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 3. The important elements of typical Federal Register documents.
 4. An introduction to the finding aids of the FR/CFR system.
- WHY:** To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, February 13, 2007
9:00 a.m.–Noon

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

RESERVATIONS: (202) 741-6008



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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

Agricultural Marketing Service

7 CFR Part 966

[Docket No. AMS-FV-06-0208; FV07-966-1 IFR]

Tomatoes Grown in Florida; Change in Handling Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule changes the handling requirements currently prescribed under the Florida Tomato marketing order (order). The order regulates the handling of tomatoes grown in Florida, and is administered locally by the Florida Tomato Committee (Committee). This rule limits the use of inverted lids on tomato containers to the handler whose information initially appeared on the lid. This rule helps ensure that lids do not contain the information for more than one active handler and aids in maintaining the positive identification and traceability of Florida tomatoes.

DATES: Effective February 7, 2007; comments received by April 9, 2007 will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; E-mail moab.docketclerk@usda.gov; or Internet: <http://www.regulations.gov>. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public

inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

William Pimental, Marketing Specialist; or Christian Nissen, Regional Manager, Southeast Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; telephone: (863) 324-3375, Fax: (863) 325-8793, or E-mail: William.Pimental@usda.gov or Christian.Nissen@usda.gov.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Jay.Guerber@usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement No. 125 and Order No. 966, both as amended (7 CFR part 966), regulating the handling of tomatoes grown in Florida, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which

the handler is an inhabitant, or has his or her principal place of petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule changes the handling requirements currently prescribed under the order. This rule limits the use of inverted lids on tomato containers to the handler whose information initially appeared on the lid. This rule helps ensure that lids do not contain the information for more than one active handler and aids in maintaining the positive identification and traceability of Florida tomatoes. This action was unanimously recommended by the Committee at a meeting on October 4, 2006.

Section 966.52 of the order provides the authority to establish pack and container requirements for tomatoes grown under the order. This includes fixing the size, weight, capacity, dimensions, markings, or pack of the container or containers which may be used in the handling of tomatoes.

Section 966.323 of the order's administrative rules prescribes the handling regulations for Florida tomatoes. Section 966.323(a)(3) delineates the requisite container requirements for weight, markings, and appearance. The section specifies, in part, that each container or lid must show the name and address of the registered handler.

The majority of Florida tomatoes are packed in containers that have a separate lid. Most lids are preprinted with the handler's name and address. In addition, most lids can be inverted by reversing the lid so the blank side is on the outside, and the preprinted information is flipped to the underside of the lid. This is done so new information can be printed on the lid. This rule amends § 966.323(a)(3) by limiting the use of inverted lids on tomato containers to the handler whose information first appeared on the lid.

Inverted lids have been used in minimal quantities in past seasons, usually when a tomato packing operation was purchased by another entity. Any containers included in the purchase could be used by the purchasing handler by inverting the lids so the purchaser's information could be affixed on the clean side. Usually there were not many containers remaining, so

the containers requiring inverted lids were fairly limited in quantity.

Recently, container sales companies have started offering their container overruns at discounted prices to tomato handlers. These containers usually have preprinted handler and product information on the lids. The Committee is concerned this could significantly increase the number of inverted lids being used by the industry and could pose problems with the positive identification and traceability of tomatoes.

In their discussion of this issue, the committee agreed the ability to positively identify product is a necessity in today's marketplace. The Committee expressed concern that the practice of inverting lids could result in misidentification and confusion in cases where tomatoes need to be traced back to their origin. The Committee recognized that in the past, most of the containers being used with an inverted lid were associated with a handler purchasing another operation. Consequently, the original owner of the lid was no longer in business, and the container was only printed with the information for one active handler.

This would not be the case with handlers using overrun containers. The overrun containers being made available are containers produced in excess of orders, with the majority preprinted with handler information. Therefore, once inverted, the lids on the overrun containers would be printed with the information for two active handlers. The Committee is concerned that having multiple handler information on a container, even with the lid inverted, could pose problems when trying to track tomatoes back to the original handler.

The Committee believes it is of critical importance that Florida tomatoes can be traced from the farm to the end-user. Proper handler identification on a container is an important part of this traceability. Allowing the use of containers with an active registered handler's information on the exterior of the lid and another on the interior could allow for misidentification and confusion in product identification. The Committee believes by limiting the use of inverted lids to the handler whose name originally appeared on the lid, positive identification and traceability will be better maintained.

In addition, in cases related to marketing order compliance, it is also important to be able to identify the original source of tomatoes. Allowing the use of inverted lids could result in the intentional misrepresentation of the

origin of the tomatoes. The box lids could be reinverted to display the handler information originally printed on the box without that handler's knowledge. Limiting the use of inverted lids on tomato containers by anyone other than the handler whose information first appeared on the lid will help alleviate any misidentification or uncertainty in product identification.

Section 8e of the Act provides that when certain domestically produced commodities, including tomatoes, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, and maturity requirements. As this rule changes the container requirements under the domestic handling regulations, no corresponding change to the import regulations are required.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 100 producers of tomatoes in the production area and approximately 70 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$6,500,000 (13 CFR 121.201).

Based on industry and Committee data, the average annual price for fresh Florida tomatoes during the 2005–06 season was approximately \$10.27 per 25-pound container, and fresh shipments totaled 47,880,303 25-pound cartons of tomatoes. Committee data indicates approximately 27 percent of the handlers handle 95 percent of the total volume shipped outside the regulated area. Based on the average price, about 75 percent of handlers could be considered small businesses under SBA's definition. In addition,

based on production, grower prices as reported by the National Agricultural Statistics Service, and the total number of Florida tomato growers, the average annual grower revenue is below \$750,000. Thus, the majority of handlers and producers of Florida tomatoes may be classified as small entities.

This rule changes the handling requirements currently prescribed under the order. This rule limits the use of inverted lids on tomato containers to the handler whose information initially appeared on the lid. This rule helps ensure that lids do not contain the information for more than one active handler and aids in maintaining the positive identification and traceability of Florida tomatoes. This rule revises § 966.323(a)(3), which specifies the requisite container requirements. Authority for this action is provided in § 966.52 of the order. The Committee unanimously recommended this change at a meeting held on October 4, 2006.

At the meeting, the Committee discussed the impact of this change on handlers in terms of cost. This rule could result in a slight increase in cost for handlers that were considering purchasing the container overruns. However, Committee members stated that plain containers are readily available on the market at reasonable prices. Consequently, the difference in cost between a discounted overrun container and a plain blank container should be minimal.

In addition, last season the industry packed more than 47 million cartons of tomatoes. The available quantities of overrun containers are limited, confining the cost benefit to those containers available. When compared to the total containers needed, the overall cost savings associated with using overrun cartons would be negligible. Also, in previous seasons, overrun containers were not available for purchase. Therefore, container cost for all handlers should be similar to those in previous seasons.

Further, this rule provides the benefit of helping to maintain the traceability and proper identification of Florida tomatoes, which outweighs the minor cost savings associated with using overrun containers. The costs and benefits of this rule are not expected to be disproportionately different for small or large entities.

One alternative to this action was to allow the use of inverted lids. However, Committee members agreed that having the information for more than one active handler appear on a carton was confusing and could make traceability and proper identification difficult. Therefore, this alternative was rejected.

This action will not impose any additional reporting or recordkeeping requirements on either small or large tomato handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

The AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

In addition, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

Further, the Committee's meeting was widely publicized throughout the Florida tomato industry and all interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee meetings, the October 4, 2006, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/fv/moab.html>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

This rule invites comments on a change to the container requirements currently prescribed under the Florida tomato marketing order. Any comments received will be considered prior to finalization of this rule.

After consideration of all relevant material presented, including the Committee's recommendation, and other information, it is found that this interim final rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2006–07 season has begun, and handlers are currently packing tomatoes; (2) the Committee unanimously recommended this change

at a public meeting and interested parties had an opportunity to provide input; (3) handlers are aware of this change; and (4) this rule provides a 60-day comment period and any comments received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 966

Marketing agreements, Reporting and recordkeeping requirements, Tomatoes.

■ For the reasons set forth in the preamble, 7 CFR part 966 is amended as follows:

PART 966—TOMATOES GROWN IN FLORIDA

■ 1. The authority citation for 7 CFR part 966 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 966.323 paragraph (a)(3)(ii) is revised to read as follows:

§ 966.323 Handling regulation.

* * * * *

(a) * * *

(3) * * *

(ii) Each container or lid shall be marked to indicate the designated net weight and must show the name and address of the registered handler (as defined in 966.7) in letters at least one-fourth (1/4) inch high, and such containers must be packed at the registered handler's facilities. The use of inverted, previously printed container lids is limited to the registered handler identified by the labels or marks that originally appeared on the lid.

* * * * *

Dated: February 1, 2007.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. 07–502 Filed 2–5–07; 8:45 am]

BILLING CODE 3410–02–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 510 and 529

New Animal Drugs; Hydrogen Peroxide

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a new animal drug application (NADA) filed by Eka Chemicals, Inc. The NADA provides for

immersion use of hydrogen peroxide solution for control of mortality in certain freshwater-reared finfish species in several life stages due to various fungal and bacterial diseases.

DATES: This rule is effective February 6, 2007.

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

SUPPLEMENTARY INFORMATION: Eka Chemicals, Inc., 1775 West Oak Commons Ct., Marietta, GA 30062–2254, filed NADA 141–255 for 35% PEROX–AID (hydrogen peroxide) for control of mortality in freshwater-reared finfish eggs due to saprolegniasis, for control of mortality in freshwater-reared salmonids due to bacterial gill disease associated with *Flavobacterium branchiophilum*, and for control of mortality in freshwater-reared coolwater finfish and channel catfish due to external columnaris disease associated with *Flavobacterium columnare* (*Flexibacter columnaris*). The NADA is approved as of January 11, 2007, and the regulations are amended in part 529 (21 CFR part 529) by adding § 529.1150 to reflect the approval. The basis of approval is discussed in the freedom of information summary.

In addition, Eka Chemicals, Inc., has not been previously listed in the animal drug regulations as a sponsor of an approved application. At this time, 21 CFR 510.600(c) is being amended to add entries for this firm.

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

Under section 573(c) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360ccc-2), this approval qualifies for 7 years of exclusive marketing rights beginning January 11, 2007, because the new animal drug has been declared a designated new animal drug by FDA under section 573(a) of the act.

The agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not

required. The agency's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

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

List of Subjects

21 CFR Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

21 CFR Part 529

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 510 and 529 are amended as follows:

PART 510—NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 510 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 379e.

2. In § 510.600, in the table in paragraph (c)(1) alphabetically add an entry for "Eka Chemicals, Inc."; and in the table in paragraph (c)(2) numerically add an entry for "061088" to read as follows:

§ 510.600 Names, addresses, and drug labeler codes of sponsors of approved applications.

* * * * *

(c) * * *

(1) * * *

Firm name and address	Drug labeler code
* * *	*
Eka Chemicals, Inc., 1775 West Oak Commons Ct., Marietta, GA 30062–2254.	061088
* * *	*
(2) * * *	
Drug labeler code	Firm name and address
* * *	* * *
061088	Eka Chemicals, Inc., 1775 West Oak Commons Ct., Marietta, GA 30062–2254
* * *	* * *

PART 529—OTHER DOSAGE FORM NEW ANIMAL DRUGS

■ 3. The authority citation for 21 CFR part 529 continues to read as follows:

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

■ 4. Add § 529.1150 to read as follows:

§ 529.1150 Hydrogen peroxide.

(a) *Specifications.* Each milliliter of solution contains 396.1 milligrams (mg) hydrogen peroxide (a 35% w/w solution).

(b) *Sponsor.* See No. 061088 in § 510.600(c) of this chapter.

(c) *Conditions of use in finfish*—(1) *Amount*—(i) Freshwater-reared finfish eggs: 500 to 1,000 mg per liter (L) of culture water for 15 minutes in a continuous flow system once per day on consecutive or alternate days until hatch for all coldwater and coolwater species of freshwater-reared finfish eggs or 750 to 1,000 mg/L for 15 minutes in a continuous flow system once per day on consecutive or alternate days until hatch for all warmwater species of freshwater-reared finfish eggs.

(ii) Freshwater-reared salmonids: 100 mg/L for 30 minutes or 50 to 100 mg/L for 60 minutes once per day on alternate days for three treatments in a continuous flow water supply or as a static bath.

(iii) Coolwater species of freshwater-reared finfish fingerlings and adults (except northern pike & paddlefish) and channel catfish fingerlings and adults: 50 to 75 mg/L for 60 minutes once per day on alternate days for three treatments in continuous flow water supply or as a static bath. Coolwater species of freshwater-reared finfish fry (except northern pike, pallid sturgeon & paddlefish) and channel catfish fry: 50 mg/L for 60 minutes once per day on alternate days for three treatments in continuous flow water supply or as a static bath.

(2) *Indications for use.* For control of mortality in freshwater-reared finfish eggs due to saprolegniasis; for control of mortality in freshwater-reared salmonids due to bacterial gill disease associated with *Flavobacterium branchiophilum*; and for control of mortality in freshwater-reared coolwater finfish and channel catfish due to external columnaris disease associated with *Flavobacterium columnare* (*Flexibacter columnaris*).

(3) *Limitations.* Initial bioassay on a small number is recommended before treating the entire group. Eggs: Some strains of rainbow trout eggs are sensitive to hydrogen peroxide treatment at a time during incubation concurrent with blastopore formation

through closure, about 70 to 140 Daily Temperature Units, °C. Consider withholding treatment or using an alternate therapeutant during that sensitive time to reduce egg mortalities due to drug toxicity. Finfish: Use with caution on walleye. Preharvest withdrawal time: zero days.

Dated: January 26, 2007.

Stephen F. Sundlof,

Director, Center for Veterinary Medicine.
[FR Doc. E7–1848 Filed 2–5–07; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 943

[TX–056–FOR]

Texas Abandoned Mine Land Reclamation Plan

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

ACTION: Final rule; approval of amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are approving an amendment to the Texas abandoned mine land reclamation plan (Texas plan) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The Railroad Commission of Texas (RCT or Commission) proposed to assume responsibility of the abandoned mine land reclamation (AML) emergency program in Texas. The Commission also proposed to revise the Texas plan by updating portions to reflect its current practices and by removing references to its old regulations (Texas Coal Mining Regulations (TCMR)) and replacing them with references to its recodified regulations (16 Texas Administrative Code (TAC)).

DATES: *Effective Date:* February 6, 2007.

FOR FURTHER INFORMATION CONTACT: Michael C. Wolf from, Director, Tulsa Field Office. Telephone: (918) 581–6430. E-mail address: mwolf from@osmre.gov.

SUPPLEMENTARY INFORMATION:

- I. Background on the Texas Plan
- II. Submission of the Amendment
- III. OSM's Findings
- IV. Summary and Disposition of Comments
- V. OSM's Decision
- VI. Procedural Determinations

I. Background on the Texas Plan

The Abandoned Mine Land Reclamation Program was established by Title IV of the Act (30 U.S.C. 1201 *et seq.*) in response to concerns over extensive environmental damage caused by past coal mining activities. The program is funded by a reclamation fee collected on each ton of coal that is produced. The money collected is used to finance the reclamation of abandoned coal mines and for other authorized activities. Section 405 of the Act allows States and Indian Tribes to assume exclusive responsibility for reclamation activity within the State or on Indian lands if they develop and submit to the Secretary of the Interior (Secretary) for approval, a program (often referred to as a plan) for the reclamation of abandoned coal mines. On the basis of these criteria, the Secretary approved the Texas plan on June 23, 1980. You can find background information on the Texas plan, including the Secretary's findings, the disposition of comments, and the approval of the plan in the June 23, 1980, **Federal Register** (45 FR 41937). You can find later actions concerning the Texas plan and amendments to the plan at 30 CFR 943.25.

II. Submission of the Amendment

By letter dated October 11, 2006 (Administrative Record No. TAML-661), Texas sent us an amendment to its plan under SMCRA (30 U.S.C. 1201 *et seq.*) at its own initiative. Texas proposed to assume the AML emergency program, update portions of its plan to reflect its current practices, and remove references to its old regulations (TCMR) and replace them with references to its recodified regulations (16 TAC). We announced receipt of the proposed amendment in the November 13, 2006, **Federal Register** (71 FR 66150). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the amendment. We did not hold a public hearing or meeting because no one requested one. The public comment period ended on December 13, 2006. We did not receive any public comments.

