proposed for an airport action that contains sufficient planning data or information to meaningfully evaluate alternatives and their potential environmental effects (40 CFR 1508.23). Paragraph 904.b provides this information because during the past decade, ARP has found that a lack of well-conceived and well-developed airport planning information or a failure to resolve planning issues have caused substantial delays in the NEPA process. Many times these delays were not NEPA-related, but were due to a lack of good planning data. ARP found that this lack of data severely hampered its ability to meaningfully evaluate project impacts and prepare the EIS.

Regarding paragraph 903.c(6), a commenter stated delay is a big problem for airport development projects, with the EIS process being a major reason for that delay. The commenter states its perception is that FAA and other agencies do not appreciate the urgency that airport sponsors, airlines, and the public feel. FAA should commit to a fixed, ambitious deadline to substantially improve its performance and reduce its tendency to over analyze and conduct long-term reviews. The commenter states FAA should work in parallel with other agencies, not sequentially or separately. The draft does not reflect the need to reduce time needed for EIS preparation. The draft should include ways to oversee and coordinate EIS processes to avoid unnecessary delays. *ARP's Response:* ARP respectfully disagrees that its personnel do not appreciate the urgency the sponsor and industry feel. See the response above under General Comments, Saving Time During NEPA Process, relating to the recommendation that the Order include instructions for

milestones, deadlines, and schedules. ARP has a well-established track record of conducting concurrent reviews under NEPA and other applicable environmental laws to make the environmental review process efficient and effective. ARP notes that it will continue to work to improve the efficiency and effectiveness of the NEPA process.

Addressing paragraph 903.d, a commenter states FAA should rely on valid information sources regardless of the information's age. The same commenter states that ARP should consult with the airport sponsor before deleting an alternative. *ARP's Response:* Regarding the validity of information, ARP disagrees. The draft paragraph noted the responsible FAA official should consider whether a document's age affects its validity for NEPA purposes. ARP highlights this, not because information is of poor quality, but because due to its age, the document may no longer accurately reflect existing environmental conditions critical to FAA's decisions. Paragraph 906.d of the final Order deletes the word, ''caution'' and cites paragraph 1401. Paragraph 1401 discusses the need to re-evaluate EAs and EISs. Regarding consulting the sponsor about deleting an alternative, ARP agrees in part. Paragraph 906.d(1) has been revised to recommend that FAA notify the sponsor when the agency determines that an alternative studied in detail in the EA will be briefly discussed in the EIS and then dismissed from further consideration.

Concerning paragraph 904, a commenter notes that a substantial amount of ''scoping'' takes place before the decision to prepare an EIS occurs or before an agency publishes a Notice of Intent (NOI). The commenter suggests the Order explain how ARP should consider scoping conducted before the NOI. *ARP's Response:* Comment noted. According to 40 CFR 1501.7, scoping shall follow the publishing of the NOI. ARP recognizes substantial, good work often occurs before the NOI, but that would be consultation and does not fulfill EIS scoping requirements. The information gleaned from the pre-NOI work is often valuable and is frequently used in preparing for scoping. Instructions that were in paragraph 904 of the draft Order, now appear in paragraph 907 of the final Order but remain unchanged.

Addressing paragraph 906.b comments, a commenter suggests adding text urging the preparation of a Memorandum of Agreement (MOA) with cooperating agencies. The MOA is a very useful tool in defining roles and commitments to FAA's schedule. The commenter notes this is a good practice and almost always improves the process and reduces delays. Another commenter objects to the need to invite agencies having permitting or approval authorities to be cooperating agencies during EIS preparation. The commenter believes cooperating agencies should be limited to those agencies that propose to implement or approve an action. The commenter states ARP should invite only agencies having discretionary approval to be cooperating agencies. The commenter further states that agencies providing funding or exercising authority over affected resources should not be cooperating agencies. A third commenter states that municipalities adjoining an airport should be cooperating agencies. A fourth commenter suggests contacting local land use agencies regarding future land uses in the airport vicinity. *ARP's Response:* Regarding the MOA with cooperating agencies, ARP agrees. Paragraph 906.a(5) of the final Order discusses a similar a document, the Memorandum of Understanding (MOU). We have revised the paragraph to encourage ARP personnel to consider the utility of entering into a formal agreement with cooperating agencies. ARP notes that a ''one-size fits all'' approach is not appropriate.

Turning to the comments on cooperating agency status, ARP disagrees with the first commenter and agrees, in part with the second one. As lead Federal agency, ARP is required to invite agencies having permitting or approval authority for the proposed action to be cooperating agencies (40 CFR 1501.6 and 1508.5). In addition, in January 2002, CEQ urged all Federal agencies to improve their cooperating agencies efforts by inviting participation by Federal and non-Federal entities as cooperating agencies. Following that date, ARP notified its personnel that agencies having authority for a component of a project should be a cooperating agency during EIS preparations. Paragraph 910.c of the final Order reflects those instructions. To enhance EIS preparation, the responsible FAA official may also decide to invite agencies with expertise to be cooperating agencies. This may be helpful because those agencies often have information and knowledge that aids in properly scoping and analyzing an action's environmental effects or mitigating expected environmental impacts. It may also foster good relations and facilitate early resolution of environmental concerns.

Turning to the comment that municipalities adjoining an airport should be invited to participate as cooperating agencies, ARP believes that this it has to make decisions on cooperating agencies on a case-by-case basis. Among other things, ARP considers the potential benefits extending an invitation may offer. These considerations may include: The existence of municipal data and information that are not publicly available; the history of the relationship between the airport sponsor and the municipalities; or approval authority the municipality may have regarding an aspect of the proposed project.

Regarding the comment on recognizing local land use agencies as cooperating agencies, ARP disagrees. Paragraph 910.a recommends contacting and involving local agencies participate as ''interested parties'' because these agencies can provide valuable information about land uses in the airport area that may be noise sensitive or otherwise incompatible with airport operations (e.g., attracting wildlife that are known hazards to aviation). The responsible FAA official should consider the role that the local land use agency plays and the history of its relationship with the airport in determining whether it makes sense to invite their participation as cooperating agencies. Involving hostile local agencies would jeopardize ARP's ability to establish a functional working group and complete an effective and efficient NEPA process.

Regarding paragraph 906.j, two commenters question the information about a cooperating agency's failure to provide comments during scoping. A commenter seeks information on the requirement, while another states this is an, ''empty threat.'' *ARP's Response:* Comment noted. ARP retains the text because it is not an, ''empty threat.'' CEQ has addressed this situation and paragraph 910.i of the final Order recognizes CEQ's position on it. Those interested in that position should review Question 14.d of the Forty Most Asked Questions (46 FR 18026, March 23, 1981).

Chapter 10 Comments: Beginning General Chapter 10 comments. A commenter notes that the Order or FAA's Web site should provide copies of all FAA and DOT documents and orders cited in FAA Orders 1050.1E and 5050.4B or that are often used during the NEPA process. *ARP's Response:* Comment noted. ARP chooses not to include the material in Order 5050.4B. Since this information is available from other sources, ARP suggests that interested parties use web-based ''search engines'' to find the material. Regarding additions to Order 1050.1E, the commenter should contact FAA's Office

of Environment and Energy, the FAA office responsible for the content of that document.

Regarding paragraph 1001.e, a commenter states that the EIS should also identify the airport sponsor's ''preferred alternative.'' Another commenter noted the text stated the airport sponsor decides if it will complete proposed action, but was questioning the statement about the conditions that would lead to a preferred alternative that is different than a sponsor's proposed action. *ARP's Response:* Addressing the use of ''preferred alternative'' to identify a sponsor's action, ARP disagrees. For NEPA purposes, the term, ''preferred alternative'' has a specific meaning. According to Question 4a of the Forty Most Asked Questions document noted in response to comment 906.j, this is the alternative that, ''* * * the agency [emphasis added] believes would fulfill its statutory mission and responsibilities, giving consideration to economic, environmental, technical and other factors.''