III. OSM's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 884.14 and 884.15. We are approving the amendment.

A. AML Emergency Program Demonstration

Section 410 of SMCRA authorizes the Secretary to use funds under the AML

program to abate or control emergency situations in which adverse effects of past coal mining pose an immediate danger to the public health, safety, or general welfare. In a **Federal Register** notice dated September 29, 1982 (47 FR 42729), we invited states to amend their AML plans for the purpose of undertaking emergency reclamation programs on our behalf and published guidelines outlining three requirements for State assumption of the AML emergency program. For us to grant emergency authority to the State agency, the agency must demonstrate that it has the following: (1) Statutory authority to undertake emergencies, (2) technical capability to design and supervise the emergency work, and (3) administrative mechanisms to respond quickly to emergencies either directly or through contractors.

1. Statutory Authority

The Commission has had statutory authority under the Texas Surface Coal Mining and Reclamation Act (TSCMRA) section 134.141 to administer an emergency response program since approval of the Texas plan on June 23, 1980. In order to implement this authority, Texas' regulations at 16 TAC 134.143 and 134.144 provide for right of entry on any land where an emergency exists. In a letter dated February 27, 1979, the Governor of Texas designated the Commission as the State agency responsible for the AML program in Texas. The Attorney General of Texas issued an official opinion on March 20, 1980, stating that the Commission is authorized under State law to conduct a State reclamation program in accordance with the requirements of Title IV of the Federal Surface Mining Control and Reclamation Act of 1977, the regulations adopted pursuant thereto, and the State Reclamation Plan. Title IV of SMCRA covers both the regular AML program and the emergency reclamation program.

2. Technical Capability

The Commission has demonstrated through past performance that it has the technical capability to implement an AML emergency program. In its October 11, 2006, submission of the amendment, the Commission included the following statement in its section of the Texas plan titled, "Staffing," to demonstrate the Commission's technical capability to design and supervise the emergency work.

The Surface Mining and Reclamation Division's Abandoned Mine Land Reclamation Program staff has * * * demonstrated experience in developing and managing AML Projects. Areas of expertise

include realty (rights of entry, appraisal and liens), environmental assessment, engineering design, construction and contract management and revegetation and erosion control.

The Division's Administration and Records Section also provides administrative support. The Commission's Finance and Accounting Division provides purchasing and contracting support and legal support is provided by the Commission's Office of General Counsel.

Texas has conducted an AML program since 1980. We have found that the Texas AML program is run in a cost efficient and professional manner. Texas has conducted project design and construction work with a high degree of competence and success. Projects are thoroughly analyzed and conducted in compliance with all National Environmental Policy Act (NEPA) requirements. Construction monitoring, post-construction monitoring, and maintenance processes ensure the projects meet contract specifications, project objectives, and program goals. Over the years, Texas has designed and inspected AML emergency projects for us. Technical capabilities used for these emergency reclamation projects are the same as those used for normal, high priority reclamation projects. We have found that Texas has developed and refined the in-house investigation, design, and project administration abilities necessary to administer an AML program and an AML emergency response program.

3. Administrative Mechanisms

During a review of Texas' revised purchasing and procurement procedures at section 884.13(d)(3) of the Texas plan, we found that the Texas Building and Procurement Commission (TBPC) has delegated the authority to make emergency purchases to all state agencies, including the Commission. The TBPC has made the decision to declare an emergency purchase the sole responsibility of the agencies and encourages the agencies to obtain at least three informal bids, whenever possible, on all emergency purchases. Emergency purchases exceeding \$25,000 must be posted in the Electronic State Business Daily and are subject to pre-payment audit by the TBPC. Texas' contracting method will allow the Commission adequate flexibility to address emergency conditions. Other administrative processes required to implement the emergency program are the same as those already in place for the Texas AML program.

In accordance with section 405 of SMCRA and 30 CFR 884.15, Texas has submitted an amendment to its AML

plan, and we have determined, pursuant to 30 CFR 884.14, the following:

1. The public has been given adequate notice and opportunity to comment on the amendment, and the record does not reflect major unresolved controversies.
2. Views of other Federal agencies have been solicited and considered.
3. The State has the legal authority, policies, and administrative structure necessary to implement the amendment.
4. The proposed plan amendment meets all requirements of the Federal

AML program regulations at 30 CFR Chapter VII, Subchapter R.

5. The State has an approved State Regulatory Program.

6. The amendment is in compliance with all applicable State and Federal laws and regulations.

We find that the proposed Texas plan amendment allowing the State to assume responsibility for an AML emergency response reclamation program on our behalf is in compliance with SMCRA and meets the requirements of the Federal regulations.

Therefore, we are approving Texas' assumption of the AML emergency program.

B. Revisions to Texas' AML Plan

Texas updated its AML plan to (1) ensure that it has the administrative mechanisms to quickly respond to AML emergencies either directly or through contractors and (2) reflect current state practices. The following table lists the sections of the AML plan that Texas revised.

Plan Section	Topic
30 CFR 884.13(c)(6)	Rights of Entry—A description of the policies and procedures to be followed by the Commission regarding right of entry on lands for the purpose of performing AML program activities.
30 CFR 884.13(d)(2)	Staffing—A description of the administrative and management structure to be used in conducting the reclamation program, including the incorporation of an organizational chart in the Texas plan.
30 CFR 884.13(d)(3)	Purchasing and Procurement—A description of the policies and procedures to be followed by the Commission regarding purchasing and procurement for the AML program.

We find that the requirements of the revised Texas AML plan meet the requirements of the Federal regulations at 30 CFR 884.13(a) through (e). Therefore, we are approving them.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment, but did not receive any.

Federal Agency Comments

On October 25, 2006, and November 7, 2006, under 30 CFR 884.14(a)(2) and 884.15(a), we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Texas plan (Administrative Record No. TAML-661.1). No comments were received.

V. OSM's Decision

Based on the above findings, we approve the amendment Texas sent us on October 11, 2006. To implement this decision, we are amending the Federal regulations at 30 CFR part 943, which codify decisions concerning the Texas plan. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 405 of SMCRA requires that the State's plan demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this rule effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

VI. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulations.

Executive Order 12866—Regulatory Planning and Review

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

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State and Tribal abandoned mine land reclamation plans and plan amendments because each program is drafted and promulgated by a specific State or Tribe, not by OSM. Decisions on proposed abandoned mine land reclamation plans and plan amendments submitted by a State or Tribe are based solely on a determination of whether the submittal meets the requirements of Title IV of SMCRA (30 U.S.C. 1231–1243) and 30 CFR part 884 of the Federal regulations.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of abandoned mine reclamation programs. One of the purposes of SMCRA is to "establish a

nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." Section 405(d) of SMCRA requires State abandoned mine land reclamation programs to be in compliance with the procedures, guidelines, and requirements established under SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. This determination is based on the fact that the Texas plan does not provide for reclamation and restoration of land and water resources adversely affected by past coal mining on Indian lands. Therefore, the Texas plan has no effect on federally-recognized Indian tribes.

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

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under

Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because agency decisions on proposed State and Tribal abandoned mine land reclamation plans and plan amendments are categorically excluded from compliance with the National Environmental Policy Act (42 U.S.C. 4332) by the Manual of the Department of the Interior (516 DM 13.5 (B)(29)).

Paperwork Reduction Act

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

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a

significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of \$100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or

tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulations did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 943

Intergovernmental relations, Surface mining, Underground mining.

Dated: January 30, 2007.

Brent Wahlquist,

Acting Director, Office of Surface Mining Reclamation and Enforcement.

■ For the reasons set out in the preamble, 30 CFR part 943 is amended as set forth below:

PART 943—TEXAS

■ 1. The authority citation for part 943 continues to read as follows:

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

■ 2. Section 943.25 is amended in the table by adding a new entry in chronological order by "Date of final publication" to read as follows:

§ 943.25 Approval of Texas abandoned mine land reclamation plan amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
10/11/2006	2/6/2007	Emergency response reclamation program; AML Plan sections 884.13(c)(6), (d)(2) and (d)(3).

[FR Doc. E7-1857 Filed 2-5-07; 8:45 am]

BILLING CODE 4310-05-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 100, 117 and 165

[USCG-2006-26697]

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

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary rules issued.

SUMMARY: This document provides required notice of substantive rules

issued by the Coast Guard and temporarily effective between January 1, 2006 and September 30, 2006 that were not published in the **Federal Register**. This quarterly notice lists temporary local regulations, temporary drawbridge operation regulations, security zones, and safety zones, all of limited duration and for which timely publication in the **Federal Register** was not possible.

DATES: This document lists temporary Coast Guard rules that became effective and were terminated between January 1, 2006 and September 30, 2006.

ADDRESSES: The Docket Management Facility maintains the public docket for this notice. Documents indicated in this notice will be available for inspection or copying at the Docket Management Facility, U.S. Department of Transportation, Room PL-401, 400 Seventh Street SW., Washington, DC 20593-0001 between 9 a.m. and 5 p.m.,

Monday through Friday, except Federal Holidays. You may electronically access the public docket for this notice on the Internet at <http://dms.dot.gov>.

FOR FURTHER INFORMATION CONTACT: For questions on this notice contact Ms. Lesley Mose, Office of Regulations and Administrative Law, telephone (202) 372-3866. For questions on viewing, or on submitting material to the docket, contact Ms. Angie Ames, Docket Operations, telephone 202-366-5115.

SUPPLEMENTARY INFORMATION: Coast Guard District Commanders and Captains of the Port (COTP) must be immediately responsive to the safety and security needs within their jurisdiction; therefore, District Commanders and COTPs have been delegated the authority to issue certain local regulations. Safety zones may be established for safety or environmental purposes. A safety zone may be

stationary and described by fixed limits or it may be described as a zone around a vessel in motion. Security zones limit access to prevent injury or damage to vessels, ports, or waterfront facilities and may also describe a zone around a vessel in motion. Special local regulations are issued to enhance the safety of participants and spectators at regattas and other marine events. Drawbridge operation regulations authorize changes to drawbridge schedules to accommodate bridge repairs, seasonal vessel traffic, and local public events. Timely publication of these rules in the **Federal Register** is often precluded when a rule responds to an emergency, or when an event occurs without sufficient advance notice. The affected public is, however, informed of these rules through Local Notices to Mariners, press releases, and other means. Moreover, actual notification is

provided by Coast Guard patrol vessels enforcing the restrictions imposed by the rule. Because **Federal Register** publication was not possible before the beginning of the effective period, mariners were personally notified of the contents of these special local regulations, drawbridge operation regulations, security zones, and safety zones by Coast Guard officials on-scene prior to any enforcement action. However, the Coast Guard, by law, must publish in the **Federal Register** notice of substantive rules adopted. To meet this obligation without imposing undue expense on the public, the Coast Guard periodically publishes a list of these temporary special local regulations, security zones, safety zones and drawbridge operation regulations. Permanent rules are not included in this list because they are published in their entirety in the **Federal Register**.

Temporary rules are also published in their entirety if sufficient time is available to do so before they are placed in effect or terminated. The safety zones, special local regulations, security zones and drawbridge operation regulations listed in this notice have been exempted from review under Executive Order 12866, Regulatory Planning and Review, because of their emergency nature, or limited scope and temporary effectiveness.

The following rules were placed in effect temporarily during the period from January 1, 2006 through September 30, 2006 unless otherwise indicated.

Dated: December 19, 2006.

S.G. Venckus,

Chief, Office of Regulations and Administrative Law.

BILLING CODE 4910-15-P

Docket Number	Location	Type	Effective Date
CGD01-06-001	Marblehead Harbor, MA	Safety Zones (Parts 147 and 165)	7/4/2006
CGD01-06-002	Northern New England	Safety Zones (Parts 147 and 165)	1/4/2006
CGD01-06-012	Weymouth, MA	Safety Zones (Parts 147 and 165)	7/1/2006
CGD01-06-014	Saugus River, MA	Drawbridges (Part 117)	2/27/2006
CGD01-06-032	Nahant Bay, MA	Safety Zones (Parts 147 and 165)	7/3/2006
CGD01-06-035	Hingham, MA	Safety Zones (Parts 147 and 165)	6/30/2006
CGD01-06-036	Salem, MA	Safety Zones (Parts 147 and 165)	7/4/2006
CGD01-06-038	Marion, MA	Safety Zones (Parts 147 and 165)	7/1/2006
CGD01-06-040	Osterville, MA	Safety Zones (Parts 147 and 165)	7/3/2006
CGD01-06-043	Provincetown, MA	Safety Zones (Parts 147 and 165)	7/4/2006
CGD01-06-044	Falmouth, MA	Safety Zones (Parts 147 and 165)	7/3/2006
CGD01-06-046	Hyannis, MA	Safety Zones (Parts 147 and 165)	7/1/2006
CGD01-06-049	Northern New England	Safety Zones (Parts 147 and 165)	5/9/2006
CGD01-06-053	Nantucket, MA	Safety Zones (Parts 147 and 165)	7/4/2006
CGD01-06-055	Boston, MA	Safety Zones (Parts 147 and 165)	7/4/2006
CGD01-06-062	Ipswich, MA	Safety Zones (Parts 147 and 165)	7/3/2006
CGD01-06-071	Gloucester, MA	Safety Zones (Parts 147 and 165)	6/25/2006
CGD01-06-072	Gloucester, MA	Safety Zones (Parts 147 and 165)	7/3/2006
CGD01-06-074	Fall River, MA	Safety Zones (Parts 147 and 165)	7/4/2006
CGD01-06-081	Point O'Woods, NY	Safety Zones (Parts 147 and 165)	7/3/2006
CGD01-06-085	Manchester, MA	Safety Zones (Parts 147 and 165)	7/3/2006
CGD01-06-086	Beverly Farms, MA	Safety Zones (Parts 147 and 165)	7/4/2006
CGD01-06-088	Nahant, MA	Safety Zones (Parts 147 and 165)	7/4/2006
CGD01-06-110	New Jersey	Drawbridges (Part 117)	8/12/2006
CGD05-06-008	Potomac Rivers, DC	Security zones (Part 165)	1/31/2006
CGD05-05-016	Moorehead City, NC	Safety Zones (Parts 147 and 165)	7/4/2006
CGD05-06-019	Virginia Beach, VA	Safety Zones (Parts 147 and 165)	7/4/2006
CGD05-06-022	Chesapeake Bay, MD	Special Local Regulations (Part 100)	6/11/2006
CGD05-06-026	Williamsburg, VA	Safety Zones (Parts 147 and 165)	7/4/2006
CGD05-06-027	Norfolk, VA	Safety Zones (Parts 147 and 165)	6/30/2006
CGD05-06-029	Chesapeake Bay, VA	Safety Zones (Parts 147 and 165)	3/24/2006

CGD05-06-030	Yorktown, VA	Safety Zones (Parts 147 and 165)	7/4/2006
CGD05-06-034	Washington, DC	Security zones (Part 165)	5/25/2006
CGD05-06-048	Newport News, VA	Safety Zones (Parts 147 and 165)	7/4/2006
CGD05-06-054	Virginia Beach, VA	Safety Zones (Parts 147 and 165)	7/4/2006
CGD05-06-084	Baltimore, MD	Safety Zones (Parts 147 and 165)	8/7/2006
CGD05-06-088	Alexandria, VA	Safety Zones (Parts 147 and 165)	8/28/2006
CGD05-06-090	Fairfax, VA	Security zones (Part 165)	8/23/2006
CGD06-06-010	Williamsburg, VA	Security zones (Part 165)	2/1/2006
CGD07-06-001	Tampa, FL	Special Local Regulations (Part 100)	1/28/2006
CGD09-04-064	Alpena, MI	Safety Zones (Parts 147 and 165)	7/4/2006
CGD09-06-003	Lake Huron	Safety Zones (Parts 147 and 165)	1/19/2006
CGD09-06-006	Lake Huron	Safety Zones (Parts 147 and 165)	2/8/2006
CGD09-06-008	Lake Erie	Safety Zones (Parts 147 and 165)	2/16/2006
CGD09-06-010	Lake Erie	Safety Zones (Parts 147 and 165)	2/28/2006
CGD09-06-011	Lake Michigan	Safety Zones (Parts 147 and 165)	3/2/2006
CGD09-06-014	Cleveland, OH	Safety Zones (Parts 147 and 165)	3/16/2006
CGD09-06-016	Lake Superior	Safety Zones (Parts 147 and 165)	3/21/2006
CGD09-06-021	Muskegon, MI	Safety Zones (Parts 147 and 165)	4/29/2006
CGD09-06-030	Lake Michigan	Safety Zones (Parts 147 and 165)	5/18/2006
CGD09-06-041	Lake Michigan	Safety Zones (Parts 147 and 165)	6/11/2006
CGD09-06-042	Lake Huron	Safety Zones (Parts 147 and 165)	6/13/2006
CGD09-06-043	Lake Michigan	Safety Zones (Parts 147 and 165)	6/15/2006
CGD09-06-045	Cheboygan, MI	Security zones (Part 165)	6/10/2006
CGD09-06-065	Grand Haven, MI	Safety Zones (Parts 147 and 165)	6/24/2006
CGD09-06-066	Elberta, MI	Safety Zones (Parts 147 and 165)	6/24/2006
CGD09-06-069	Chicago, IL	Safety Zones (Parts 147 and 165)	6/24/2006
CGD09-06-073	Milwaukee, WI	Safety Zones (Parts 147 and 165)	6/23/2006
CGD09-06-077	Manistee, MI	Safety Zones (Parts 147 and 165)	7/3/2006
CGD09-06-079	Wolcott, NY	Safety Zones (Parts 147 and 165)	7/3/2006
CGD09-06-081	Lake Ontario	Safety Zones (Parts 147 and 165)	6/27/2006
CGD09-06-083	Chicago River South Branch	Security zones (Part 165)	6/23/2006
CGD09-06-130	Lake Ontario	Safety Zones (Parts 147 and 165)	7/25/2006

CGD09-06-131	Grand Haven, MI	Safety Zones (Parts 147 and 165)	8/1/2006
CGD09-06-143	Algoma, WI	Safety Zones (Parts 147 and 165)	8/13/2006
CGD09-06-151	Lake Huron	Safety Zones (Parts 147 and 165)	8/16/2006
CGD09-06-152	Port Huron, MI	Safety Zones (Parts 147 and 165)	8/18/2006
CGD09-06-153	Lake Erie	Safety Zones (Parts 147 and 165)	8/21/2006
CGD09-06-155	Lake Ontario	Safety Zones (Parts 147 and 165)	8/29/2006
CGD09-06-158	Lake Superior	Safety Zones (Parts 147 and 165)	9/8/2006
CGD09-06-159	Lake Michigan	Safety Zones (Parts 147 and 165)	9/13/2006
CGD09-06-160	Lake Superior	Safety Zones (Parts 147 and 165)	9/12/2006
CGD09-06-162	Lake Superior	Safety Zones (Parts 147 and 165)	9/12/2006
CGD11-06-001	San Francisco Bay, CA	Special Local Regulations (Part 100)	3/17/2006
CGD11-06-008	San Francisco Bay, CA	Special Local Regulations (Part 100)	6/2/2006
CGD13-06-003	Puget Sound, WA	Security zones (Part 165)	1/29/2006
CGD13-06-005	Seattle, WA	Safety Zones (Parts 147 and 165)	1/24/2006
CGD13-06-010	Puget Sound, WA	Security zones (Part 165)	3/5/2006
CGD13-06-013	Seattle, WA	Security zones (Part 165)	3/24/2006
CGD13-06-017	Lake Washington, Washington	Security zones (Part 165)	4/18/2006
CGD13-06-018	Medina, Washington	Security zones (Part 165)	4/18/2006
CGD13-06-029	Lake Washington, Washington	Security zones (Part 165)	6/16/2006
CGD13-06-030	Medina, Washington	Security zones (Part 165)	6/16/2006
CGD13-06-031	Fairhaven, Washington	Security zones (Part 165)	6/17/2006
CGD13-06-041	Warrenton, OR	Safety Zones (Parts 147 and 165)	8/22/2006
CGD13-06-043	Olympia, WA	Safety Zones (Parts 147 and 165)	9/3/2006
CGD13-06-046	Warrenton, OR	Safety Zones (Parts 147 and 165)	9/18/2006
CGD13-06-049	Warrenton, OR	Safety Zones (Parts 147 and 165)	10/18/2006
COTP Charleston 06-023	Port Charleston, SC	Safety Zones (Parts 147 and 165)	2/6/2006
COTP Charleston 06-062	Charleston, SC	Safety Zones (Parts 147 and 165)	4/13/2006
COTP Charleston 06-069	Charleston, SC	Safety Zones (Parts 147 and 165)	4/13/2006
COTP Charleston 06-134	Hilton Head, SC	Safety Zones (Parts 147 and 165)	7/4/2006
COTP Guam 06-001	Apra Harbor, GU	Safety Zones (Parts 147 and 165)	1/31/2006
COTP Guam 06-006	Apra Harbor, GU	Safety Zones (Parts 147 and 165)	3/22/2006
COTP Guam 06-009	Cocos Crossing, GU	Safety Zones (Parts 147 and 165)	5/28/2006

COTP Hampton Roads 06-046	Ocean City, MD	Safety Zones (Parts 147 and 165)	6/19/2006
COTP Honolulu 06-001	Honolulu, HI	Security zones (Part 165)	1/9/2006
COTP Honolulu 06-004	Honolulu, HI	Security zones (Part 165)	4/5/2006
COTP Houston-Galveston 05-0015	Alvin, TX	Safety Zones (Parts 147 and 165)	8/15/2005
COTP Jacksonville 06-031	Cocoa, FL	Safety Zones (Parts 147 and 165)	2/25/2006
COTP Jacksonville 06-045	Jacksonville, FL	Security zones (Part 165)	4/6/2006
COTP Jacksonville 06-058	Jacksonville, FL	Security zones (Part 165)	3/24/2006
COTP Jacksonville 06-090	New Smyrna Beach, FL	Safety Zones (Parts 147 and 165)	6/24/2006
COTP Jacksonville 06-091	Cocoa, FL	Safety Zones (Parts 147 and 165)	7/4/2006
COTP Jacksonville 06-092	St. Mary's, GA	Safety Zones (Parts 147 and 165)	7/4/2006
COTP Jacksonville 06-093	Fernandina Beach, FL	Safety Zones (Parts 147 and 165)	6/4/2006
COTP Jacksonville 06-094	Sanford, FL	Safety Zones (Parts 147 and 165)	7/4/2006
COTP Jacksonville 06-095	Ormond Beach, FL	Safety Zones (Parts 147 and 165)	7/4/2006
COTP Jacksonville 06-096	Flagler Beach, FL	Safety Zones (Parts 147 and 165)	7/4/2006
COTP Jacksonville 06-098	Jacksonville Beach, FL	Safety Zones (Parts 147 and 165)	7/4/2006
COTP Jacksonville 06-099	Edgewater, FL	Safety Zones (Parts 147 and 165)	7/4/2006
COTP Jacksonville 06-100	Jacksonville, FL	Safety Zones (Parts 147 and 165)	7/4/2006
COTP Jacksonville 06-101	Jacksonville, FL	Safety Zones (Parts 147 and 165)	7/4/2006
COTP Jacksonville 06-118	Patrick AFB, FL	Safety Zones (Parts 147 and 165)	7/4/2006
COTP Jacksonville 06-119	Kissimmee, FL	Safety Zones (Parts 147 and 165)	7/4/2006
COTP Jacksonville 06-120	Cocoa Beach, FL	Safety Zones (Parts 147 and 165)	7/4/2006
COTP Jacksonville 06-128	Orange Park, FL	Safety Zones (Parts 147 and 165)	7/4/2006
COTP Jacksonville 06-129	St. Augustine, FL	Safety Zones (Parts 147 and 165)	7/4/2006
COTP Jacksonville 06-143	Palatka, FL	Safety Zones (Parts 147 and 165)	7/4/2006
COTP Jacksonville 06-180	Jacksonville, FL	Safety Zones (Parts 147 and 165)	8/29/2006
COTP Louisville 06-001	Louisville, KY	Security zones (Part 165)	1/11/2006
COTP Mobile 05-039	Longbeach, MS	Safety Zones (Parts 147 and 165)	9/4/2005
COTP Mobile 05-040	Biloxi, MS	Safety Zones (Parts 147 and 165)	9/11/2005
COTP Mobile 05-041	Bayou La Batre, AL	Safety Zones (Parts 147 and 165)	9/17/2005
COTP Mobile 05-042	Gulfport, MS	Safety Zones (Parts 147 and 165)	9/19/2005
COTP Mobile 05-045	Biloxi, MS	Safety Zones (Parts 147 and 165)	9/22/2005
COTP Mobile 05-048	Orange Beach, AL	Safety Zones (Parts 147 and 165)	10/26/2005

COTP Mobile 05-050	Dauphin Island, AL	Safety Zones (Parts 147 and 165)	11/3/2005
COTP Morgan City 06-002	Morgan City	Safety Zones (Parts 147 and 165)	3/5/2006
COTP Morgan City 06-005	Morgan City	Safety Zones (Parts 147 and 165)	4/4/2006
COTP Ohio Valley 06-027	Evansville, IN	Safety Zones (Parts 147 and 165)	5/27/2006
COTP Ohio Valley 06-028	Point Pleasant, WV	Safety Zones (Parts 147 and 165)	7/8/2006
COTP Ohio Valley 06-030	Charleston, WV	Safety Zones (Parts 147 and 165)	7/3/2006
COTP Ohio Valley 06-031	Marietta, OH	Safety Zones (Parts 147 and 165)	7/8/2006
COTP Ohio Valley 06-032	Chattanooga, TN	Safety Zones (Parts 147 and 165)	6/11/2006
COTP Ohio Valley 06-034	Florence, AL	Safety Zones (Parts 147 and 165)	7/4/2006
COTP Ohio Valley 06-036	Cumberland City, TN	Safety Zones (Parts 147 and 165)	7/1/2006
COTP Ohio Valley 06-042	Chattanooga, TN	Safety Zones (Parts 147 and 165)	7/3/2006
COTP Ohio Valley 06-043	Clarksville, TN	Safety Zones (Parts 147 and 165)	7/8/2006
COTP Ohio Valley 06-044	Ashland, KY	Safety Zones (Parts 147 and 165)	7/4/2006
COTP Pittsburgh 05-017	Pittsburgh, PA	Safety Zones (Parts 147 and 165)	8/27/2005
COTP Port Arthur 05-014	Port Arthur, TX	Safety Zones (Parts 147 and 165)	7/24/2005
COTP Port Arthur 05-015	Sabine Pass, TX	Safety Zones (Parts 147 and 165)	7/25/2005
COTP Port Arthur 05-017	Orange, TX	Safety Zones (Parts 147 and 165)	9/3/2005
COTP Port Arthur 05-019	Orange, TX	Safety Zones (Parts 147 and 165)	9/7/2005
COTP Port Arthur 05-020	Orange, TX	Safety Zones (Parts 147 and 165)	9/30/2005
COTP Port Arthur 05-021	Port Arthur, TX	Safety Zones (Parts 147 and 165)	9/21/2005
COTP Port Arthur 05-022	Orange, TX	Safety Zones (Parts 147 and 165)	10/9/2005
COTP Port Arthur 05-023	Orange, TX	Safety Zones (Parts 147 and 165)	10/11/2005
COTP Port Arthur 05-024	Orange, TX	Safety Zones (Parts 147 and 165)	10/27/2005
COTP Port Arthur 05-025	Gulf of Mexico	Safety Zones (Parts 147 and 165)	11/20/2005
COTP Port Arthur 05-026	Orange, TX	Safety Zones (Parts 147 and 165)	12/13/2005
COTP Port Arthur 05-027	Beaumont, TX	Safety Zones (Parts 147 and 165)	12/31/2005
COTP Port Arthur 05-028	Gulf of Mexico	Safety Zones (Parts 147 and 165)	12/20/2005
COTP Port Arthur 06-001	Port Arthur, TX	Safety Zones (Parts 147 and 165)	1/12/2006
COTP Port Arthur 06-002	Port Arthur, TX	Safety Zones (Parts 147 and 165)	1/17/2006
COTP Port Arthur 06-003	Port Arthur, TX	Safety Zones (Parts 147 and 165)	1/30/2006
COTP Port Arthur 06-004	Orange, TX	Safety Zones (Parts 147 and 165)	2/1/2006
COTP Port Arthur 06-005	Port Arthur, TX	Safety Zones (Parts 147 and 165)	2/3/2006

COTP Port Arthur 06-006	Orange, TX	Safety Zones (Parts 147 and 165)	2/14/2006
COTP Port Arthur 06-007	Port Arthur, TX	Safety Zones (Parts 147 and 165)	2/26/2006
COTP Port Arthur 06-008	Port Arthur, TX	Safety Zones (Parts 147 and 165)	3/16/2006
COTP Port Arthur 06-009	Orange, TX	Safety Zones (Parts 147 and 165)	4/1/2006
COTP Port Arthur 06-010	Port Neches, TX	Safety Zones (Parts 147 and 165)	5/13/2006
COTP Port Arthur 06-014	Hackberry, LA	Safety Zones (Parts 147 and 165)	5/31/2006
COTP Port Arthur 06-017	Port Arthur, TX	Safety Zones (Parts 147 and 165)	7/4/2006
COTP Port Arthur 11-006	Orange, TX	Safety Zones (Parts 147 and 165)	5/2/2006
COTP Port Arthur 13-006	Orange, TX	Safety Zones (Parts 147 and 165)	5/27/2006
COTP San Diego 04-008	Parker, AZ	Safety Zones (Parts 147 and 165)	4/17/2004
COTP San Diego 05-007	Lake Havasu, CA	Safety Zones (Parts 147 and 165)	2/19/2005
COTP San Diego 05-011	Parker, AZ	Safety Zones (Parts 147 and 165)	4/23/2005
COTP San Diego 05-014	Oceanside Harbor, VA	Safety Zones (Parts 147 and 165)	3/19/2005
COTP San Diego 05-027	North San Diego Bay, CA	Safety Zones (Parts 147 and 165)	2/9/2005
COTP San Diego 05-051	San Diego, CA	Safety Zones (Parts 147 and 165)	7/8/2005
COTP San Diego 06-007	Lake Havasu, CA	Safety Zones (Parts 147 and 165)	2/18/2006
COTP San Diego 06-017	Lake Havasu, CA	Safety Zones (Parts 147 and 165)	3/25/2006
COTP San Diego 06-052	San Diego, CA	Safety Zones (Parts 147 and 165)	7/8/2006
COTP San Diego 06-074	San Diego Bay, CA	Safety Zones (Parts 147 and 165)	6/24/2006
COTP San Diego 06-086	Parker, AZ	Safety Zones (Parts 147 and 165)	5/6/2006
COTP San Francisco Bay 06-004	San Francisco Bay, CA	Safety Zones (Parts 147 and 165)	2/8/2006
COTP San Francisco Bay 06-005	Oakland, CA	Safety Zones (Parts 147 and 165)	2/15/2006
COTP San Francisco Bay 06-007	Bodega Bay, CA	Safety Zones (Parts 147 and 165)	6/19/2006
COTP San Francisco Bay 06-010	San Francisco Bay, CA	Security zones (Part 165)	3/17/2006
COTP San Francisco Bay 06-011	San Francisco Bay, CA	Safety Zones (Parts 147 and 165)	3/29/2206
COTP San Francisco Bay 06-012	San Francisco Bay, CA	Safety Zones (Parts 147 and 165)	4/4/2006
COTP San Francisco Bay 06-014	Carquinez Strait, CA	Safety Zones (Parts 147 and 165)	4/26/2006
COTP San Francisco Bay 06-015	Montara, CA	Safety Zones (Parts 147 and 165)	4/18/2006
COTP San Francisco Bay 06-016	Sacramento, CA	Security zones (Part 165)	4/2/2006
COTP San Francisco Bay 06-020	San Francisco Bay, CA	Safety Zones (Parts 147 and 165)	6/11/2006
COTP San Francisco Bay 06-035	Bodega Bay, CA	Safety Zones (Parts 147 and 165)	8/1/2006
COTP San Juan 06-087	Ponce, PR	Security zones (Part 165)	5/6/2006