Regarding the comment about preferred alternative differing from a proposed action, ARP notes the comment. ARP alerts the commenter that simply selecting a proposed action because that is what the sponsor wishes is ''rubber stamping'' an airport plan without considering its economic, environmental, and technical effects. That is not NEPA's intent, nor is that the way ARP makes its decisions. After completing its NEPA process, ARP has occasionally selected a preferred alternative that differed from a sponsor's proposed actions. As noted in the first part of this response, ARP's independent analyses and the approving FAA official's consideration of economic, environmental, and technical factors can lead to a decision differing from the airport sponsor's.

Addressing comments on paragraph 1003, a commenter states, although it recognizes FAA's final discretion in deciding an EIS's adequacy, the paragraph unduly limits airport sponsor participation in the EIS process. The comment further notes that airport sponsors play necessary and appropriate roles in EIS preparation, especially when State documents have been prepared for actions. The commenter wants ARP to revise the paragraph to allow more active sponsor participation. Another commenter seeks instructions allowing the airport sponsor to review consultant work to decide if it has been performed competently and completely per the contract the sponsor finances. A third commenter objects to excluding everyone except FAA in getting, managing, or using raw data. The commenter suggests that local citizen advisory committees provide input to the consultant's selection. FAA's approach concerns the commenter because it may allow the agency to conclude the process without a thorough review of analytical procedures. *ARP's Response:* Regarding sponsors participating in EIS processing, please see the response to comment in this Preamble's Consultation with airport sponsors section.

Regarding the comment on the sponsor's review of consultant work for contract purposes, under 40 CFR 1506.6(c) FAA, not the sponsor, has exclusive oversight and authority to direct the EIS consultant's work. This impliedly includes the authority to assure that consultant EIS work is fully and competently performed. In overseeing and directing the work of EIS consultants, FAA decides if the contractor's work is meeting quality and timeliness requirements under the contract. When FAA becomes concerned that the consultant (contractor) is in default, then the sponsor will be given sufficient access to information to allow it make its own determination. EIS contracts are exceptions to ordinary contracts because Section 1506.6(c) overrides competing state and local procurement and contract management practices.

Turning to concerns about cost control, the current process contains ample safeguards to assure that the work is performed at reasonable costs. The sponsor has access to sufficient information, including the cost estimates in the Statement of Work, consultant invoices, and the EIS schedule, to determine whether costs are being reasonably incurred. If sponsors have concerns that the costs of the work being performed are not reasonably incurred then sponsors present those concerns to FAA and they are normally resolved.

ARP appreciates the sponsor's desire for greater access to information during the NEPA process. As discussed above in detail in response to the general comment, section, Consultation with airport sponsors, FAA meets with sponsors to discuss and reach agreement upon the access to be provided. As far as access to verify costs, the current process strikes the right balance between cost considerations and conserving the integrity of the NEPA process. FAA is aware that there have been rare, but regrettable occasions when sponsors have terminated EIS contracts due to objections to cost. On one occasion this occurred, when in FAA's opinion, the contractor was performing work fully and competently. However, the sponsor felt the contractor's estimate for continuing work was too costly and desired not to continue to work with the contractor.

These past instances suggest additional sponsor review could have the unintended effect of making cost control a higher priority than meeting NEPA requirements. The reviews proposed would also require the agency to release contractor drafts under FOIA. This would potentially cause public confusion, a chilling effect upon agency deliberations, and diversion of agency resources from the NEPA process. It is unnecessary to expose the NEPA process to such a review with these potential consequences when there are other ample, less intrusive means available for controlling costs. Therefore, ARP does not agree that sponsors should be allowed to review consultant's work for adequacy and reasonableness of cost prior to authorizing payment.

Addressing the comment recommending citizen advisory board input in selecting EIS consultants, ARP disagrees. Federal agencies must comply with the Federal Advisory Committee Act to obtain consensus recommendations from the public. Given the time, effort, and money involved, ARP does not believe that it is practical for the FAA to convene Federal advisory committees to represent the various groups that might want to provide input to assist FAA with the very limited task of selecting airport EIS consultants.

Concerning paragraph 1004.a, three commenters objected to the statement that sponsors may develop conceptual plans or designs that depict about 20 percent of the specifications needed to build or perform other work. One of these commenters noted there is no legal authority for this change in policy or intrusion into the sponsor's affairs. The commenter notes that limiting design and engineering imposes delays in improvements, which are already, in the view of the commenter, delayed by a process that takes too long. Also, extensive design and other information may be needed to finance a project, develop mitigation, and engage the community. Section 1506.1(d) does not prevent applicants from developing plans or designs or performing work necessary to apply for licenses, permits, and assistance. Another commenter observed that this statement would appear to limit the amount of engineering/design work that an airport sponsor can undertake in anticipation of completion of the NEPA process. This

commenter recommends replacing ''may develop'' with ''often develops.'' A third commenter asks if a sponsor goes beyond the 20-percent provision, what is the responsible FAA official to do? *ARP's Response:* ARP agrees in part. Paragraph 1004.c. of the final Order (''Plans and Designs for the NEPA process'') replaces the term ''may develop'' with the phrase ''[n]ormally, this analysis requires * * *.'' Paragraphs 1004.c (2)–(4) explain that ARP discourages sponsors from developing substantially more than 25 percent of the detailed plans, except in certain cases where a sponsor is applying for a permit or monetary assistance. Paragraph 1004.c also notes that going beyond stated design development risks prompting legal challenges. It also lists the steps that responsible FAA official shall take to assure the integrity of the EIS process. These revisions clarify that FAA is establishing an approximate level of project design for its own use. It is doing this to assure that the actions it takes during the EIS, including approval of grant funds to prepare the EIS itself, meet the letter and spirit of NEPA. Section 1004.c. in the final Order also now states that completing final project design may raise issues of compliance under Section 1506.1 and is at the sponsor's own risk. This reflects the dearth of case law concerning the responsibilities of Federal agencies and applicants when an applicant is completing final project design before the EIS process has been completed. See, CEQ's Forty Most Asked Questions, Question 11 (46 FR 18026 March 23, 1981).

Turning to the comment that extensive design and engineering may be needed for matters within the sponsors' prerogatives such as project financing, we note that Section 1506.1(d) permits applicants to develop plans and designs needed to apply for permits, licenses, and assistance. It is unclear under the case law whether such matters otherwise lie within the sponsors' prerogatives during completion of an EIS. ARP has added a new subsection d to Section 1004 that acknowledges the exception for certain plans and designs and recommends that sponsors consult FAA in these circumstances to determine the level of planning needed. It also clarifies that FAA does not discourage preparation of more detailed plans in the circumstances discussed there. As noted in paragraph 1004.c.(2) and discussed above, preparation of detailed plans before the EIS is completed may engage the community in ways that are not helpful. It has not been ARP's experience that a greater level of detail than 25% is normally needed to develop mitigation, however, if data become available to support this statement then we will change this guidance as appropriate.

Responding to the comment about responsible FAA official duties if a sponsor exceeds the 30-percent design level, ARP does not have jurisdiction by law to halt completion of final project design by sponsors.[10] Section 1004 clarifies that responsible FAA officials should normally limit AIP and PFC funding for the design work in an EIS to the 25% level. See, *Village of Bensenville* v. *FAA,* (376 F.3d 1114 (D.C. Circuit, 2004). Responsible FAA officials also must also warn sponsors in writing about the possible risks of not complying with 1506.1, as described in detail in new subsections (2), (3), and (4) of section 1004.c. ARP also added a new subparagraph b to Section 1004 to remind personnel about their responsibilities under related provisions concerning ALP approvals and land acquisition.