COTP Savannah 06-037	Savannah, GA	Security zones (Part 165)	2/25/2006
COTP Savannah 06-053	Savannah, GA	Security zones (Part 165)	3/16/2006
COTP Savannah 06-068	Savannah, GA	Security zones (Part 165)	4/14/2006
COTP St Petersburg 06-009	Tampa Bay, FL	Safety Zones (Parts 147 and 165)	1/19/2006
COTP St Petersburg 06-010	Tampa Bay, FL	Safety Zones (Parts 147 and 165)	1/21/2006
COTP St Petersburg 06-013	St Petersburg, FL	Safety Zones (Parts 147 and 165)	1/20/2006
COTP St Petersburg 06-014	Wiggins Pass, FL	Safety Zones (Parts 147 and 165)	2/1/2006
COTP St Petersburg 06-017	Ft Myers Beach, FL	Safety Zones (Parts 147 and 165)	1/21/2006
COTP St Petersburg 06-024	Tampa Bay, FL	Safety Zones (Parts 147 and 165)	2/3/2006
COTP St Petersburg 06-028	St Petersburg, FL	Safety Zones (Parts 147 and 165)	2/9/2006
COTP St Petersburg 06-032	St Petersburg, FL	Safety Zones (Parts 147 and 165)	2/16/2006
COTP St Petersburg 06-033	Tampa Bay, FL	Safety Zones (Parts 147 and 165)	2/24/2006
COTP St Petersburg 06-036	Tampa Bay, FL	Security zones (Part 165)	2/17/2006
COTP St Petersburg 06-043	Naples Beach, FL	Security zones (Part 165)	3/6/2006
COTP St Petersburg 06-046	Gulf of Mexico, FL	Safety Zones (Parts 147 and 165)	3/9/2006
COTP St Petersburg 06-047	Ft Myers Beach, FL	Safety Zones (Parts 147 and 165)	3/9/2006
COTP St Petersburg 06-059	Crystal River, FL	Safety Zones (Parts 147 and 165)	3/21/2006
COTP St Petersburg 06-106	Bradenton, FL	Safety Zones (Parts 147 and 165)	5/17/2006
COTP St Petersburg 06-123	Ft Myers Beach, FL	Safety Zones (Parts 147 and 165)	6/15/2006
COTP St Petersburg 06-127	Tampa Bay, FL	Safety Zones (Parts 147 and 165)	6/7/2006
COTP St Petersburg 06-199	Clearwater, FL	Safety Zones (Parts 147 and 165)	9/28/2006
COTP St Louis 05-031	St Louis, MO	Safety Zones (Parts 147 and 165)	11/30/2005
COTP St Louis 06-003	St Louis, MO	Safety Zones (Parts 147 and 165)	3/28/2006
COTP St Louis 06-004	Peoria, IL	Safety Zones (Parts 147 and 165)	3/29/2006
COTP Western Alaska 06-003	Unalaska Island, AK	Safety Zones (Parts 147 and 165)	8/9/2006
MSU Huntington 06-001	Marietta, OH	Safety Zones (Parts 147 and 165)	4/22/2006
MSU Huntington 06-002	Charleston, WV	Safety Zones (Parts 147 and 165)	4/29/2006

DEPARTMENT OF TRANSPORTATION**Maritime Administration****46 CFR Part 296**

[Docket No. MARAD-2006-23804]

RIN 2133-AB68

**Maintenance and Repair
Reimbursement Pilot Program****AGENCY:** Maritime Administration,
Department of Transportation.**ACTION:** Final rule.

SUMMARY: This final rule amends the Maritime Administration's (MARAD's) regulations governing its pilot program for the reimbursement of costs of qualified maintenance and repair (M&R) of Maritime Security Program (MSP) vessels performed in United States shipyards. Under Public Law 109-163, the Secretary of Transportation, acting through the Maritime Administrator, is directed to implement regulations that, among other things, replace MARAD's voluntary M&R reimbursement program with a mandatory program.

DATES: This rule is effective March 8, 2007.

FOR FURTHER INFORMATION CONTACT: Jean E. McKeever, Associate Administrator for Marine Asset Development, Maritime Administration, 400 Seventh Street, SW., Washington, DC 20590; phone: (202) 366-5737; fax: (202) 366-3511; or e-mail Jean.McKeever@dot.gov.

SUPPLEMENTARY INFORMATION:**Background**

The Maritime Security Program (MSP) was established to maintain a modern U.S.-flag fleet of commercially viable, militarily useful, privately-owned vessels for national defense needs and to maintain a strong U.S. presence in international maritime trade. Under the MSP, the U.S. Government contracts with certain operators of U.S.-flag commercial vessels to be on call for service when needed in times of national emergency or war. In return, the U.S. Government provides a yearly operating payment, subject to availability of appropriations.

The original MSP was established by the Maritime Security Act of 1996 (Pub. L. 104-239, Oct. 8, 1996) for fiscal years 1996 through 2005. On November 24, 2003, President Bush signed the Maritime Security Act of 2003 (MSA 2003) (part of the National Defense Authorization Act for Fiscal Year 2004) which reauthorized the MSP for fiscal years 2006 through 2015. Sixty MSP operating agreements authorized under MSA 2003 were awarded on January 12,

2005. The operating agreements, one for each vessel, require the vessel owner or operator to operate the vessel in commercial service in foreign trade under U.S. registry and to make that vessel available to the United States when needed. The operating agreements under MSA 2003, became effective October 1, 2005, and, subject to available appropriations, are renewable for each subsequent fiscal year through the end of fiscal year 2015.

In addition to reauthorizing the MSP, section 3517 of the MSA 2003 established a voluntary pilot program under which the Secretary of Transportation could enter into agreements to reimburse MSP vessel operators for the costs of qualified M&R performed in U.S. shipyards. Reimbursement levels under the voluntary program were established at 80% of the difference between the fair and reasonable cost of obtaining qualified M&R work in U.S. shipyards and the cost of qualified M&R work in foreign shipyards. MARAD promulgated implementing regulations for this program at 46 CFR section 296.60 (70 FR 55581, Sept. 22, 2005).

Under Public Law 109-163, enacted on January 6, 2006, the Secretary of Transportation was directed to implement regulations to replace the voluntary M&R reimbursement program with a mandatory program. Under the mandatory program, MARAD must enter into an agreement with one or more MSP Contractors, subject to appropriations, for the M&R of one or more vessels that are subject to an MSP operating agreement to be performed in a U.S. shipyard, "as a condition of awarding an operating agreement to the person." Under Public Law 109-163, reimbursement levels are established at 100% of the difference between the fair and reasonable cost of obtaining qualified M&R work in U.S. shipyards and the cost of qualified M&R work in foreign shipyards.

MARAD published a notice of proposed rulemaking (NPRM) on February 8, 2006 (71 FR 6438), inviting public comments. The NPRM proposed, among other things, to make performance of qualified M&R in the United States mandatory as a condition of participation in MSP. The NPRM also invited suggestions regarding what documentation Contractors could provide to assist MARAD in determining the fair and reasonable cost of obtaining qualified M&R work in U.S. shipyards as well as in the foreign shipyards where Contractors would otherwise undertake such work.

Several of the MSP contractors objected to the mandatory nature of the

proposed M&R regulation. They argued that the terms of the statute could only be read as applying to subsequent awards of MSP operating agreements and not to MSP operating agreements that had previously been awarded. They also argued, moreover, that even Congress is barred from unilaterally amending the terms of a binding government contract. Other MSP contractors requested that M&R reimbursements cover certain indirect costs of performing M&R in U.S. shipyards.

In order to have a full airing of MARAD's authority to require existing MSP contractors to participate in the M&R Pilot Program, MARAD opened a reply comment period that closed September 22, 2006. 71 FR 46399 (Aug. 23, 2006). The Shipbuilders Council of America submitted comments arguing that MARAD does have the authority to change existing MSP agreements. They maintain that: (1) The terms of the MSP operating agreement allow for changes to the agreements by mutual consent; (2) the MSP operating agreements must be renewed annually, and upon renewal MARAD could make such renewal conditional on acceptance of an M&R Pilot Program agreement; and (3) the M&R Pilot Program agreement would not cause any hardship among MSP operators.

After review of the comments on both sides of the authority issue, the relevant statutory text and the available legislative history, MARAD finds that Congress intended that the M&R provisions be a condition only on future awards of MSP operating agreements. The plain language of section 3517 requires MARAD to require at least one contractor to enter into an M&R agreement as a condition of award of an MSP agreement. However, all 60 existing MSP agreements had been awarded prior to enactment of the mandatory provisions in section 3517. Further, there is no indication that Congress intended for MARAD to abrogate existing MSP operating agreements. On the other hand, there is strong evidence that Congress considered the M&R obligation to be voluntary on existing MSP contractors because Congress provided an incentive for existing MSP operators to take on the M&R obligation. See section 3502(c) of the John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. 109-364, which grants a priority, during times of insufficient appropriations, in allocation of MSP payments to MSP contractors that have entered into M&R agreements. There would be no reason for Congress to provide an incentive for doing that

which is mandatory. Therefore, we must conclude that Congress viewed the M&R obligations to not be mandatory, but to be voluntary, for existing MSP contractors.

Accordingly, existing MSP contractors may enter into an M&R agreement, but entering into an M&R agreement will not be a condition of retaining an MSP operating agreement. However, entering into an M&R agreement will be a condition of future awards of MSP operating agreements, such as awards for replacements or transfers of existing MSP agreements, or award of new agreements in the event that MARAD is authorized to award more than 60 agreements.

As to other issues raised concerning administration of the M&R Pilot Program, we have reviewed the comments submitted and make the following determinations. The M&R reimbursement payment will be structured to cover all direct and reasonable indirect costs of repairing vessels in the United States. We do this to help ensure that the M&R Pilot Program, if funded by Congress, will truly equalize the cost of domestic and foreign repairs. It is our intention to make the program work in a way that benefits both the U.S. shipyards and the MSP operators. However, all costs will have to be estimated with relative certainty prior to MARAD's commitment to pay costs. MARAD will undertake to cover the cost of additional required repairs, which were not reasonably identifiable prior to entry into a shipyard—but not more than 20 percent of the originally estimated cost of repairs. The burden of computing the foreign cost of repairs primarily will be upon the vessel operator. However, the vessel operator must submit sufficient documentation to allow us to verify the cost of foreign repairs. Each participant in the M&R Pilot Program will be required to keep MARAD informed of its scheduled maintenance and repair work. Pursuant to a statutory requirement, the M&R participant must notify MARAD of its intent to obtain the M&R not later than 90 days before the date of the performance of the M&R. MARAD will determine which M&R projects MARAD finds suitable for accomplishment in United States shipyards. MARAD will base such determinations on the amount of funds available, the number of vessels operated by the vessel operator and the proximity of the vessels' itineraries to suitable U.S. shipyard locations. The M&R Pilot Program participants may suggest an alternative M&R project, but MARAD will not excuse the M&R obligations absent a compelling reason.

Disregard of the M&R obligations will constitute a default of the MSP operating agreement. MARAD will prepare a standard addendum to the MSP operating agreement for those MSP contractors who decide to enter into an M&R Pilot Program agreement.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review), and Department of Transportation (DOT) Regulatory Policies; Pub. L. 104–121

This final rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget. This final rule is not likely to result in an annual effect on the economy of \$100 million or more. This final rule is also not significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034, February 26, 1979). The costs and economic impact associated with this rulemaking are considered to be sufficiently small that no further analysis is necessary.

Executive Order 13132

We have analyzed this rulemaking in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism") and have determined that it does not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement. The regulations have no substantial effects on the States, the current Federal-State relationship, or on the current distribution of power and responsibilities among local officials. Therefore, consultation with State and local officials was not necessary.

Executive Order 13175

MARAD does not believe that this final rule will significantly or uniquely affect the communities of Indian tribal governments when analyzed under the principles and criteria contained in Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments). Therefore, the funding and consultation requirements of this Executive Order do not apply.

Regulatory Flexibility

The Maritime Administrator certifies that this final rule will not have a significant economic impact on a substantial number of small entities. We anticipate that no small entities will participate in this program.

Unfunded Mandates Reform Act of 1995

This final rule will not impose an unfunded mandate under the Unfunded Mandates Reform Act of 1995. It will not result in costs of \$100 million or more, in the aggregate, to any of the following: State, local, or Native American tribal governments, or the private sector. This final rule is the least burdensome alternative that achieves this objective of U.S. policy.

Environmental Assessment

We have analyzed this final rule for purposes of compliance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) and have concluded that, under the categorical exclusions provision in section 4.05 of Maritime Administrative Order (MAO) 600–1, "Procedures for Considering Environmental Impacts," 50 FR 11606 (March 22, 1985), neither the preparation of an Environmental Assessment, an Environmental Impact Statement, nor a Finding of No Significant Impact for this rulemaking is required. This final rule does not change the environmental effects of the current M&R Pilot Program and thus no further analysis under NEPA is required.

Paperwork Reduction

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507 et seq.), this rulemaking contains no new information collection and record keeping requirements that require OMB approval.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit <http://dms.dot.gov>.

List of Subjects in 46 CFR Part 296

Assistance payments, Maritime carriers, Reporting and recordkeeping requirements.

■ Accordingly, 46 CFR Chapter II, Subchapter C, Part 296 is amended as follows:

PART 296—MARITIME SECURITY PROGRAM (MSP)

■ 1. The authority citation for part 296 is revised to read as follows:

Authority: Pub. L. 108–136, Pub. L. 109–163; 49 U.S.C. 322(a), 49 CFR 1.66.

■ 2. Revise § 296.60 to read as follows:

§ 296.60 Applications.

(a) *Introduction.* This section sets forth MARAD's regulations governing its Maintenance and Repair (M&R) Reimbursement Pilot Program. The M&R program is presently a 5-year program, authorized at \$19.5 million per year for FY 2006–2011.

(b) *M&R participants.* Every existing Contractor in MSP may enter into an agreement under 46 U.S.C. 3517, to perform qualified M&R of one or more MSP vessels in United States shipyards, subject to the terms of this section. Every MSP Contractor entering into an MSP operating agreement, including those agreements transferred from an existing MSP Contractor, or newly issued or reissued from MARAD, after March 8, 2007, must agree to enter into an agreement under 46 U.S.C. 3517, to perform qualified M&R of one or more MSP vessels in United States shipyards, subject to the terms of this section. Each vessel that is subject to an M&R agreement will receive a priority in the allocation of MSP payments if the amount available for a fiscal year for making payments under MSP operating agreements is not sufficient to pay the full amount authorized under each agreement for such fiscal year.

(c) *Terms of Agreement.* An agreement under this section:

(1) Will require that except as provided in paragraph (d) of this section, all qualified M&R on the vessel will be performed in the United States;

(2) Will require the Administrator to reimburse the Contractor in accordance with paragraph (j) of this section for the costs of qualified M&R performed in the United States; and

(3) Will apply to qualified M&R performed during the 5-year period beginning on the date the vessel begins operating under the operating agreement under chapter 531 of title 46, United States Code.

(d) *Exception to Requirement to Perform Work in the United States.* A Contractor will not be required to have qualified M&R work performed in the United States under this section if:

(1) The Administrator determines that there is no facility capable of meeting all technical requirements of the qualified M&R in the United States located in the geographic area in which the vessel normally operates available to perform the work in the time required by the Contractor to maintain its regularly scheduled service;

(2) The Administrator determines that there are insufficient funds to pay reimbursement under paragraph (j) of this section with respect to the work; or

(3) The Administrator fails to make the certification described in paragraph (h)(2) of this section.

(e) *Qualified M&R.* In this section the term “qualified M&R” means:

(1) Except as provided in paragraph (e)(2) of this section:

(i) Any inspection of a vessel that is—
(A) Required under chapter 33 of title 46, United States Code; and

(B) Performed in the period in which the vessel is subject to an agreement under this section;

(ii) Any M&R of a vessel that is determined, in the course of an inspection referred to in paragraph (e)(1)(i) of this section, to be necessary; and

(iii) Any additional M&R the Contractor intends to undertake at the same time as the work described in paragraph (e)(1)(ii) of this section; but (2) does not include:

(i) M&R not agreed to by the Contractor to be undertaken at the same time as the work described in paragraph (e)(1) of this section;

(ii) Work carried out as part of continuous machinery surveys and other similar requirements not associated with a drydocking of the vessel; or

(iii) Any emergency work that is necessary to enable a vessel to return to a port in the United States.

(f) *Qualification of Shipyard.* MARAD will assess the following factors in determining whether a proposed shipyard is capable of undertaking the proposed M&R:

(1) The dimension of the facility relative to the size of the vessel;

(2) The capacity and the reach of the lifting cranes necessary for performing the specified work; and

(3) The skills and experience of sufficient numbers of workers to complete the job in time to maintain the vessel's schedule.

(g) *Required information.* Under each M&R agreement, the participant must provide within 30 days of enrollment a schedule for regular and special surveys for each vessel in the agreement. At the same time, and on an annual basis by January 1 of each calendar year, each M&R participant must submit a schedule of anticipated M&R for each vessel under an M&R agreement for the coming year. In addition, the M&R participant must provide for each such vessel the anticipated itinerary for the coming year.

(h) *Notification Requirements.*—

(1) NOTIFICATION BY

CONTRACTOR.—The Administrator is not required to pay reimbursement to a Contractor under this section for qualified M&R, unless the Contractor—

(i) Notifies the Administrator of the intent of the Contractor to obtain the qualified M&R, by not later than 90 days before the date of the performance of the qualified M&R; and

(ii) Includes in such notification:

(A) A description of all qualified M&R that the Contractor should reasonably expect may be performed;

(B) A description of the vessel's normal route and port calls in the United States;

(C) An estimate of the cost, with supporting documentation, of obtaining the qualified M&R described under paragraph (h)(1)(ii)(A) of this section in the United States; and

(D) An estimate of the cost, with supporting documentation, of obtaining the qualified M&R described under paragraph (h)(1)(ii)(A) of this section outside the United States, in the country in which the Contractor otherwise would undertake the qualified M&R.

(2) CERTIFICATION BY ADMINISTRATOR.—

(i) Not later than 30 days after the date of receipt of notification under paragraph (h)(1) of this section, the Administrator will certify to the Contractor—

(A) Whether the cost estimates provided by the Contractor are fair and reasonable;

(B) If the Administrator determines that such cost estimates are not fair and reasonable, the Administrator's estimate of fair and reasonable costs for such work;

(C) Whether there are available to the Administrator sufficient funds to pay reimbursement under paragraph (j) of this section with respect to such work; and

(D) That the Administrator commits such funds to the Contractor for such reimbursement, if such funds are available for that purpose.

(ii) If the Contractor notification described in paragraph (h)(1) of this section does not include an estimate of the cost of obtaining qualified M&R in the United States, then not later than 30 days after the date of receipt of such notification, the Administrator will:

(A) Certify to the Contractor whether there is a facility capable of meeting all technical requirements of the qualified M&R in the United States located in the geographic area in which the vessel normally operates available to perform the qualified M&R described in the notification by the Contractor under paragraph (h)(1) of this section in the time period required by the Contractor to maintain its regularly scheduled service; and

(B) If there is such a facility, require the Contractor to resubmit such

notification with the required cost estimate for such facility.

(i) *Allocation of available funds.* If the funds available to MARAD are insufficient to accommodate every M&R project required to be performed in U.S. shipyards, MARAD will select those work projects suitable for accomplishment in United States shipyards, for which MARAD will reimburse the differential costs of the M&R. MARAD will base such determinations on the amount of funds available, the projected cost of each repair, the number of vessels operated by the vessel operator and the proximity of the vessels' itineraries to suitable U.S. shipyard locations.

(j) *Reimbursement.*—

(1) IN GENERAL.—The Administrator will, subject to the availability of appropriations, reimburse a Contractor for costs incurred by the Contractor for qualified M&R performed in the United States under this section.

(2) AMOUNT.—The amount of reimbursement will be equal to the difference between—

(i) The fair and reasonable cost of obtaining the qualified M&R in the United States; and

(ii) The fair and reasonable cost of obtaining the qualified M&R outside the United States, in the country in which the Contractor would otherwise undertake the qualified M&R.

(3) DETERMINATION OF FAIR AND REASONABLE COSTS.—

(i) The Administrator will determine fair and reasonable costs for purposes of paragraph (j)(2) of this section after considering the supporting documentation submitted by the Contractor. If it is too difficult to accurately ascertain the foreign costs of anticipated M&R, the Maritime Administrator may decide to compute the foreign cost of M&R by reference to a percentage of the domestic cost of the M&R, based on available general information.

(ii) MARAD will also pay for other costs borne by the M&R participant reasonably associated with the qualified M&R performed in a U.S. shipyard that would not be incurred if the vessel was repaired in a foreign shipyard. Such costs include:

(A) Any additional vessel maintenance and repair preparation costs, including costs for additional engineering, design and contract bid proposal costs;

(B) Costs (including capital and operating costs) for "lost time" for transit to a U.S. shipyard in excess of the transit period to a foreign shipyard on the same trade route to which the vessel is assigned and for the time spent

in a U.S. shipyard which exceeds the estimated time required by a foreign shipyard for the same work.

(C) Costs for additional labor, supervision, overhead and other work involving shore-side personnel.

(iii) Upon approval of each specific M&R project, the Administrator will establish with the Contractor a set level of funding to be provided by MARAD. If, during the course of performing M&R in a U.S. shipyard, it is discovered that the repairs will entail additional unanticipated costs, the Administrator shall provide MARAD's share of funding corresponding to the percentage of the domestic M&R costs originally agreed to by MARAD, but not in excess of 20 percent of the original funding level agreed to by MARAD. Cost overruns will be the obligation of the M&R participant unless MARAD determines that it is fair to reimburse the M&R participant and sufficient funds are available to do so.

(iv) Payment of MARAD's share of the shipyard contract price may be made as work progresses or upon completion of the M&R and finalization of costs, as MARAD may determine. Vouchers for payment may be submitted to the Associate Administrator for Marine Asset Development. Payments shall be paid and processed under the terms and conditions of the Prompt Payment Act, 31 U.S.C. 3901. However, pursuant to 31 U.S.C. 3902(f), interest on late payments will be paid only if appropriated funds for paying reimbursement under the M&R Pilot Program are available.

Dated: February 1, 2007.

By Order of the Maritime Administrator.

Daron T. Threet,

Secretary, Maritime Administration.

[FR Doc. E7-1880 Filed 2-5-07; 8:45 am]

BILLING CODE 4910-81-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 001005281-0369-02; I.D. 013107B]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic; Trip Limit Reduction

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

ACTION: Temporary rule; inseason trip limit reduction.

SUMMARY: NMFS reduces the commercial trip limit of Atlantic group Spanish mackerel in or from the exclusive economic zone (EEZ) in the southern zone to 1,500 lb (680 kg) per day. This trip limit reduction is necessary to maximize the socioeconomic benefits of the quota.

DATES: Effective 6 a.m., local time, February 5, 2007, through February 28, 2007, unless changed by further notification in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Steve Branstetter, telephone: 727-824-5305, fax: 727-570-5308, e-mail: Steve.Branstetter@noaa.gov.

SUPPLEMENTARY INFORMATION: The fishery for coastal migratory pelagic fish (king mackerel, Spanish mackerel, cero, cobia, little tunny, dolphin, and, in the Gulf of Mexico only, bluefish) is managed under the Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic (FMP). The FMP was prepared by the Gulf of Mexico and South Atlantic Fishery Management Councils (Councils) and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act by regulations at 50 CFR part 622.

Based on the Councils' recommended total allowable catch and the allocation ratios in the FMP (65 FR 41015, July 3, 2000) NMFS implemented a commercial quota of 3.87 million lb (1.76 million kg) for the Atlantic migratory group of Spanish mackerel. Atlantic migratory group Spanish mackerel are divided into a northern and southern zone for management purposes. The southern zone for Atlantic migratory group Spanish mackerel extends from 30°42'45.6" N. lat., which is a line directly east from the Georgia/Florida boundary, to 25°20.4' N. lat., which is a line directly east from the Miami-Dade/Monroe County, Florida, boundary.

For the southern zone, seasonally variable trip limits are based off an adjusted quota of 3.62 million lb (1.64 million kg). The adjusted quota is calculated to allow continued harvest in the southern zone at a set rate for the remainder of the fishing year in accordance with 50 CFR 622.44(b)(2). Beginning December 1, trip limits are unlimited on weekdays and 1,500 lb (680 kg) per day on weekends. When 75 percent of the adjusted quota of Atlantic group Spanish mackerel is taken until 100 percent of the adjusted quota is taken, Spanish mackerel in or from the EEZ in the southern zone may not be

possessed on board or landed from a permitted vessel in amounts exceeding 1,500 lb (680 kg) per day.

NMFS has determined that 75 percent of the adjusted quota for Atlantic group Spanish mackerel has been taken. Accordingly, the 1,500-lb (680-kg) per day commercial trip limit applies to Spanish mackerel in or from the EEZ in the southern zone effective 6 a.m., local time, February 5, 2007, through February 28, 2007, unless changed by further notification in the **Federal Register**.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(3)(B), as such prior notice and opportunity for public comment is unnecessary and contrary to the public interest. Such procedures would be unnecessary because the rule itself already has been subject to notice and comment, and all that remains is to notify the public of the trip limit reduction. Allowing prior notice and opportunity for public comment is contrary to the public interest because of the need to immediately implement this action in order to protect the fishery since the capacity of the fishing fleet allows for rapid harvest of the quota. Prior notice and opportunity for public comment will require time and would potentially result in a harvest well in excess of the established quota.

For the aforementioned reasons, the AA also finds good cause to waive the 30 day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

This action is taken under 50 CFR 622.43(a) and is exempt from review under Executive Order 12866.

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

Dated: January 31, 2007.

James P. Burgess,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.
[FR Doc. 07-504 Filed 2-1-07; 2:37 pm]

BILLING CODE 3510-22-S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 060216044-6044-01; I.D. 013107A]

Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Area 630 of the Gulf of Alaska

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

ACTION: Temporary rule; modification of a closure.

SUMMARY: NMFS is reopening directed fishing for pollock in Statistical Area 630 of the Gulf of Alaska (GOA) for 48 hours. This action is necessary to fully use the A season allowance of the 2007 total allowable catch (TAC) of pollock specified for Statistical Area 630 of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), February 6, 2007, through 1200 hrs, A.l.t., February 8, 2007. Comments must be received at the following address no later than 4:30 p.m., A.l.t., February 16, 2007.

ADDRESSES: Send comments to Sue Salvesson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. Comments may be submitted by:

- Mail to: P.O. Box 21668, Juneau, AK 99802;
- Hand delivery to the Federal Building, 709 West 9th Street, Room 420A, Juneau, Alaska;
- FAX to 907-586-7557;
- E-mail to 630pollock@noaa.gov and include in the subject line of the e-mail comment the document identifier: g63plkro1.fo.wpd (E-mail comments, with or without attachments, are limited to 5 megabytes); or
- Webform at the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions at that site for submitting comments.

FOR FURTHER INFORMATION CONTACT: Jennifer Hogan, 907-586-7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and

Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

NMFS closed the directed fishery for pollock in Statistical Area 630 of the GOA under § 679.20(d)(1)(iii) on January 22, 2007 (72 FR 2793, January 23, 2007).

NMFS has determined that approximately 3,134 mt of pollock remain in the directed fishing allowance in Statistical Area 630 of the GOA. Therefore, in accordance with § 679.25(a)(1)(i), (a)(2)(i)(C) and (a)(2)(iii)(D), and to fully utilize the A season allowance of the 2007 TAC of pollock in Statistical Area 630, NMFS is terminating the previous closure and is reopening directed fishing for pollock in Statistical Area 630 of the GOA. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance will be reached after 48 hours. Consequently, NMFS is prohibiting directed fishing for pollock in Statistical Area 630 of the GOA for 48 hours, effective 1200 hrs, A.l.t., February 6, 2007.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) and 679.25(c)(1)(ii) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the opening of pollock in Statistical Area 630 of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of January 30, 2007.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

Without this inseason adjustment, NMFS could not allow the fishery for pollock in Statistical Area 630 of the GOA to be harvested in an expedient manner and in accordance with the regulatory schedule. Under § 679.25(c)(2), interested persons are invited to submit written comments on

this action to the above address until February 16, 2007.

This action is required by § 679.25 and § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: January 31, 2007.

James P. Burgess,
Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.
[FR Doc. 07-503 Filed 2-1-07; 2:37 pm]

BILLING CODE 3510-22-S

Proposed Rules

Federal Register

Vol. 72, No. 24

Tuesday, February 6, 2007

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.

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 40, 72, 74, and 150

RIN: 3150-AH85

Regulatory Improvements to the Nuclear Materials Management and Safeguards System

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations related to licensee reporting requirements for source material and special nuclear material (SNM) to the Nuclear Materials Management and Safeguards System (NMMSS). The proposed amendments would lower the threshold of the quantities of SNM and certain source materials that require the submission of material status reports to the NMMSS. Also, the proposed amendments would make some modifications to the types of and timing of submittals of transaction reports to the NMMSS. The amendments would also require licensees to reconcile any material inventory discrepancies that NRC identifies in the NMMSS database. The proposed amendments would reduce some regulatory burden by reducing the current reporting requirements related to the export of certain source material and SNM. However, the annual reporting requirements would be new requirements for licensees who possess 350 grams or less, of SNM. These amendments are needed to improve the accuracy of the material inventory information maintained in the NMMSS.

DATES: Submit comments on the rule by April 23, 2007. Submit comments specific to the information collections aspects of this rule by March 8, 2007. Comments received after this date will be considered if it is practical to do so, but the NRC is able to assure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any one of the following methods. Please include the following number RIN 3150-AH85 in the subject line of your comments. Comments on rulemakings submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including personal information such as social security numbers and birth dates in your submission.

Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, ATTN: Rulemakings and Adjudications Staff.

E-mail comments to: SECY@nrc.gov. If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at (301) 415-1966. You may also submit comments via NRC's rulemaking Web site at <http://ruleforum.llnl.gov>. Address questions about our rulemaking Web site to Carol Gallagher (301) 415-5905; e-mail cag@nrc.gov. Comments can also be submitted via the Federal eRulemaking Portal <http://www.regulations.gov>.

Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 am and 4:15 pm Federal workdays. (Telephone (301) 415-1966).

Fax comments to: Secretary, U.S. Nuclear Regulatory Commission at (301) 415-1101.

Publicly available documents related to this rulemaking may be viewed electronically on the public computers located at the NRC's Public Document Room (PDR), O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. The PDR reproduction contractor will copy documents for a fee. Selected documents, including comments, may be viewed and downloaded electronically via the NRC rulemaking Web site at <http://ruleforum.llnl.gov>.

Publicly available documents created or received at the NRC after November 1, 1999, are available electronically at NRC's Electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this site, the public can gain entry into NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public

documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1-800-397-4209, 301-415-4737 or by e-mail to pdr@nrc.gov.

You may submit comments on the information collections by the methods indicated in the Paperwork Reduction Act Statement.

FOR FURTHER INFORMATION CONTACT:

Neelam Bhalla, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-6843, e-mail, nxb@nrc.gov.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Discussion
 - A. Special Nuclear Material Transfer Reports
 - B. Special Nuclear Material Status Reports
 - C. Source Material Transfer Reports
 - D. Source Material Status Reports
 - E. Reconciliation of Submitted Inventories
 - F. Reporting Identification Symbol and Holding Accounts
 - G. Reduction in Reporting Requirements for Export of Material Shipments
 - H. Who Would This Action Affect?
 - I. How Would the Information be Reported?
- III. Summary of Proposed Amendments by Section
- IV. Criminal Penalties
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- VI. Plain Language
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- VIII. Environmental Impact: Categorical Exclusion
- IX. Paperwork Reduction Act Statement
- X. Public Protection Notification
- XI. Regulatory Analysis
- XII. Regulatory Flexibility Certification
- XIII. Backfit Analysis

I. Background

The NMMSS is the national database used in the United States by NRC licensees, the Agreement State licensees, and Department of Energy (DOE) contractors to report the possession of certain special nuclear material (SNM) and source material. The NMMSS was created as a result of comprehensive accounting procedures developed by the Atomic Energy Commission in response to the passage of the Atomic Energy Act of 1954 and began processing of facility submittals in 1965. The DOE is responsible for maintaining the NMMSS database. The NMMSS database supports NRC

domestically in the review of licensee material control and accounting programs, and internationally as the U.S. Government database for collecting and reporting information required by international treaties. The NRC reporting requirements related to the NMMSS are primarily contained in 10 CFR Parts 40, 72, 74, 75, 76, and 150.

The NMMSS database uses licensee submittals to serve two important functions: (1) meeting international reporting obligations, and (2) assisting in the oversight of licensee material control and accounting (MC&A) programs required by 10 CFR Parts 40, 72, 74, 75, 76, and 150.