Regarding paragraph 1005.e, a commenter requests revisions to allow adoption of material other than NEPA documents. *ARP's Response:* ARP has added a note to paragraph 1005.d addressing this issue. The note states that the responsible FAA official may use information not in NEPA documents to prepare EISs for FAA actions. However, before doing so, the official must independently review the information and accept responsibility for it. This is the same process those officials use to adopt NEPA documents that other agencies prepare.

Addressing paragraph 1007, one commenter recommended that the Order provide guidance on addressing cumulative impacts. The commenter suggested using one of these methods: as a separate impact category in the Environmental Consequences section; within each of the other impact categories; or as a separate chapter. *ARP's Response:* 1007.i of this Order provides a summary of cumulative impacts. ARP will provide more detail on this topic in the Desk Reference it will prepare. Until ARP issues that information, document preparers and reviewers should use paragraph 1007.i, Order 1050.1E, paragraph 500c, and CEQ's guidance on assessing cumulative impacts, Considering Cumulative Effects Under the National Environmental Policy Act (*http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm*). Concerning the presentation of cumulative impacts, EIS preparers may use any of the three presentation methods mentioned above in the comment summary.

Addressing paragraph 1007.d, a commenter states the Purpose and Need information is not consistent with Order 1050.1E, paragraph 405.c. Another commenter states FAA should have one clear statement of Purpose and Need. Two commenters highlight the need to consider airport design and aviation concerns in the Purpose and Need. They discuss several planning issues like load factors and airside design criteria. *ARP's Response:* Agree in part regarding consistency with 1050.1E. ARP used information from Order 1050.1E, paragraph 405c and 506d in preparing purpose and need instructions in 5050.4B. However, ARP notes that many other FAA organizations build facilities. In contrast, as paragraph 706.b notes, an airport sponsor, not FAA, initiates proposed development projects at an airport. Sponsors apply to FAA for approval to amend airport layout plans to depict their projects and for financial assistance for construction. The instructions in 1050.1E primarily address purpose and need statements for direct Federal actions that FAA itself undertakes (*e.g.*, constructing radar facilities, installing aids to navigation, NAVAIDS). ARP personnel require supplemental instructions because case law continues to evolve concerning the definition of purpose and need and the obligation to evaluate alternatives to a proposed action developed by an applicant for a license or permit.

ARP has revised paragraph 706.b to delete the statement formerly in paragraph 1007 ''Since airport sponsors, not the FAA, propose airport projects, the responsible FAA official's role is to review the sponsor's proposal to determine if it meets the purpose and need.'' (Paragraph 1007.d now refers the reader to paragraph 706.b.) ARP has deleted this sentence because it is somewhat inconsistent with instructions in 1050.1e paragraph 506d[11] and the CEQ guidance underlying it.[12] ARP has replaced the

[10] Under 49 U.S.C. 47172, enacted in 2003 as part of Vision 100, ARP may approve design-build contracts.

[11] Paragraph 506d of 1050.1E states: ''[The purpose and need] distinguishes between the need for the proposed action and the desires or preferences of the agency or applicant * * *''

[12] Question 2a of the Memorandum: Forty Most Asked Questions (46 FR 18026–18038, March 23, 1981). Question 2 indicates: ''In determining the scope of alternatives to be considered, the emphasis is on what is ''reasonable'', rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Reasonable alternatives include those that are practical or feasible from the technical or economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.''

sentence with the following statement in paragraph 706.b(1): ''The purpose and need should be defined considering the statutory objectives of the proposed Federal actions as well as the sponsor's goals and objectives.'' The new text is consistent with *Citizens Against Burlington Inc.* v. *Busey,* 938 F.2d, 190 (D.C. Cir. 1991). It is also consistent with prior CEQ guidance that the applicant's goals and objectives may be considered along with other common sense realities; CEQ Guidance on NEPA Regulations, Selection of Alternatives in Licensing and Permitting Situations (48 FR 34263 July 28, 1983).

Section 1007.d(1) summarizes 49 U.S.C. section 47171(j), which establishes a process for notice, comment, and deference to FAA Purpose and Need statements for actions at congested airports. Order 5050.4B must also supplement the instructions in Order 1050.1E relating to purpose and need statements because different legal requirements apply.

In response to the comments on airport planning, ARP agrees in part. Paragraph 706.b of the final Order mentions planning concerns in general, but does not provide much information because the purpose of the Order is to use planning input to complete the NEPA process. In preparing its advisory circular on airport master planning (AC 150/5070–6), ARP notes it is the sponsor's duty to adequately plan an airport project before ARP starts preparing an EIS. ARP has provided information on that planning process in Chapter 5 of that AC and in paragraph 904.b of the final Order. Chapter 5 of this Order also summarizes the important link between the NEPA process and airport planning.

Concerning another comment on paragraph 1007.d, a commenter suggested adding a ninth subparagraph to discuss the need for accurate forecast data and a reasonable range among data to develop supportable Purpose and Need statements and conduct good environmental analyses. Another commenter states that using the 2001 benchmarking study to determine project that ARP would streamline to meet Vision 100 would essentially ''lock'' ARP to those capacity data. *ARP's Response:* Regarding the first comment, ARP agrees. The final Order discusses the need for reasonable consistency between between a sponsor's forecasts and FAA's Terminal Area Forecast (TAF) to ensure proper environmental analyses in EAs and EISs. Paragraph 706.b(3) provides guidelines for judging reasonable consistency.

Addressing the comment on benchmark data, ARP declines to interpret this provision for the first time in the final Order. The plain language of 49 U.S.C. 47175(2) defines the term ''congested airport'' with reference to airports listed in Table 1 of the FAA's 2001 Airport Capacity Benchmark Report. There is sparse legislative history on this topic. Section 47175 also provides that a congested airport must be ''an airport that accounted for at least 1% of all delayed aircraft operations in the United States in the most recent data available to the FAA Administrator. In the context of delay, Congress explicitly provided for use of the most recent data available. The final Order includes a footnote to paragraph 1007.d. stating that congested airports are those accounting for 1% of all delayed aircraft operations in the U.S. using data in FAA's 2001 Airport Capacity Benchmark Report (49 U.S.C. 40129(e)). The footnote further states that ARP's Planning and Environmental Division should be contacted for more information if needed. Notably, the FAA's 2004 Airport Capacity Benchmark Report added only 4 airports to the list (Cleveland-Hopkins, Fort Lauderdale-Hollywood, and Portland International Airports, and Chicago-Midway Airport). We intend to seek clarification of Congress' intent as part of the reauthorization of the agency's enabling legislation. Addressing paragraph 1007.e, a commenter requests including valuable information from paragraph Order 5050.4A for the term ''prudent and feasible'' alternative due to the requirements of section 509(b)(5) of the 1982 Airport Act (recodified at 49 U.S.C. 47106(c)(1)(B)) and section 4(f) of the Dept. of Transportation Act (recodified at 49 U.S.C. 303(c)). Also, a number of commenters discuss the term ''reasonable'' and request further guidance on it. One commenter indicated that ''and achievable'' should be deleted. They also stated the draft's discussion of the terms ''reasonable'' and ''possible/feasible and prudent'' appeared to be inconsistent. *ARP's Response:* Regarding definitions for the term ''feasible and prudent,'' ARP agrees. ARP has revised paragraphs 1007.e(4) and (5) of the final Order to clarify that the phrase ''feasible and prudent'' is used in both statutes. ARP has also provided additional guidance regarding the term ''prudent'' to reflect recently updated (March 2005) FHWA guidance on the ''feasible and prudent'' standard under Department of Transportation Act Section 4(f), (recodified at 49 U.S.C. 303).[13] For example, based on the new guidance ''prudent'' means an alternative that must achieve the Project's purpose and need. We have also noted in this paragraph that Section 509(b)(5) addresses alternatives to the project while alternatives to the use are involved under DOT Section 4(f).''

Addressing the comment regarding consistent terminology, ARP disagrees. Although the terms are used throughout the Order, the appropriate term was used depending upon the applicable legal context, that is, the NEPA document being prepared and the applicable special purpose law. When discussing EAs, the term ''reasonable'' is used (paragraph 706.d), but when discussing EISs addressing new airports, new runways, or major runway extensions, the terms ''possible and prudent'' are also used. Here, EISs addressing these actions must include the terms ''possible and prudent alternative'' to meet the requirements of 49 U.S.C. 47106(c)(1)(B). In this case, the Secretary of Transportation (Secretary) may approve a project grant application for those airport facilities having significant adverse effects only after finding that no possible and prudent alternative exists (paragraph 1007.e(4) of the final Order). Also, the term ''feasible and prudent'' must appear in EISs addressing any transportation action that would use section 4(f) resources as noted in paragraph 1007.e(5) of the final Order. Section 4(f) provides that the Secretary may approve a project that would use a 4(f)-protected resource only if there is no prudent and feasible alternative to using the protected resource and the approved project includes all possible planning to minimize harm to the resource. Finally, projects involving wetlands and floodplains require the analysis of ''practicable'' alternatives (paragraph 1007.e(6)).

Addressing the improper use of the word, ''achievable'' and Section 4(f) requirements, ARP agrees that was a typographical error. ARP has corrected the text in paragraph 1007.e(4) of the Order. It now repeats the requirements in 49 U.S.C. 303(c)(1) regarding, ''* * * all possible planning to minimize harm.''

Concerning paragraph 1007.f, a commenter states the information on Affected Environment is vague. *ARP's Response:* Disagree. The Order provides the same information in Order 1050.1E,

[13] See, Section 4(f) Policy Paper, dated March 1, 2005. Review the paper's ''Section 4(f) Evaluation'' section focusing on *Examples of Alternative Selection Process. http://environment.fhwa.dot.gov/projdev/4fpolicy.asp#alternatives.*

paragraphs 405e and 506.f. Paragraph 706.e discusses what an EA's Affected Environment should contain. Paragraph 1007.f discusses the information an EIS's Affected Environment section would need and incorporating information from an EA in that EIS section.

Addressing paragraph 1007.g, a commenter recommends including Appendix A from 1050.1E. Another commenter sought information on the sequence in which EISs should discuss environmental consequences. *ARP's Response:* Regarding Appendix A, ARP notes the comment. ARP has addressed this issue in various parts of this preamble (item a, Instructions to ''NEPA-like'' states, Desk Reference). To summarize, ARP will issue the Desk Reference after it issues this Order. Until then, ARP staff and other interested parties must use Appendix A of Order 1050.1E for information on assessing resources outside NEPA. When ARP issues the Desk Reference, all parties may use the Desk Reference to analyze airport actions.

Concerning the sequence of consequences, paragraph 1007.g(2) does not require alphabetical presentations in NEPA documents. Document preparers should present the information in the most informative, ''easiest-to-understand'' way. Readers should note that in preparing Appendix A for Order 1050.1E, the authors simply presented the resources in alphabetical order for easier document and reference use. That sequence does *not* dictate the presentation of impacts in alphabetical order.

Regarding paragraph 1007.j, a few commenters suggested electronically distributing NEPA documents to reduce costs. *ARP's Response:* The responsible FAA official may use CDs or a Web sites to distribute EISs. ARP realizes that not all interested parties have access to electronic documents, so the final Order also mentions hard copy availability. Like other FAA organizations, ARP encourages electronic distribution to reduce costs, delivery time, and environmental concerns (waste, transportation, etc.) associated with hard copies.

Concerning paragraph 1007.n, a commenter notes the instructions here repeated information in paragraph 1007.m and caused some confusion. *ARP's Response:* Agree. Paragraph 1007.n incorporates and re-arranges information on using and distributing EIS appendices and reference material. Paragraph 1007.o now presents information about incomplete or unavailable information formerly in paragraph 1007.n(3).

Chapter 11 Comments: ARP received no general comments on this chapter. Turning to paragraph 1100, two commenters note the Order should state sponsors should be able to review preliminary draft EISs and other information used to prepare it.

ARP's Response: Comment noted. ARP refers readers this Preamble's Consultation with Airport Sponsors section.

Regarding paragraph 1101.a, a commenter states local municipalities adjoining the airport should review draft EISs. The commenter also states the National Park Service (NPS) should review those documents. Another commenter notes some entities should receive copies of draft EIS (metropolitan planning organizations, local governments), while others need not review the document (asbestos regulators). *ARP's Response:* Comments noted. The draft Order reflects the requirements under 40 CFR 1503.1. FAA obtains comments from the entities named in these comments in the circumstances identified. Paragraph 1101.a(1)–(5) as revised clarifies that FAA requests comments from various entities. These include municipalities or state transportation departments that do not qualify under 1503.1(a)(2) or the public under 40 CFR 1503.1(a)(4) when either entity has an interest in the proposed project or may be affected by it.

Addressing paragraph 1101.b, a number of commenters stated electronic distribution should be an option. *ARP's Response:* Agree. Paragraph 1101.b contains this instruction. Also, see response to comment for paragraph 1007.j.

Concerning paragraph 1101.(d), a commenter states there is no need to publish a press release to announce draft EIS availability. *ARP's Response:* Agree. Regulations at 40 CFR 1506.6(b)(3)(iv) provide that Federal agencies shall: ''* * * (b) provide public notice of * * * the availability of environmental documents so as to inform those persons and agencies who may be interested or affected * * *. (3) In the case of an action with effects primarily of local concern the notice may include: * * * (iii) Publication in local newspapers * * * (v) Notice through other local media.'' Paragraph 1101.b(3) clarifies that the responsible FAA official must provide notice of the draft EIS's availability to the public. The paragraph further states that the responsible FAA official may do so by sending a press release to local media serving the project area. ARP believes press releases are excellent ideas, since many people in an affected area read local newspapers.

Concerning paragraph 1102.b, a commenter states this paragraph should include action-forcing deadlines and procedures to increase the likelihood or require timely reviews. *ARP's Response:* See the Response to the general comment, Saving time during the NEPA process and streamlining the NEPA process. In addition, readers should note that paragraphs 1102.b(1) and (2) of the final Order now discuss altering the prescribed DEIS review periods to reflect requirements in 40 CFR 1506.10.(d).

Regarding paragraph 1104, a commenter notes that other agencies should not have discretion on when a draft EIS is ruled inadequate. FAA should have the final discretion regarding document re-circulation. *ARP's Response:* Agree. Paragraph 1104 of the final Order clarifies this is the responsible FAA official's decision.

Chapter 12 Comments: ARP received no general comments on this chapter. Addressing paragraph 1200, a commenter states airport sponsors should be consulted on all comment responses and have reasonable opportunity to review all proposed responses. The commenter notes this is needed because issues may be raised for the first time during the comment period, and this will trigger the first response to a substantive issue. *ARP Response:* ARP has revised this paragraph to indicate that the responsible FAA official must consult the airport sponsor before finalizing a response to a comment that would commit the sponsor to change the proposed project, change the operation of the airport or change proposed mitigation measures. See the response to the general comment, Consultation with airport sponsors, for further explanation.