With regard to international commitments, the United States has committed to a national accountancy and control system for nuclear materials through treaties with nuclear trading partners and the International Atomic Energy Agency (IAEA). The NMMSS is part of the overall program to help satisfy these international commitments by constituting the national database used by NRC and the Agreement State licensees, and DOE contractors to report the possession of certain quantities SNM and source material. The information submitted to the NMMSS is then reported externally by the United States in order to satisfy these treaty requirements. The NMMSS also maintains accounting data on U.S. peaceful use exports and imports of nuclear materials that have occurred since 1965.

With respect to NRC's oversight of the MC&A at licensed facilities, the NMMSS is the national database that serves as the central collection and processing point for inventory, shipment, and receipt information required to be reported by commercial and Federal Government facilities. Applicable NRC reporting requirements are specified in 10 CFR Parts 40, 72, 74, 75, 150. As a result of these reporting requirements, the NMMSS can provide the NRC staff with a projection of quantities of reportable materials located, shipped, or received at a particular licensee site.

In October 2001, the DOE Office of the Inspector General (OIG) issued a report based on an audit of the NMMSS for DOE-owned nuclear materials.¹ One of the findings of that report was that DOE could not fully account for DOE-owned nuclear materials loaned or leased to licensees. A similar audit conducted by NRC's OIG, also raised concerns over the accuracy of material inventories in

the NMMSS.² In the report, the NRC OIG recommended that the scope of licensee reporting should be expanded to include a requirement that smaller licensees (those possessing less than 350 grams of SNM), submit inventory information to the NMMSS annually.

As a result of its audit, NRC took immediate steps to verify and reconcile inventories in the NMMSS database by issuing a bulletin, NRC Bulletin 2003-04: "Rebaselining of Data in the Nuclear Materials Management and Safeguards System." The bulletin was sent to all NRC and Agreement State licensees then holding NMMSS accounts and requested them to provide inventory information to the NMMSS. The NRC staff also conducted site visits to review selected licensees' submitted information in comparison to actual physical inventories. The review concluded that licensees did not submit or update inventories to the NMMSS for several years (or decades) because they possessed or transferred materials that did not meet minimum reporting thresholds. These efforts also helped identify accounts with zero balances. The rebaselining efforts resulted in decreasing the number of active accounts and supported a further review and reconciliation of material inventories in the remaining accounts.

At the end of these efforts, NRC determined that enhanced reporting of inventory information by those licensees not presently required to do so would provide greater assurance about the accuracy of licensee inventory information maintained in the database. NRC believes that licensee inventories must be submitted regularly and reconciled in comparison to values projected by the NMMSS database to maintain the usefulness of the database for international and domestic regulatory needs.

II. Discussion

The NRC staff has had extensive interactions with the NMMSS operator and industry representatives since the issuance of NRC Bulletin 2003-04. On the basis of these efforts and an evaluation of the current regulations related to the NMMSS reporting, the NRC staff concluded that many of the discrepancies in NMMSS information resulted because: (1) Many licensees (those that possess less than 350 grams of SNM) infrequently ship and/or receive reportable materials, and (2) Many licensees do not meet the current

regulatory threshold for annual reporting of SNM or source material and lose institutional awareness of the NMMSS over time. As a result, for many licensees there are no requirements to periodically confirm the accuracy of values projected by the NMMSS.

This conclusion led NRC to embark on an effort to amend its regulations to enhance the accuracy of the NMMSS database. The proposed amendments would lower the threshold of quantities of special nuclear materials and certain source materials requiring the submission of both status and transaction reports to the NMMSS. Another amendment to keep the NMMSS data more current, would be to modify reporting requirements in § 40.64 to require licensees involved in enrichment services, downblending material initially enriched in U²³⁵ isotope 10 percent or more, or mixed-oxide (MOX) fuel fabrication of uranium, to report the transfer, receipt, inventory adjustment, inventory, and material balance information for source material. These changes to NMMSS reporting requirements would improve the accuracy of material balance (inputs/outputs) information. Currently, licensees are only required to report source material subject to international treaty requirements. However, source material reporting is an important part of the material balance equation because these materials are used as an input material in the downblending of uranium, MOX fuel fabrication, and uranium enrichment cycle. This type of facility reporting would facilitate the evaluation of the prior and ending source material balances of licensees that engage in activities that change the SNM values of materials.

The NRC staff considered other possible consequences posed by inaccurate NMMSS information associated with these holders of small quantities of SNM. Gram quantities of SNM held by many small quantity licensees do not appear to pose a significant challenge to the promotion of security from an MC&A perspective. However, if periodic reporting and evaluation of small licensee balances are not required, it could reduce public confidence in the primary tool used by the NRC in the oversight of small licensee MC&A activities since NRC would not have assurance that projected material balances are representative of the quantities of materials at these sites. Further, this will allow for more accuracy in the NMMSS database.

The following sections summarize the significant proposed changes to the regulations and the NRC's basis for those proposed changes.

¹ This report entitled, "Accounting for Government Owned Nuclear Materials Provided to Non-Department Domestic Facilities" (October 26, 2001), is available at <http://www.ig.doe.gov/pdf/ig-0529.pdf>.

² This report entitled, "Audit of NRC's Regulatory Oversight of Special Nuclear Materials" (OIG-03-A-15, May 23, 2003), is available at <http://www.nrc.gov/reading-rm/doc-collections/insp-gen/2003/03-a-15.pdf>.

A. Special Nuclear Material Transaction Reports

Currently, licensees are required by 10 CFR 74.15(a) to report to the NMMSS whenever they transfer or receive one gram or more of SNM. The proposed revision would add a requirement that licensees must also report to the NMMSS whenever it makes an on-site adjustment to the SNM inventory involving a quantity of one gram or more SNM. The inventory adjustments may be due to decay, or normal operational losses. Domestic MC&A safeguards would be enhanced by this change because the NRC inspection staff would be aware of possible inventory anomalies sooner and NMMSS generated inventories would more accurately reflect actual facility inventory values between reconciliation periods. Thus, required reporting of these adjustments as they are generated would improve the accuracy of the NMMSS database.

Additionally, 10 CFR 72.78 and 74.15 require submission of material transaction reports for the transfer and receipt of SNM but do not specify the time frames in which the reports must be made. However, the reporting time frames are specified in NUREG/BR-0006, "Instructions for the preparation and Distribution of Material Transaction Reports." In contrast, for source material transactions under § 40.64(a), nuclear material transaction reports are required to be submitted by the close of business, the next working day for the transfer of source material and within ten business days of receipt, for the receipt of source material. Therefore, for consistency with those provisions, §§ 72.78 and 74.15 would be amended to require each licensee who transfers SNM to submit a nuclear material transaction report no later than the close of business the next working day, and each licensee who receives the material to submit a nuclear material transaction report within ten days after the material is received. Consistent with this change, Part 150 would be amended to require licensees who transfer SNM to submit a nuclear material transaction report to NMMSS no later than the close of business the next working day. Currently, § 150.16(a) requires licensees only submit the SNM transaction report "promptly" after the SNM transfer takes place. By changing "promptly" to "no later than the close of business the next working day" the regulation would be unambiguous.

A revision would also be made to the titles of §§ 72.78, 74.15 and 150.16. Currently, §§ 72.78 and 74.15 are entitled "Nuclear material transfer reports," and § 150.16 is entitled

"Submission to Commission of nuclear material transfer reports." The amended titles of §§ 72.78 and 74.15 would be "Nuclear material transaction reports." § 150.16 would be entitled "Submission to Commission of nuclear material transaction reports." The amended titles would correctly reflect the requirements contained in these sections for both receipt and transfer of nuclear material, and would be consistent with the name of the submission report.

B. Special Nuclear Material Status Reports

Currently, licensees are required by § 74.13(a) to report annual SNM inventories to the NMMSS only if they are authorized to possess more than 350 grams of SNM. The proposed amendment would lower the reporting threshold to one gram or more, requiring a licensee who possesses or who had possessed in the previous reporting period, one gram or more of SNM to report an annual inventory to the NMMSS. By lowering the reporting threshold, NRC would improve its knowledge of the location and presence of SNM possessed by licensees. The staff considered changing the current 350 gram threshold to a number of values that were less than 350 grams but more than one gram. This approach was rejected because this would still result in a number of licensees that would not have to report inventory regularly and ultimately cause a variation of the same problem, that NRC would not have adequate input regarding inventories held by these licensees. The staff also considered lowering the inventory/material balance threshold to less than one gram of SNM. This method was not pursued because it would "mis-align" NRC regulations with DOE and international entities with whom the U.S. has treaty agreements in place. Also, the licensee community would have potentially an additional burden to develop new (less than one gram) measurement techniques. Finally, the staff established the new threshold at one gram of SNM because: (1) International entities (those with which we have treaties) recognize one gram as the basic measuring unit for SNM; (2) one gram is a threshold value accepted by DOE and would meet their reporting expectations for licensees possessing government-owned material; (3) a one gram threshold would address the NRC OIG concern about ensuring we have interaction with and reporting from small quantity licensees; and (4) the one gram threshold for inventory/material balance reporting would align with the present one gram requirement for

licensees reporting shipments and receipts (transactions) of SNM.

The submission of material balance reports under the current rule is linked to the performance and conduct of annual physical inventories and related reports required by §§ 74.19(c), 74.31(c)(5), 74.33(c)(4), or 74.43(c)(6), in March and September for those subject to § 74.51. Those provisions are linked for the convenience of licensees, since both reports contain the same minimum threshold requirements of more than 350 grams. However, the activities associated with performing, documenting, and maintaining records associated with a physical inventory, as required by 10 CFR 74.19(c), are different and more encompassing than those associated with preparing and submitting a material status report required in 10 CFR 74.13. Because the staff does not plan to revise § 74.19(c) as part of this rulemaking, it would therefore no longer be possible to link the reporting requirements of the two rules since a physical inventory under 74.19(c) is only implicated if a licensee is authorized to possess greater than 350 grams of SNM.

Thus, § 74.13 would be revised to continue to permit licensees authorized to possess greater than 350 grams of SNM to submit material status reports along with their physical inventory reports as required by §§ 74.19(c), 74.31(c)(5), 74.33(c)(4), or 74.43(c)(6), and, in March and September of each year, for those subject to § 74.51. However, for those licensees who are authorized to possess 350 grams or less of SNM, the proposed rule would require the submission of material balance reports no later than March 31 of each year. The NRC finds that this schedule would eliminate any reporting problems related to inconsistencies in reporting quantities that would persist between §§ 74.13 and 74.19, but maintains the intended flexibility and efficiency of the current rule.

C. Source Material Transaction Reports

Currently, § 40.64(a) requires submission of a Nuclear Material Transaction Report whenever a licensee transfers, receives, or adjusts the inventory of foreign obligated source material by one kilogram or more. Foreign obligated materials are those nuclear materials that are subject to tracking by international treaties. Also, reports are required for the import and export of one kilogram or more of any source material, regardless of obligation. However, the current requirements do not require reporting when material is utilized. The proposed revision would amend the rule to require reporting

when a licensee utilizes one kilogram or more of source material in enrichment services, downblend material initially enriched in the U²³⁵ isotope to 10 percent or more, or mixed-oxide fuel fabrication, regardless of obligation. The NRC staff believes that source material reporting is an important part of the material balance equation because these materials are used as an input material in the downblending of uranium, mixed-oxide (MOX) fuel fabrication, and uranium enrichment cycle. This amendment to NMMSS reporting would facilitate the evaluation of the prior and ending balances of licensees that engage in activities that change the SNM values of their inventories and thus improve the accuracy of the NMMSS data.

D. Source Material Status Reports

Currently, § 40.64(b) requires annual source material inventory reports of foreign obligated source material for licensees authorized to possess more than 1000 kilograms of source material. The proposed revision would lower this value to one kilogram or more of foreign obligated source material. A lowered reporting threshold would provide the NRC with better knowledge of the location and presence of foreign obligated source material possessed by the licensees. The proposed revision would also require the licensees to report annual source material inventory when a licensee utilizes one kilogram or more of any source material in enrichment services, downblend material initially enriched in the U²³⁵ isotope to 10 percent or more, or mixed-oxide fuel fabrication, regardless of the obligation. Based on a review of the rebaselining efforts, the NRC staff has concluded that many licensees did not submit or update inventories to the NMMSS for several years, because they possessed or transferred materials that did not meet the minimum reporting thresholds. By lowering the reporting threshold from 1000 kilograms to 1 kilogram of foreign material, the staff believes the information maintained in the NMMSS database would be more current and reliable.

E. Reconciliation of Submitted Inventories

Facilities that presently report inventory and material balance information also voluntarily participate in a periodic reconciliation process with the NMMSS to address any differences between NMMSS generated inventory values and the facility reported inventory values. Although, the reconciliation process is not explicitly required by regulations, it is an integral part of routine NMMSS operations. To

address this issue, the proposed amendments to §§ 40.64(b), 72.76(a), 74.13(a), 150.17(a) and 150.17(b) would require licensees to reconcile any inventory discrepancies identified by NRC in the NMMSS database within 30 days of being notified of a discrepancy by NRC. In the proposed amendments to §§ 40.4, 72.3, 74.4 and 150.3, a new definition, "reconciliation," would be added to describe the process by which licensees' reports are evaluated and compared by NRC to the projected material balances by the NMMSS. The NMMSS projected balances are the NMMSS calculated material balances based on the transfer, receipt, or other adjustments reported to the NMMSS by the licensees during the previous reporting period. The process is considered complete when a licensee resolves any differences between the reported inventory and the inventory projected by the NMMSS database. This requirement would help in maintaining the accuracy of information in the NMMSS database.

F. Reporting Identification Symbol (RIS) and Holding Accounts

NRC currently assigns a reporting account number called Reporting Identification Symbol (RIS) to each licensee to submit information to the NMMSS. The proposed revisions to §§ 40.64(b) and 74.13(a) would require licensees to report inventory of source material and SNM, respectively, not only for their primary RIS account but also source and SNM inventories in associated holding accounts. Holding accounts were established by some licensees to identify the material that the licensee was not actively using. Currently, licensees are not required to acknowledge shipments and receipts, or report inventory information pertaining to the holding accounts to the NMMSS. MC&A safeguards would be enhanced by this change because of the increased accuracy and availability of inventory information to the NRC staff.

G. Reduction in Reporting Requirements for Export of Material Shipments

Currently, licensees who export reportable quantities of SNM or source material file both the shipper's and receiver's information on two separate forms when exporting nuclear material, as described in NUREG/BR-0006. Based on the NRC inspector observations, the current additional requirement to report a foreign facility description of the same transactions has not been useful in assuring the accuracy of domestic MC&A information and is not necessary to meet international reporting requirements. Consequently, this

requirement can be eliminated to reduce burden without adverse effects on safety or security. This change would be reflected in the revised NUREG/BR-0006 and in the proposed amendments to §§ 40.64, 74.15 and 150.16.

In the proposed amendment, licensees would be required to file only the shipper's information form unless a significant shipper/receiver difference, or, a theft or diversion is identified. In this context "significant" refers to a difference, for SNM, that requires resolution as described in §§ 74.31, 74.43, or 74.59, as applicable. For source material, the quantities delineated in § 40.64(c)(1) involving a theft or unlawful diversion would be the threshold quantity for additional reporting. This proposed change to the reporting requirement would reduce the licensees reporting burdens when shipping nuclear materials without significantly impacting the quality of the information reported to the database.

H. Who Would This Action Affect?

Currently, licensees possessing more than 350 grams of SNM report inventory and material balance information annually to the NMMSS. The lowering of the threshold to one gram of SNM and one kilogram of source material subject to treaty obligations would affect approximately 200 additional NRC and Agreement State licensees who presently possess between one and 350 grams of SNM.

New requirements associated with source material reporting would also apply to licensees that perform uranium enrichment services, downblend material initially enriched in the U²³⁵ isotope to 10 percent or more, and mixed-oxide fuel fabrication. However, the actual impact on these licensees would be minimal because much of the source material used for these types of processes has associated treaty obligations and is subject to the current reporting requirements.

Finally, the reduction in reporting requirements associated with export of SNM and source material would impact approximately 17 NRC and Agreement State licensees that export such materials. This change to the current reporting requirements as specified in NUREG/BR-0006 would result in a reduction of about 1,700 reports per year, from the current number of 3400 reports per year to the NMMSS without impacting the quality of information in the NMMSS database.