Regarding paragraphs 1203.c and 1203.e, a commenter states the requirements concerning Section 4(f) and wetlands, respectively, could conflict and prevent a project from moving forward. The commenter suggests including information to address this situation. *ARP's Response:* Agree in part. ARP has revised paragraph 1204.a of the final Order advising the responsible FAA official to watch for this situation. It states that if there is an alternative under consideration to comply with another special purpose law, and it conflicts with the alternative that would avoid Section 4(f) use or minimize effects on a 4(f)-protected resources, the official must carefully evaluate both alternatives and balance the harm the alternatives

would cause. This balance should be in consultation with pertinent resource agencies. The official must recommend the alternative avoiding Section 4(f) use or reducing impacts on a 4(f) resource if it meets purpose and need. However, there are times where important non-4(f) resource impacts must be weighed to determine the most prudent alternative.[14] Therefore, ARP does not agree with the commenter that such conflicts prevent FAA from making decision to move forward with airport actions. Before making a decision, the approving official should discuss this with the airport sponsor to alert the sponsor to the situation.

Addressing paragraph 1202, a commenter states ARP should quickly alert a sponsor to the fact that its preferred alternative is not the sponsor's proposed action. *ARP's Response:* Agree. Paragraph 1202 of the final Order tells the approving FAA to notify the sponsor about this as early as possible and follow the process outlined in paragraph 801.

Concerning paragraph 1203, a commenter states the information discussed should not be in the final EIS. Instead, it should be in the action's administrative record. Addressing paragraph 1203.b(1), a commenter questions the provision noting sponsor certification for a public hearing and placing that information in an EIS. *ARP's Response:* Disagree as to the information being placed in the administrative record.

Addressing paragraph 1203.b(1), a commenter questions the provision noting sponsor certification for a public hearing and placing that information in an EIS. *ARP's Response:* Disagree as to the information being placed in the administrative record. ARP has revised the title of the paragraph to clarify that it relates to AIP-eligible airport projects and has revised the text to specify that this integrates environmental requirements under 49 U.S.C. 47106 and 47107(a). Notably, the review and finding under 47106(c)(1)(B)(1)(ii) must be a matter of public record. The approving FAA official needs this evidence to make the necessary determinations in findings in the Record of Decision (ROD) concerning these AIP environmental requirements. As to the hearing, FAA and the sponsor typically provide this opportunity for a hearing during the NEPA process. This is the most appropriate time for a hearing concerning a proposed airport project's economic, social, and environmental effects and its consistency with local or state planning objectives. For these reasons, it is appropriate for FAA to integrate this certification requirement into its NEPA procedures.

Concerning paragraph 1203.g(1), a commenter asks why getting permits cannot occur as a grant assurance, since sponsors can get other permits such as section 404 permits after FAA completes its NEPA process. *ARP's Response:* The approach the commenter suggested would not be consistent with NEPA or recent initiatives to streamline NEPA reviews. Various paragraphs in Chapter 12 reflect requirements under 40 CFR 1500.5(g). That regulation provides that Federal agencies: ''* * * *shall* [emphasis added] reduce delays* * * by integrating NEPA requirements with other environmental review and consultation requirements.'' For example, paragraph 1208 addresses coastal zone consistency requirements that ARP addresses during the NEPA process. ARP requires this because during NEPA, it must analyze and disclose potential impacts on resources (in this case, coastal resources) as part of the NEPA process. Also, FAA, as the lead agency, must ensure compliance with the Coastal Zone Management Act before it may take final agency action to approve an airport development project (see 15 CFR subparts C and D, part 930).

Admittedly, FAA has had some difficulty integrating compliance with section 404 Clean Water Act permitting requirements into some of its NEPA analyses. As a result, for projects such as the third runway at Seattle International Airport, the Corps prepared a supplemental NEPA document after FAA completed its EIS and issued its ROD. In the past, sponsors have been somewhat reluctant to invest in the additional design and engineering work needed for a permit before FAA completes its environmental review. As part of ARP's renewed efforts to reduce delays and streamline its environmental reviews, ARP is improving its performance in this area.

Regarding 1205.b, two commenters asked clarification on extending final EIS review periods. *ARP's Response:* Agree. Readers should note that paragraph 1211.b of the final Order clarifies 40 CFR 1503.1(b). That regulation states that FAA may request comments on an FEIS.

Regarding paragraph 1206, two commenters noted a mistake about the time to refer a final EIS to CEQ. *ARP's Response:* Agree. The draft contained a typographical error addressing the timing of a referral. Paragraph 1212.a(2) states that a Federal agency may refer a proposed major Federal action to CEQ no later than 25 days after the final EIS has been made available to the public, commenting agencies, and the EPA.

Chapter 13 Comments: ARP received no general comments on this chapter. Concerning paragraph 1301.a, a commenter states the draft Order implies the Record of Decision (ROD) identifies, ''* * * material representations in the FEIS.'' The commenter states this is important because as the proposed action's details change sponsors need to know if a written re-evaluation of an EIS is needed. The commenter suggests that the ROD incorporate by reference information in the final EIS. *ARP's Response:* Disagree. Approving FAA officials provide rationales for their decisions in RODs. ARP has developed a format to do so, and the instructions in the draft and final Orders provide that information. Instructions in paragraph 1401 of the final Order discuss circumstances that may require a re-evaluation. In summary, not all changes warrant a re-evaluation. The responsible FAA official may use discretion in deciding the need for that. In doing so, the official would determine if changes to the proposed action or other factors regarding the affected environment would cause environmental effects not previously analyzed or worsen those already studied.

Concerning paragraph 1301.c(2), a commenter asks why an approving FAA official would choose a preferred alternative different from one, ''* * * described in the FEIS he/she has just approved''? *ARP's Response:* Comments on the final EIS (paragraph 1211.b) or new information or technology may lead the decision maker to select an alternative that differs from the agency preferred alternative identified in the final EIS. The decision maker may determine that another alternative is superior when balancing all relevant factors or that an applicable special purpose law requires selection of another alternative. ARP includes instructions on this rarely used, but possible situation to ensure its staff has instructions on the process it must follow in this situation.

Addressing paragraph 1301.g(4), a commenter objects to the paragraph. Zoning and compatible land use decisions are local responsibilities, not FAA's. Therefore, FAA cannot or should not impose more requirements on a sponsor to ensure the airport is compatible with surrounding areas. *ARP's Response:* Paragraph 1301.g(4) uses language in paragraph 99.b(4) of 5050.4A to clarify language that was in

[14] See, Section 4(f) Policy Paper, dated March 1, 2005. Review the paper's ''Section 4(f) Evaluation'' section focusing on *Examples of Alternative Selection Process. http://environment.fhwa.dot.gov/projdev/4fpolicy.asp#examples.*

the draft Order. The paragraph indicates that this is one guideline for environmental assurances in grant agreements and other documents. The special commitment would relate to the noise effects of the proposed airport project. For example, a runway extension might require zoning an area for industrial use. This guideline is consistent with the obligation sponsor's of federally funded airports assume under 49 U.S.C. 47107(a)(10). That section requires the sponsor, to the extent reasonable, to take appropriate action to restrict land uses next to or near the airport to uses that are compatible with normal airport operations.

Concerning paragraph 1302.e, a commenter suggests adding text to the ROD to address mitigation and the need to include all practicable means to minimize environmental harm the preferred alternative would cause. Conversely, if that mitigation is not in the ROD, the official provides rationale for not including it. The commenter notes 40 CFR 1502.2(c) states this provision. *ARP's Response:* Agree. The draft inadvertently omitted this. Paragraph 1301.e of the final Order includes this information.