I. How Would the Information Be Reported?

Licensees may continue to submit foreign obligated source material information pursuant to proposed § 40.64(b) as a statement and may submit the statement with other reports that the licensee is required to submit, such as the SNM material balance report. However, source material and SNM transaction reports must be submitted by filing Nuclear Material Transaction Reports forms in computer-readable format as specified in NRC NUREG/BR-0006. Additional source and SNM inventory and material balance reports must be submitted in computer-readable format as specified in the NRC NUREG/BR-0007. Specific details about the forms and format for these reports are contained in the NRC NUREG/BR-0006 and 0007.

Additionally, reporting software is available to the licensees free of charge from the NMMSS contractor.

III. Summary of Proposed Amendments by Section

Section 40.4 Definitions

Section 40.4 would be amended to add a definition of "reconciliation." Reconciliation would be defined to mean the process by which licensee inventory submittals are compared to values projected by the NMMSS, and that the process is considered complete when the licensee resolves any differences between the two values, including foreign obligated materials.

Section 40.64 Reports

Section 40.64(a) would be amended to (1) require licensees who utilize one kilogram or more of source material, regardless of obligation, in enrichment services, downblending uranium that has an initial enrichment of the U²³⁵ isotope of 10 percent or more, or in the fabrication of mixed-oxide fuels, to complete and submit a Nuclear Material Transaction Report; and (2) to require licensees who export source material to complete only the licensee portion of the transaction report unless there is an indication of loss, theft, or diversion of the source material, in which case both the licensee's and the foreign facility's information on the form would have to be reported.

Section 40.64(b) would be amended to (1) lower reporting thresholds for possession and reporting of inventory of foreign obligated source material to one kilogram; (2) require each licensee who possesses one kilogram or more of uranium or thorium source material in the operation of enrichment services, downblending uranium that has an

initial enrichment of the U²³⁵ isotope of 10 percent or more, or in the fabrication of mixed-oxide fuels, to complete and submit, in computer-readable format, Material Balance and Physical Inventory Listing Reports concerning all source material (both foreign obligated and non-obligated) that the licensee has received, produced, possessed, transferred, consumed, disposed of, or lost in the previous reporting period; (3) resolve any inventory discrepancies identified by the NRC within 30 calendar days of submission of the information; (4) require inventory reporting not only in the (RIS) account but include material held in all associated holding accounts; and (5) correct the NRC address to obtain the reporting instructions.

Section 72.3 Definitions

Section 72.3 would be amended to add a definition of "reconciliation." Reconciliation would be defined to mean the process by which licensee submittals are compared to projected values developed by the NMMSS, and that the process is considered complete when the licensee resolves any differences between the two values, including foreign obligated materials.

Section 72.72 Material Balance Inventory and Records Requirements for Stored Materials

Section 72.72(a) would be amended to (1) correct the reference for SNM to § 74.13(a) (the current reference to § 74.13(a)(1) is incorrect because there is no paragraph (a)(1) in § 74.13); and (2) would require licensees to keep records showing the receipt, inventory, disposal, acquisition, and transfer of source material in quantities as specified in § 40.64.

Section 72.76 Material Status Reports

Section 72.76(a) would be amended (1) to require reports on source material as specified in § 40.64; (2) require licensees to resolve any discrepancies identified during the report review and reconciliation process within 30 calendar days of submission of the information; and (3) correct the NRC address to obtain the reporting instructions.

Section 72.78 Nuclear Material Transfer Reports

The section heading would be revised to read, "Nuclear Material Transaction Reports." The amendment is consistent with the name of the report (transaction report) and describes requirements for both receipt and transfer of nuclear materials.

Section 72.78(a) would be amended (1) to add a reporting requirement when a licensee adjusts the inventory of SNM as specified by § 74.15 or source material as specified by § 40.64; and (2) to correct the NRC address or obtaining the reporting instructions.

Section 74.2 Scope

Section 74.2(a) would be amended to lower the applicability of general reporting and record keeping requirements of subpart B of Part 74 to each person who possesses one gram or more of SNM.

Section 74.4 Definitions

Section 74.4 would be amended to add a definition of "reconciliation." Reconciliation would be defined to mean the process by which licensee submittals are compared to projected values developed by NMMSS, and that the process is considered complete when the licensee resolves any differences between the two values, including foreign obligated materials.

Section 74.13 Material Status Reports

Section 74.13(a) would be amended to (1) lower reporting thresholds from authorization to possess more than 350 grams of SNM to possession of one gram or more of SNM, or possession of one gram or more of SNM in the inventory reporting period; (2) require inventory reporting to include not only the primary Reporting Identification Symbol (RIS) account but SNM in any associated holding accounts; (3) to require licensees to resolve any discrepancies identified during the report review and reconciliation process within 30 calendar days of notification of a discrepancy identified by the NRC; (4) to require licensee submission of material balance reports no later than March 31 of each year for reports not covered under §§ 74.19, 74.31(c)(5), 74.33(c)(4), 74.43(c)(6), or 74.51; and (5) to correct the NRC address to obtain the reporting instructions.

Section 74.15 Nuclear Material Transfer Reports

The section heading would be revised to read, "Nuclear Material Transaction Reports." The amendment is consistent with the name of the report (transaction report) and describes requirements for both receipt and transfer of nuclear materials.

Section 74.15(a) would be amended to (1) add a reporting requirement when the inventory of SNM is adjusted in a quantity of one gram or more; (2) specify that each licensee who transfers SNM to submit a Nuclear Material Transaction Report no later than the close of

business the next working day, and each licensee who receives the material to submit a Nuclear Material Transaction Report within ten (10) days after the material is received; and (3) make a revision to correct the NRC address to obtain the reporting instructions.

The current paragraph (c) would be redesignated as a new paragraph (d). A new paragraph (c) would be added to § 74.15 to require licensees who export one gram or more of SNM to complete only the supplier's portion of the form unless a significant shipper-receiver difference as described in §§ 74.31, 74.43, or 74.59 is identified.

Section 150.3 Definitions

Section 150.3 would be amended to add a definition of "reconciliation." Reconciliation would be defined to mean the process by which licensee submittals are compared to projected values developed by the NMMSS and that the process is considered complete when the licensee resolves any differences between the two values, including foreign obligated materials.

Section 150.8 Information Collection Requirements: OMB Approval

In Section 150.8 paragraph (c)(1) would be revised, paragraph (c)(2) would be redesignated as a new paragraph (c)(3), and a new paragraph (c)(2) would be added to describe that in § 150.17, DOE/NRC Form 742 and its computer-readable format are approved under control number 3150-0004, and DOE/NRC Form 742C and its computer-readable format are approved under control number 3150-0058.

Section 150.16 Submission to Commission of Nuclear Material Transfer Reports

The section heading would be revised to read, "Submission to the Commission of nuclear material transaction reports." The amendment is consistent with the name of the report (transaction report) and describes requirements for both receipt and transfer of nuclear materials.

Section 150.16(a) would be revised to add a new paragraph (a)(1) that would generally retain the requirements of current paragraph (a), but would be amended to (1) require reporting when the inventory of SNM is adjusted in a quantity of one gram or more; (2) specify that for transfer of SNM, the information be submitted no later than the close of next business day; (3) would require completion of only the licensee's portion of the form for exporting SNM unless a significant shipper-receiver difference as described in §§ 74.31, 74.43, or 74.59 is identified; and (4),

correct the NRC address to obtain the reporting instructions.

The new paragraph (a)(2) in § 150.16 would describe the material transaction reporting requirements for the source material. Currently, source material transaction reporting requirements are described in § 150.17(a), under the heading "Submission to Commission of source material reports." Moving these requirements to § 150.16, would help licensees locate the material transaction reporting requirements for both SNM and source material in § 150.16.

The new § 150.16(a)(2) would also (1) require a licensee who utilizes any uranium or thorium source material, regardless of obligation, in a quantity of one kilogram or more, in enrichment services, downblending uranium that has an initial enrichment of the U²³⁵ isotope of 10 percent or more, or in the fabrication of mixed-oxide fuels, to submit source material transaction reports; (2) require licensees to file only the licensee's portion of the form when exporting one kilogram or more of source material, unless there is an indication of theft or diversion as described in § 40.64(c) of this chapter, in which case both the receiver's and shipper's portion of the form must be completed; (3) require the shipper's portion of the form to be completed for imports; and (4) correct the NRC address to obtain the reporting instructions.

Section 150.17 Submission to Commission of Source Material Reports

The section heading would be revised to read, "Submission to Commission of nuclear material status reports." This amendment would help licensees locate the reporting requirements for material status reports for both source material and SNM. This format is similar to the reporting formats for source and SNM status reporting in 10 CFR Parts 40, 72, and 74.

Section 150.17(a) would be amended to require each licensee who is in possession of, or had possessed in the previous reporting period, SNM in a quantity of one gram or more, to annually complete and submit in computer-readable format Material Balance and Inventory Reports concerning special nuclear material that the licensee has received, produced, possessed, transferred, consumed, disposed of, or lost. It would also require licensees to resolve any discrepancies identified during the report review and reconciliation process within 30 calendar days of notification of a discrepancy identified by NRC.

Section 150.17 (b) would be amended to (1) lower the annual inventory reporting threshold from the current

1000 kilogram of foreign obligated source material to one kilogram; (2) add a reporting requirement that a licensee who utilizes one kilogram or more of any source material in enrichment services, downblend material initially enriched in the U²³⁵ isotope to 10 percent or more, or mixed-oxide fuel fabrication would be required to submit material balance and physical inventory listing reports concerning source material that the licensee has received, produced, possessed, transferred, consumed, disposed, or lost; (3) require licensees to resolve any discrepancies identified during the report review and reconciliation process within 30 calendar days of notification of a discrepancy identified by NRC; and (4) correct the NRC address to obtain the reporting instructions.

IV. Criminal Penalties

For the purpose of Section 223 of the Atomic Energy Act (AEA), the Commission is proposing to amend 10 CFR Parts 40, 72, 74, and 150 under one or more of Sections 161b, 161i, or 161o of the AEA. Willful violations of the rule would be subject to criminal enforcement.

V. Agreement State Compatibility

Under the "Policy Statement on Adequacy and Compatibility of Agreement State Programs" approved by the Commission on June 30, 1997, and published in the **Federal Register** on September 3, 1997 (62 FR 46517), this proposed rule would be designated Compatibility Category "NRC." The Compatibility Categories for the sections amended in this proposed rule would be the same as the sections in the current rule. The revisions to §§ 40.64, 72.72(a), 72.76, 72.78, 74.4, 74.13, 74.15, 150.16 and 150.17 are designated as Category "NRC," because these are areas of exclusive NRC regulatory authority. The following new sections, §§ 40.4, 72.3 and 150.3, are also designated Compatibility Category "NRC." Compatibility Category "NRC" are the NRC program elements that address areas of regulation that cannot be relinquished to Agreement States under the Atomic Energy Act or provisions of Title 10 of the Code of Federal Regulations. Although an Agreement State may not adopt program elements reserved to NRC, it may wish to inform its licensees of certain requirements via a mechanism that is consistent with the particular State's administrative procedure laws, but does not confer regulatory authority on the State.

VI. Plain Language

The Presidential Memorandum dated June 1, 1998, entitled, "Plain Language in Government Writing" directed that the Government's writing be in plain language. NRC requests comments on this proposed rule specifically with respect to the clarity and effectiveness of the language used. Comments should be sent to the address listed under the heading "ADDRESSES" of this document.

VII. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995 (Pub. L. 104-113) requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or otherwise impractical. In this proposed rule, the NRC would modify current reporting requirements for source material and special nuclear material to the Nuclear Materials Management and Safeguards System (NMMSS). This action does not constitute the establishment of a standard that establishes generally applicable requirements.

VIII. Environmental Impact: Categorical Exclusion

NRC has determined that this proposed rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1) for the proposed changes to Part 150 and as described in 10 CFR 51.22(c)(3)(iii) for the changes to Parts 40, 72, and 74. Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this proposed rule.

IX. Paperwork Reduction Act Statement

This proposed rule contains new or amended information collection requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq). This rule has been submitted to the Office of Management and Budget for review and approval of the information collection requirements.

Type of submission, new or revision: Revision.

The title of the information collection: 10 CFR Parts 40, 72, 74, and 150, "Regulatory Improvements to Nuclear Materials Management and Safeguards System," Proposed Rule.

The form number if applicable: DOE/NRC Form 741 "Nuclear Material Transaction Report," DOE/NRC Form 742, "Material Balance Report," and DOE/NRC Form 742C, "Physical Inventory Listing."

How often the collection is required: Annually, or when a transaction is made.

Who will be required or asked to report: Licensees who possess one gram or more of special nuclear material, one kilogram or more of foreign obligated source material and licensees who possess one kilogram or more of source material used in uranium enrichment, downblending of uranium enriched to 10 percent or more in U-235 and mixed-oxide fuel fabrication activities.

An estimate of the number of annual responses: 33,065 (currently 33,860 total responses for Forms 741, 742 and 742C per year. Proposed rule would decrease the responses to 33,065 per year because of a reduction in the information collection for export of special nuclear material and source material). The reduction was achieved by:

NRC Form 741: - 1195 responses.

NRC Form 742: +200 responses.

NRC Form 742C: +200 responses.

The estimated number of annual respondents: 380. Currently, 180 licensees report information on Forms 741, 742 and 742C. Two hundred additional respondents for each of the Forms 742 and 742C are expected in the proposed rule as follows:

NRC Form 741: 180 respondents.

NRC Form 742: 380 respondents.

NRC Form 742C: 380 respondents.

An estimate of the total number of hours needed annually to complete the requirement or request: A reduction of 695 hours (*NRC Form 741:* - 1495 hours at 1.25 hours/response; *NRC Form 742,* +400 hours at 2hours/response; *NRC Form 742C,* +400 hours at 2hours/response).

Abstract: NRC is proposing to amend its regulations related to current reporting requirements for source material and special nuclear material to the NMMSS. The proposed amendments would require that all licensees possessing one gram or more of special nuclear material (SNM) or one kilogram or more of source material with foreign treaty obligations to report and reconcile material balance and inventory information at least annually. Additionally, inventory adjustments would have to be reported. The proposed amendments would also reduce the current reporting requirements associated with the export of source material or SNM to require in most cases, only shipper information be reported. The rule would require licensees who engage in certain activities (i.e., enrichment, downblending, mixed-oxide fuel fabrication) to report information on all source materials used for those

activities. These information collections are mandatory.

NRC is seeking public comment on the potential impact of the information collections contained in this proposed rule and on the following issues:

1. Is the proposed information collection necessary for the proper performance of the functions of NRC, including whether the information will have practical utility?

2. Is the estimate of burden accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques?

A copy of the OMB clearance package may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O-1 F21, Rockville, MD 20852. The OMB clearance package and rule are available at the NRC worldwide Web site: <http://www.nrc.gov/public-involve/doc-comment/omb/index.html> for 60 days after the signature date of this notice and are also available at the rule forum site, <http://ruleforum.llnl.gov>.

Send comments on any aspect of these proposed information collections, including suggestions for reducing the burden and on the above issues, by March 8, 2007 to the Records and FOIA/Privacy Services Branch (T-5 F52), U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, or by Internet electronic mail to INFCOLLECTS@NRC.GOV and to the Desk Officer, Margaret A. Malanoski, Office of Information and Regulatory Affairs, NEOB-10202, (3150-0020, 3150-0003, 3150-0132, 3150-0123, 3150-0032, 3150-0004, and 3150-0058), Office of Management and Budget, Washington, DC 20503. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date. You may also e-mail comments to Margaret_A_Malanoski@omb.eop.gov or comment by telephone at (202) 395-3321.

X. Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

XI. Regulatory Analysis

The Commission has prepared a draft regulatory analysis on this proposed

regulation. The analysis examines the costs and benefits of the alternatives considered by the Commission. The Commission requests public comment on the draft regulatory analysis. Comments on the draft analysis may be submitted to the NRC as indicated under the **ADDRESSES** heading of this document. The analysis is available for inspection in the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD. Single copies of the regulatory analysis are available from Neelam Bhalla, telephone (301) 415-6843, e-mail, nxb@nrc.gov of the Office of Federal and State Materials and Environmental Management Programs.