Paragraph 1303 of the final Order discusses issuance of the Record of Decision (ROD). Paragraph 1303 states that the approving FAA official cannot issue a ROD until 30 days have elapsed from the date EPA publishes the Notice of an FEIS's availability in the **Federal Register**. The paragraph also notes EPA may reduce the 30-day ''wait period,'' if FAA shows compelling reasons of national policy to do so (40 CFR 1506.10(d)). Conversely, EPA may extend the 30-day ''wait period,'' if a Federal agency provides compelling reasons of national policy supporting that extension. However, EPA may do so only after consulting with FAA. EPA may not extend the ''wait period'' more than addition 30 days, if FAA does not agree with a longer extension (40 CFR 1506.10(d)).

Chapter 14 Comments: ARP received no general comments on this chapter. Addressing paragraph 1401, two commenters express concern about the 3-year longevite instruction. One commenter notes that CEQ guidance does not define document longevite but, instead, uses various tests to determine a document's adequacy and reliability. The commenter seeks information on how the time limit was set and instances where it may not apply. The other commenter notes that Question No. 32 in CEQ's Forty Most Asked Questions (46 FR 18026, March 23, 1981) uses a 5-year '' rule of thumb.'' The commenter argues that FAA must not use the shelf life as a reason for not preparing EIS for phased projects. Another commenter seeks information on when the shelf life begins. *ARP's Response:* FAA must follow requirements in DOT Order 5610.1C, paragraph 19d, and Order 1050.1E, paragraph 514. Besides meeting DOT and Order 1050.1E requirements, ARP includes this information in paragraphs 1401.b and c to address the many questions it has received on this topic since publishing FAA Order 5050.4A in 1985.

In response to the phasing comment, ARP does not use the 3-year shelf life to avoid EISs (or EAs) for phased projects. In fact, paragraph 1402.c(3) of the final Order discusses this issue.

Finally, responding to the question on the start of the 3-year period, paragraphs 1401.b and c provide that information. For draft EISs (and EAs), that period begins when the responsible FAA official completes FAA's review of the draft document. For final EAs, the time stars when the responsible FAA official accepts the airport sponsor's final EA as a Federal document. FEIS ''start time'' is the date the approving FAA official signs the EIS approval declaration.

Concerning paragraph 1402, a commenter states a supplement should be required every 5 years and a supplement should be triggered if new information is available. *ARP's Response:* Agree in part. ARP disagrees a supplement is needed every 5 years. Re-evaluations address this issue. If there is no substantial change in the project and on significant new information bearing upon environmental impacts becomes available in that period, there is no need to supplement. While not all new information requires a supplement, a supplement is needed in if new information is available as the commenter noted. Paragraph 1402 of the final Order discusses this.

For paragraph 1402.b(2), a commenter notes that changes in the affected environment may require more evaluation. *ARP's Response:* Agree. The draft paragraph noted that, ''significant new changes, circumstances, or information'' may become available. To ensure users understand this phrase includes affected environment, paragraph 1402.b(2) now specifies that factor.

Addressing paragraph 1402.d notes that a new FONSI may be needed if an EA is supplemented. *ARP's Response:* Agree. Paragraph 1402.d(3) of the final Order includes this provision.

Concerning paragraph 1404, a commenter states emergencies should be CATEXs. *ARP's Response:* Disagree. Regulations at 40 CFR 1506.11 address emergencies when an EIS is normally required. CEQ does not designate the NEPA process for these situations. Instead regulations require agencies, in consultation with CEQ, to set up alternative arrangements to control the emergency's immediate impacts. Paragraph 1404 addresses emergency situations.

Chapter 15 Comments: Beginning General Chapter 15 comments. A commenter states this chapter repeats information in Order 1050.1E, Appendix D. The chapter should focus on issues that the Appendix does not address. *ARP's Response:* Disagree The commenter is correct that much of Chapter 15 includes information from Appendix D, but ARP includes this information to complete the Order's instructions and minimize reliance on 1050.1E.

Addressing paragraph 1504.b(2), a commenter states the need to relieve airport congestion is not an emergency situation. *ARP's Response:* Agree. ARP has not and does not intend to use NEPA's emergency provisions to address airport congestion.

Concerning paragraph 1505.k, a commenter states that FAA should not have the ability to force another agency to issue approvals or authorizations according to a rigid timetable. It states that reporting missed deadlines, ''has the appearance of a veiled threat * * * contrary to U.S. government edicts to streamline procedures and reduce paperwork.'' The commenter recommends that FAA use a constructive, less ''heavy-handed approach'' because the stated instructions will cause, ''an unbelievably large amount of manpower and wasted taxes.'' *ARP's Response:* Comment noted. The instructions in this paragraph and the final Order reflect Congress' requirements (see Title III of Vision 100—The Century of Aviation Re-Authorization Act of 2003, section 47171). They are not FAA's attempt to use a ''heavy-handed approach.''

Appendix A Comments: A commenter suggests deleting the example of a ''short-form'' EA because it is a poor example. *ARP's Response:* Agree. The Desk Reference will provide a revised example of a short-form'' EA for guidance and information.

Comments Addressing Table 1 (Now Table 6–1 of the Final Order)

Avigation easements. A commenter suggested adding these easements to the list of categorical exclusions. *ARP's Response:* Avigation easements qualify for categorical exclusion under

paragraph 307d of FAA Order 1050.1E when carried an airport sponsor carries them out as parts of an FAA-approved noise compatibility program under 14 CFR part 150. They also qualify for categorical exclusion under paragraph 310z of FAA Order 1050.1E when related to topping or trimming trees to meet standards for removing obstructions to navigable airspace under 14 CFR part 77. FAA invites the commenter to specify other circumstances, if any, in which a categorical exclusion should be available for avigation easements. ARP will consider this information in determining whether to recommend such a change to Order 1050.1E.

Snow equipment. A commenter noted the table does not include snow equipment. Please add it per Order 1050.1E. *ARP's Response:* Agree. Table 6–1 of the final Order includes this under ''Safety equipment for airport certification.''

Wildlife Hazard Management Plan (WHMP). A commenter stated the relationship between NEPA and WHMP approval is not very clear. What is the status of Part 139 certification during an extended NEPA review of a WHMP? *ARP's Response:* Paragraph 209 of the final Order has been revised to provide clearer instructions concerning application of NEPA to WHMP approval and implementation. The sponsor's filing of a WHMP for approval under 14 CFR 139.337(d)(1) satisfies the sponsor's Part 139 certification requirements. Because FAA approval of a WHMP normally qualifies for categorical exclusion under Paragraph 308e of Order 1050.1E, extended NEPA review for WHMP approvals will be unusual.

Comments Addressing Table 2 (Now Table 6–2 of the Final Order)

Airfield improvements, aircraft parking area. A commenter suggested adding taxiways. ARP's Response: Agree. ARP includes taxiways in the table. It is included in Order 1050.1E, paragraph 310.e.

Airfield improvements, roads. A commenter suggested inserting the word, ''permanently'' regarding change in Level of Service. *ARP's Response:* Agree. ARP made the change.

Cargo building. The commenter notes the annotation isn't clear. The statement, ''similar in size'' doesn't address large buildings covering many acres. Please clarify the annotation to ensure it states, ''within the same footprint as the existing [building].'' Without that information there is a chance to categorically exclude large facilities having substantial impacts. *ARP's Response:* Agree in part. ARP is not authorized to change the text or intent of Order 1050.1E, paragraph 310h. Therefore, we cannot add the suggested wording. However, ARP agrees there is a need to provide some way of determining if an action ''would substantially expand a passenger handling or cargo building.'' Footnote 2 in Table 6–2 provides information on determining if a terminal or cargo facility would be substantially expanded. That information focuses on potential noise and air quality issues, since most expansions typically involve those issues.

Conveying airport land. A commenter stated this should refer to only Federally-owned land to meet Order 1050.1E. *ARP's Response:* Agree. ARP changed the text. We unintentionally omitted the qualifying words, ''federally-owned.''

Deicing/anti-icing facility. A commenter asks if this facility includes stormwater collection, diversion, conveyance and treatment or recycling facilities? *ARP's Response:* Yes. All of these items are included because they help prevent significant water quality effects due to de-icing/anti-icing activities. Of course, if building or operating any of these items would involve extraordinary circumstances, the responsible FAA official would need to determine if an EA or EIS is needed.

Low emission technology equipment. The commenter is unclear on how Order 1050.1E, paragraphs 309g, 310n, and 310u apply to this equipment. *ARP's Response:* ARP states the disturbances to build infrastructure within airport boundaries needed for this equipment cause many of the same effects the cited paragraphs address. In addition, the environmental benefits due to operating this equipment help to improve airport-related air quality. Paragraph 309.g of Order 1050.1E addresses upgrading power and control cables for existing facilities and equipment noted in Order 6850.2, Visual Guidance Lighting Systems. Since the low emission equipment requires electrically powered charging stations and other electrical power supply, upgrading existing power and control cables to service low emission equipment has impacts like those activities paragraph 309.g addresses. Paragraph 310n of Order 1050.1E addresses minor facility expansion not requiring additional land. ARP believes this paragraph applies because low emission equipment service facilities often are built near aircraft operating areas or other disturbed areas that paragraph 310n addresses. Finally, ARP believes Paragraph 310u of Order 1050.1E addresses closing and removing above ground or underground storage tanks (AST/USTs) at an FAA facility. Although the public-use airports ARP oversees are not FAA facilities, using the same AST/UST removal instructions as those FAA facilities would use (FAA Order 1050.15A, Fuel Storage Tanks at FAA Facilities), and following EPA regulations (40 CFR 280, 281, and 112) would prevent significant impacts due to removing AST/USTs. This removal often accompanies low emission technology equipment purchase and use at an airport.

Non-U.S. waters, including wetlands and categorically excluded actions. A commenter objected to considering these resources because the Corps' regulations do not address them. *ARP's Response:* Disagree. NEPA, and special purpose laws like the Fish and Wildlife Coordination Act, and Executive Order 11990, Wetlands, do not differentiate between jurisdictional and non-jurisdictional wetlands. Designation as a ''navigable waterway'' does not minimize a resource's ecological value. Including this information also reflects information in Order 1050.1E, Appendix A, section 18 addressing wetlands. ARP also provides information on this issue to address a number of questions it has received about these non-jurisdictional waters and wetlands. Table 6–2 includes a new categorical exclusion addressing categorically excluded actions in non-jurisdictional wetlands. ARP proposed that categorical exclusion in its December 16, 2004, Notice of Availability of draft Order 5050.4B. Based on comments received, ARP has inserted information to address non-jurisdictional wetlands in Table 6–2.

On-airport obstruction treatment. A commenter requests not limiting actions to tree trimming or vegetation clearing. The commenter suggests including any non-mechanized land clearing. *ARP's Response:* Disagree. The annotation as written and paragraphs 310l or 310z of Order 1050.1E focus on addressing obstruction to air navigation. Paragraphs 3101 and 310z do not limit actions to non-mechanized methods. Therefore, the recommended change is not needed. Reviewers must consider any extraordinary circumstances related to obstruction removal actions to determine if the action is a CATEX or if it requires an EA or EIS.

Ownership change by purchase or transfer. A commenter asks why transfer by purchase is not included. *ARP's Response:* Agree. We have revised the text to include this action to better reflect Order 1050.1E, paragraph 307m.

Releasing airport land. A commenter requests changing the annotation to

clarify if an environmental analysis is needed for short-term leases (i.e., less than or equal to 5 years). *ARP's Response:* Agree. ARP has revised the text for this action to better reflect the intent of Order 1050.1E, paragraph 307b. The responsible FAA official must consider the environmental effects associated with airport land releases, regardless of the duration of the release.

U.S. Waters, including wetlands and categorically excluded actions. A commenter strongly objected to limiting categorical exclusions to those that qualify for General Permits. The commenter states involvement of U.S. waters or wetlands should not disqualify a CATEX. In Alaska, it is a rare event that an action does not involve waters of the U.S. The reason for qualifying for a CATEX should depend on the impact, not a regulatory authority. Another commenter suggests that FAA work with the Corps of Engineers to develop a category of actions that Nationwide Permit No. 23 would cover. This would address many actions having minor impacts on U.S. waters, including wetlands. Commenters from the State of Alaska argue this is needed to address the number of actions in that state involving waters and wetlands and to ''streamline'' the NEPA process. Another commenter sought guidance on the need for sponsors to create new wetlands to replace those lost. This mitigation may be needed under the Federal government's ''no net loss policy.'' Several commenters stated the annotation should not reference the Corps' General Permit Program, but instead, use the words, ''Corps of Engineers Nationwide Permit'' or ''Corps of Engineers Regional Permit.'' Another commenter states this and other CATEX omit state water permitting and Coastal Zone Management Act (CZMA) Federal consistency requirements. *ARP's Response:* Disagree. Tables 6–1 and 6–2 summarize those sections of the CATEXs in FAA Order 1050.1E, paragraphs 307–312 specific to airports. The Office of Environment and Energy (AEE) is responsible for coordinating substantial, agency-wide changes such as this one to Order 1050.1E (see Order 1050.1E, paragraph 10.0). In addition, actions falling under General Permits are those that do not normally cause significant environmental impacts. That is why they are CATEXs in Order 1050.1E. Therefore, when preparing Order 1050.1E, it seemed appropriate for FAA to develop CATEXs based on General Permits to compliment the Corps' General Permit Program.

Addressing the suggestion about Nationwide Permit No. 23, readers should review the above response. ARP informs the commenter that FAA developed CATEX paragraph 310k in Order 1050.1E to address, ''actions having minor impacts on U.S. waters and wetlands.'' FAA did this to help streamline its NEPA process. Earlier versions of Orders 1050.1 and 5050.4 required EAs for *all* FAA actions affecting U.S. waters or wetlands, regardless of the type of project or amount of wetland affected.

Concerning the comment on ''no net loss,'' ARP believes required consultation with expertise agencies addressing wetland impacts would address the extent of required mitigation.

Regarding the comments that the Order's annotation should not reference the Corps' General Permit Program, but instead, use the words, ''Corps of Engineers Nationwide Permit'' or ''Corps of Engineers Regional Permit,'' ARP disagrees. ARP sees no need to change the annotation. The term, ''General Permit'' includes Nationwide, Regional, and Programmatic Permit Programs (61 FR 241 65874).

Concerning, coastal zone consistency, we agree. Readers should note the extraordinary circumstance evaluation in Table 6–3 includes the need to examine potential project impacts on coastal zone resources.

Comments Addressing Table 3 (Now Table 6–3 of the Final Order

General Comment: A number of commenters noted the table did not include information addressing federally-listed endangered/threatened species, Section 4(f), Section 106, prime/unique farmlands, and some other resources. Another commenter notes confusion may occur about the expertise agency having jurisdiction over resources involving certain extraordinary circumstances. The commenter suggested the table provide information about the agency(ies) with whom the sponsor or FAA would consult. A commenter noted that the table did not address inconsistency with Federal, State, local, or Tribal laws. The commenter requested adding this text from Order 1050.1E, paragraph 304j. *ARP's Response:* Agree. Table 6–3 includes the important information the commenters noted.

Air Quality. Some commenters are troubled by FAA-wide guidance. Now, that guidance states that if an action causes air pollutants to exceed respective National Air Quality Standard (NAAQSA) thresholds, costly, time-consuming air quality modeling using dispersion analysis is needed. The commenter requests that FAA provide guidance to clarify this issue, perhaps by recognizing General Conformity's applicability analysis. If this analysis shows emissions would be below NAAQS thresholds, further analysis is not needed. The commenter suggests that dispersion analysis is needed only for non-attainment pollutants at airports in non-attainment areas. ARP's Response: See the Response to the Comment on paragraph 408.b(1), above.

Community disruption. A commenter suggests using the term, ''compatible land use'' when deciding if land use is compatible with aviation. Using community disruption does not apply to noise compatibility, so delete it. *ARP's Response:* Disagree. Table 6–3 includes community disruption because Order 1050.1E, paragraph 304d includes that term. Noise impacts on noise-sensitive areas are addressed in Order 1050.1E, paragraph 304f, and are also included in Table 6–3 of this Order.

Cumulative impacts. Two commenters urge ARP and FAA to provide guidance on cumulative impact analysis. The commenter notes Order 1050.1E does not provide sufficient guidance on that important topic. The commenters argue the information is too important for a desk reference that, ''has not undergone the proper vetting within the airport community.'' *ARP's Response:* Agree in part. ARP agrees added information on this topic is helpful. Readers should note that ARP's Desk Reference will address this issue with more guidance than Order 1050.1E presents because so many of its analysts and sponsors sought that information. However, ARP notes that Order 1050.1E at paragraph 500.c provide some information on this topic and references various portions of the CEQ regulations that discuss it. In addition, paragraph 1007.i of this Order provides helpful information from Order 5050.4A. CEQ has issued detailed guidance in a special publication that is useful for all Federal actions, not just airport actions (*http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm*).

Regarding publishing this information in a desk reference that has not received public vetting, ARP disagrees. As the Desk Reference merely summarizes existing legal requirements, and contains no policy guidance implementing NEPA, ARP sees little value in affording an opportunity for public review and comment in advance. Nevertheless, before issuing the Desk Reference later this year, ARP has decided to distribute selected chapters of the Desk Reference for public information purposes only (see this

Preamble's Desk Reference section for other information).

Floodplains. Two commenters request adding information from Order 1050.1E, Appendix A, paragraphs 9.2b and 9.2f to Table 6–3. *ARP's Response:* Disagree. Like other extraordinary circumstances Table 6–3 discusses, this entry reflects information from Order 1050.1E, paragraph 304, particularly paragraph 304.d. That paragraph does not incorporate information from Appendix A discussing how to assess extraordinary circumstances. As noted in responses to Air Quality, Table 6–3 is a tool to alert analysts that a resource could present an extraordinary circumstance warranting further study. Order 1050.1E, Appendix A provides information on conducting the analysis for each extraordinary circumstance addressing requirements outside NEPA. (ARP's Desk Reference will do likewise for airport actions). To alert reviewers that this circumstance would apply only to actions affecting the floodplain, we have added the words, ''that an action in the 100-year floodplain would cause.'' This matches the note referring to the Corps of Engineers or the Federal Emergency Management Agency and should help analysts screen a proposed action for floodplain impacts.

Highly controversial action. Two commenters suggested using information from Order 1050.1E, paragraph 304i to better describe this circumstance. *ARP's Response:* Agree. Table 6–3 refers to paragraph 9.i of the final Order. That paragraph incorporates the information from Order 1050.1E, paragraph 304.i.

Noise. Two commenters suggest focusing the extraordinary circumstance on noise increases within the DNL 65–dB contour to avoid confusion about using supplemental noise metrics. They suggest using language in Order 1050.1E, Appendix A, section 11.b(8). *ARP's Response:* Agree. The table refers the reader to the noise information in paragraph 9.n of the Order. That paragraph reflects the information in Order 1050.1E.

Water quality. Two commenters state the text is confusing. They suggest using text from Order 5050.4A. *ARP's Response:* Disagree. Like other extraordinary circumstances Table 6–3 discusses, this entry reflects information in Order 1050.1E, paragraph 304, particularly paragraph 304h, which supersedes Order 5050.4A.

Dated: May 5, 2006.

Dennis E. Roberts,

Director, Office of Airport, Planning and Programming, APP–1.

[FR Doc. 06–4527 Filed 5–17–06; 8:45 am]

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Federal Register

Thursday,
May 18, 2006

Part IV

The President

Proclamation 8019—Prayer for Peace, Memorial Day, 2006

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Thursday, May 18, 2006

Presidential Documents

Title 3—

The President

Proclamation 8019 of May 16, 2006

Prayer for Peace, Memorial Day, 2006

By the President of the United States of America

A Proclamation

Throughout our history, the men and women who have worn the uniform of the United States have placed the security of our Nation before their own safety. America will be forever grateful for their service and sacrifice. On Memorial Day, we honor those who have paid the ultimate price for our freedom.

Defending the ideals of our Nation has required the service and sacrifice of those from every generation. From Valley Forge, across Europe and Asia, and in Afghanistan and Iraq, courageous Americans have given their lives so that others could live in freedom. These Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen took an oath to defend America, and they upheld that oath with bravery and decency. They have liberated the oppressed, spread freedom and peace, and set a standard of courage and compassion for our Nation. All who enjoy the blessings of liberty live in their debt.

This debt of gratitude extends also to the families who stood by our servicemen and women in times of war and times of peace. Each of the fallen has left behind loved ones who carry a burden of grief, and all Americans are inspired by the strength of these families.

At this important time in the history of freedom, a new generation of Americans is defending our flag and our liberty. These men and women carry on the legacy of our Nation's fallen heroes and demonstrate that the United States Armed Forces remain the greatest force for freedom in human history.

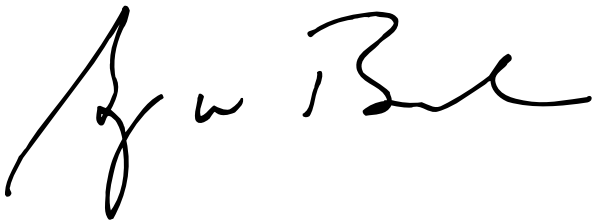
Those who lost their lives in the defense of freedom helped protect our citizens and lay the foundation of peace for people everywhere. On Memorial Day, a grateful Nation pays tribute to their personal courage, love of country, and dedication to duty.

In respect for their devotion to America, the Congress, by a joint resolution approved on May 11, 1950, as amended (64 Stat. 158), has requested the President to issue a proclamation calling on the people of the United States to observe each Memorial Day as a day of prayer for permanent peace and designating a period on that day when the people of the United States might unite in prayer. The Congress, by Public Law 106–579, has also designated the minute beginning at 3:00 p.m. local time on that day as a time for all Americans to observe the National Moment of Remembrance.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, do hereby proclaim Memorial Day, May 29, 2006, as a day of prayer for permanent peace, and I designate the hour beginning in each locality at 11:00 a.m. of that day as a time to unite in prayer. I also ask all Americans to observe the National Moment of Remembrance beginning at 3 p.m., local time, on Memorial Day. I encourage the media to participate in these observances. I also request the Governors of the United States and the Commonwealth of Puerto Rico, and the appropriate officials of all units of government, to direct that the flag be flown at half-staff until noon on this Memorial Day on all buildings, grounds, and naval vessels throughout the United States, and in all areas under its jurisdiction and

control. I also request the people of the United States to display the flag at half-staff from their homes for the customary forenoon period.

IN WITNESS WHEREOF, I have hereunto set my hand this sixteenth day of May, in the year of our Lord two thousand six, and of the Independence of the United States of America the two hundred and thirtieth.



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H.R. 3351/P.L. 109–221

Native American Technical Corrections Act of 2006 (May 12, 2006; 120 Stat. 336)

Last List May 9, 2006

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