XII. Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this rule would not, if promulgated, have a significant economic impact on a substantial number of small entities. The proposed rule would affect about 180 licensees who are currently required to file reports and approximately 200 additional NRC and Agreement State licensees. Affected licensees include enrichment facilities, fuel fabricators, laboratories, reactors, universities, colleges, medical clinics, and hospitals, some of which may qualify as small business entities as defined by 10 CFR 2.810. The proposed rule would result in annual savings for the 17 licensees subject to current reporting requirements because there would be a reduction in the number of transaction forms submitted for certain export transactions. However, for the licensees possessing 350 grams or less of SNM, there would be an additional cost from the proposed regulations. The annual time required by these licensees to complete each inventory and material balance report is estimated at two hours. No research or compilation is necessary because all information is transcribed from in-house records kept for other purposes. The total annual burden to perform the proposed reporting and reconciliation for these 200 licensees would be 400 hours. Based on the draft regulatory analysis conducted for this action, the annual costs of the proposed amendments for affected licensees are estimated to be \$34,800 total or on average about \$174 per affected licensee. NRC believes that the selected alternative reflected in the proposed amendment is the least burdensome, most flexible alternative that would accomplish the NRC's regulatory objective.

XIII. Backfit Analysis

NRC has determined that the backfit rule (§§ 50.109, 70.76, 72.62, or 76.76) does not apply to this proposed rule because this amendment would not involve any provisions that would impose backfits as defined in the backfit rule. Therefore, a backfit analysis is not required.

List of Subjects

10 CFR Part 40

Criminal penalties, Government contracts, Hazardous materials transportation, Nuclear materials, Reporting and recordkeeping requirements, Source material, Uranium.

10 CFR Part 72

Administrative practice and procedure, Criminal penalties, Manpower training programs, Nuclear materials, Occupational safety and health, Penalties, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

10 CFR Part 74

Accounting, Criminal penalties, Hazardous materials transportation, Material control and accounting, Nuclear materials, Packaging and containers, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Special nuclear material.

10 CFR Part 150

Criminal penalties, Hazardous materials transportation, Intergovernmental relations, Nuclear materials, Reporting and recordkeeping requirements, Security measures, Source material, Special nuclear material.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 553; the NRC is proposing to adopt the following amendments to 10 CFR parts 40, 72, 74, and 150.

PART 40—DOMESTIC LICENSING OF SOURCE MATERIAL

1. The authority citation for part 40 continues to read as follows:

Authority: Secs. 62, 63, 64, 65, 81, 161, 182, 183, 186, 68 Stat. 932, 933, 935, 948, 953, 954, 955, as amended, secs. 11e(2), 83, 84, Pub. L. 95-604, 92 Stat. 3033, as amended, 3039, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2014(e)(2), 2092, 2093, 2094, 2095, 2111, 2113, 2114, 2201, 2232, 2233, 2236, 2282); sec. 274, Pub. L. 86-373,

73 Stat. 688 (42 U.S.C. 2021); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 275, 92 Stat. 3021, as amended by Pub. L. 97-415, 96 Stat. 2067 (42 U.S.C. 2022); sec. 193, 104 Stat. 2835, as amended by Pub. L. 104-134, 110 Stat. 1321, 1321-349 (42 U.S.C. 2243); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Section 40.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 40.31(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 40.46 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 40.71 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

2. In § 40.4, a new definition, Reconciliation, is added in alphabetical order to read as follows:

§ 40.4 Definitions.

* * * * *

Reconciliation means the process of evaluating and comparing licensee reports required under this part to the projected material balances generated by the Nuclear Materials Management and Safeguards System. This process is considered complete when the licensee resolves any differences between the reported and projected balances, including those listed for foreign obligated materials.

* * * * *

3. In § 40.64, paragraphs (a) and (b) are revised to read as follows:

§ 40.64 Reports.

(a) Except as specified in paragraphs (d) and (e) of this section, each specific licensee who: transfers, receives, or adjusts the inventory in any manner, of uranium or thorium source material with foreign obligations by one kilogram or more; or who imports or exports one kilogram or more of uranium or thorium source material; or who uses one kilogram or more of any uranium or thorium source material in enrichment services, downblending uranium that has an initial enrichment of the U²³⁵ isotope of 10 percent or more, or in the fabrication of mixed-oxide fuels, shall complete a Nuclear Material Transaction Report in computer-readable format as specified in the instructions in NUREG/BR-0006 and NMMSS Report D-24, "Personal Computer Data Input for NRC Licensees." Each licensee who exports one kilogram or more of uranium or thorium source material shall complete in the format listed above the licensee's portion of the Nuclear Material Transaction Report unless there is indication of loss, theft, or diversion as discussed under paragraph (d) of this section, in which case both the licensee's and the foreign facility's

information must be reported. Licensees who import one kilogram or more of uranium or thorium source material shall complete the supplier's and the licensee's portion of the Nuclear Material Transaction Report. Copies of the instructions may be obtained either by writing the U.S. Nuclear Regulatory Commission, Division of Fuel Cycle Safety and Safeguards, Washington, DC 20555-0001, or by e-mail to RidsNmssFcsc@nrc.gov. Each licensee who transfers the material shall submit a Nuclear Material Transaction Report in computer-readable format as specified in the instructions no later than the close of business the next working day. Each licensee who receives the material shall submit a Nuclear Material Transaction Report in computer-readable format in accordance with instructions within ten (10) days after the material is received. The Commission's copy of the report must be submitted to the address specified in the instructions. These prescribed computer-readable forms replace the DOE/NRC Form 741 previously submitted in paper form.

(b) Except as specified in paragraphs (d) and (e) of this section, each licensee who:

(1) Possesses, or had possessed in the previous reporting period, at any one time and location, one kilogram or more of uranium or thorium source material with foreign obligations as defined in this part, shall document holdings as of September 30 of each year and submit to the Commission within 30 days, a statement of its source material inventory with foreign obligations as defined in this part. Alternatively, this information may be submitted with the licensee's material status reports on special nuclear material filed under parts 72 or 74 of this chapter, as a statement of its source material inventory with foreign obligations as defined in this part. This statement must be submitted to the address specified in the reporting instructions in NUREG/BR-0007, and include the Reporting Identification Symbol (RIS) assigned by the Commission to the licensee.

(2) Possesses, or had possessed in the previous reporting period, one kilogram or more of uranium or thorium source material pursuant to the operation of enrichment services, downblending uranium that has an initial enrichment of the U²³⁵ isotope of 10 percent or more, or in the fabrication of mixed-oxide fuels shall complete and submit, in computer-readable format, Material Balance and Physical Inventory Listing Reports concerning all source material that the licensee has received,

produced, possessed, transferred, consumed, disposed of, or lost. Reports must be submitted for each Reporting Identification Symbol (RIS) account including all holding accounts. Each licensee shall prepare and submit these reports as specified in the instructions in NUREG/BR-0007 and NMMSS Report D-24, "Personal Computer Data Input for NRC Licensees." These reports must document holdings as of September 30 of each year and must be submitted to the Commission within 30 days. Alternatively, these reports may be submitted with the licensee's material status reports on special nuclear material filed under parts 72 or 74 of this chapter. Copies of the reporting instructions may be obtained either by writing to the U.S. Nuclear Regulatory Commission, Division of Fuel Cycle Safety and Safeguards, Washington, DC 20555-0001, or by e-mail to RidsNmssFcsc@nrc.gov. Each licensee required to report material balance, inventory, and/or foreign obligation information, as detailed in this part, shall resolve any discrepancies identified during the report review and reconciliation process within 30 calendar days of notification of a discrepancy identified by the NRC.

* * * * *

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL, HIGH-LEVEL RADIOACTIVE WASTE AND REACTOR-RELATED GREATER THAN CLASS C WASTE

4. The authority citation for Part 72 continues to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86-373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95-601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102-486, sec. 7902, 106 Stat. 3123 (42 U.S.C. 5851); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97-425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100-203, 101 Stat. 1330-235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); sec. 651(e), Pub. L. 109-58, 119 Stat. 806-10 (42 U.S.C. 2014, 2021, 2021b, 2111).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100-203, 101 Stat. 1330-232, 1330-236 (42 U.S.C. 10162(b), 10168(c), (d)). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C.

2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100-203, 101 Stat. 1330-235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97-425, 96 Stat. 2202, 2203, 2204, 2222, 2224 (42 U.S.C. 10101, 10137(a), 10161(h)). Subparts K and L are also issued under sec. 133, 98 Stat. 2230 (42 U.S.C. 10153) and sec. 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

5. In § 72.3, a new definition, Reconciliation, is added in alphabetical order to read as follows:

§ 72.3 Definitions.

* * * * *

Reconciliation means the process of evaluating and comparing licensee reports required under this part to the projected material balances generated by the Nuclear Materials Management and Safeguards System. This process is considered complete when the licensee resolves any differences between the reported and projected balances, including those listed for foreign obligated materials.

* * * * *

6. In § 72.72, paragraph (a) is revised to read as follows:

§ 72.72 Material balance, inventory, and record requirements for stored materials.

(a) Each licensee shall keep records showing the receipt, inventory (including location), disposal, acquisition, and transfer of all special nuclear material with quantities as specified in § 74.13(a) and for source material as specified in § 40.64 of this chapter. The records must include as a minimum the name of shipper of the material to the ISFSI or MRS, the estimated quantity of radioactive material per item (including special nuclear material in spent fuel and reactor-related GTCC waste), item identification and seal number, storage location, onsite movements of each fuel assembly or storage canister, and ultimate disposal. These records for spent fuel and reactor-related GTCC waste at an ISFSI or for spent fuel, high-level radioactive waste, and reactor-related GTCC waste at an MRS must be retained for as long as the material is stored and for a period of 5 years after the material is disposed of or transferred out of the ISFSI or MRS.

* * * * *

7. In § 72.76, paragraph (a) is revised to read as follows:

§ 72.76 Material status reports.

(a) Except as provided in paragraph (b) of this section, each licensee shall complete in computer-readable format and submit to the Commission a Material Balance Report and a Physical

Inventory Listing Report as specified in the instructions in NUREG/BR-0007 and NMMSS Report D-24 "Personal Computer Data Input for NRC Licensees." Copies of these instructions may be obtained either by writing to the U.S. Nuclear Regulatory Commission, Division of Fuel Cycle Safety and Safeguards, Washington, DC 20555-0001, or by e-mail to *RidsNmssFcass@nrc.gov*. These reports, as specified by §§ 74.13 or 40.64 of this chapter, provide information concerning the special nuclear material and or source material possessed, received, transferred, disposed of, or lost by the licensee. Each report must be submitted within 60 days of the beginning of the physical inventory required by § 72.72(b) of this chapter. The Commission may, when good cause is shown, permit a licensee to submit Material Balance Reports and Physical Inventory Listing Reports at other times. Each licensee required to report material balance and inventory information as described in this part, shall resolve any discrepancies identified during the report review and reconciliation process within 30 calendar days of notification of a discrepancy identified by NRC. The Commission's copy of this report must be submitted to the address specified in the instructions. These prescribed, computer-readable forms replace the DOE/NRC Forms 742 and 742C previously submitted in paper form.

8. In § 72.78 the section heading and paragraph (a) are revised to read as follows:

§ 72.78 Nuclear material transaction reports.

(a) Except as provided in paragraph (b) of this section, whenever the licensee transfers or receives or adjusts the inventory in any manner, of special nuclear material as specified by § 74.15 and or source material as specified by § 40.64 of this chapter, the licensee shall complete in computer-readable format a Nuclear Material Transaction Report as specified in the instructions in NUREG/BR-0006 and NMMSS Report D-24, "Personal Computer Data Input for NRC Licensees." Copies of these instructions may be obtained either by writing to the U.S. Nuclear Regulatory Commission, Division of Fuel Cycle Safety and Safeguards, Washington, DC 20555-0001, or by e-mail to *RidsNmssFcass@nrc.gov*. Each licensee who transfers the material shall submit a Nuclear Material Transaction Report in computer-readable format as specified in the instructions no later than the close of business the next working day. Each licensee who

receives the material shall submit a Nuclear Material Transaction Report in computer-readable format in accordance with instructions within ten (10) days after the material is received. Each ISFSI licensee who receives spent fuel from a foreign source shall complete both the supplier's and the receiver's portion of the Nuclear Material Transaction Report, verify the identity of the spent fuel, and indicate the results on the receiver's portion of the form. These prescribed computer-readable forms replace the DOE/NRC Form 741 which have been previously submitted in paper form.

PART 74—MATERIAL CONTROL AND ACCOUNTING OF SPECIAL NUCLEAR MATERIAL

9. The authority citation for Part 74 continues to read as follows:

Authority: Secs. 53, 57, 161, 182, 183, 68 Stat. 930, 932, 948, 953, 954, as amended, sec. 234, 83 Stat. 444, as amended, sec. 1701, 106 Stat. 2951, 2952, 2953, (42 U.S.C. 2073, 2077, 2201, 2232, 2233, 2282, 2297f); secs. 201, as amended 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

10. In § 74.2, paragraph (a) is revised to read as follows:

§ 74.2 Scope.

(a) The general reporting and recordkeeping requirements of subpart B of this part apply to each person licensed under this chapter who possesses special nuclear material in a quantity of one gram or more of contained uranium-235, uranium-233, or plutonium; or who transfers or receives a quantity of special nuclear material of one gram or more of contained uranium-235, uranium-233, or plutonium. The general reporting and recordkeeping requirements of subpart B of this part do not apply to licensees whose MC&A reporting and recordkeeping requirements are covered by §§ 72.72, 72.76, and 72.78 of this chapter.

11. In § 74.4, a new definition, Reconciliation, is added in alphabetical order to read as follows:

§ 74.4 Definitions.

Reconciliation means the process of evaluating and comparing licensee reports required under this part to the projected material balances generated by the Nuclear Materials Management and Safeguards System. This process is considered complete when the licensee

resolves any differences between the reported and projected balances, including those listed for foreign obligated materials.

12. In § 74.13, paragraph (a) is revised to read as follows:

§ 74.13 Material status reports.

(a) Each licensee, including nuclear reactor licensees as defined in §§ 50.21 and 50.22 of this chapter, possessing, or who had possessed in the previous reporting period, at any one time and location special nuclear material in a quantity totaling one gram or more of contained uranium-235, uranium-233, or plutonium shall complete and submit, in computer-readable format Material Balance Reports concerning special nuclear material that the licensee has received, produced, possessed, transferred, consumed, disposed, or lost. This prescribed computer-readable report replaces the DOE/NRC form 742 which has been previously submitted in paper form. The Physical Inventory Listing Report must be submitted with each Material Balance Report. This prescribed computer-readable report replaces the DOE/NRC Form 742C which has been previously submitted in paper form. Reports must be submitted for each Reporting Identification Symbol (RIS) account including all holding accounts. Each licensee shall prepare and submit the reports described in this paragraph as specified in the instructions in NUREG/BR-0007 and NMMSS Report D-24 "Personal Computer Data Input for NRC Licensees." Copies of these instructions may be obtained from the U.S. Nuclear Regulatory Commission, Division of Fuel Cycle Safety and Safeguards, Washington, DC 20555-0001, or by e-mail to *RidsNmssFcass@nrc.gov*. Each licensee subject to the requirements of § 74.51 shall compile a report as of March 31 and September 30 of each year and file it within 30 days after the end of the period covered by the report. Licensees subject to the requirements of §§ 74.19(c), 74.31(c)(5), 74.33(c)(4), or 74.43(c)(6) shall submit a report within 60 calendar days of the beginning of the physical inventory. All other licensees shall submit a report no later than March 31 of each year. The Commission may permit a licensee to submit the reports at other times for good cause. Each licensee required to report material balance, and inventory information, as detailed in this part, shall resolve any discrepancies identified during the report review and reconciliation process

within 30 calendar days of notification of a discrepancy identified by NRC.

* * * * *

13. In § 74.15 the section heading and paragraph (a) are revised, paragraph (c) is redesignated as a new paragraph (d), and a new paragraph (c) is added to read as follows:

§ 74.15 Nuclear material transaction reports.

(a) Each licensee who transfers, receives, or adjusts the inventory in any manner of special nuclear material in a quantity of one gram or more of contained uranium-235, uranium-233, or plutonium shall complete in computer-readable format a Nuclear Material Transaction Report. This shall be done as specified in the instructions in NUREG/BR-0006 and NMMSS Report D-24, "Personal Computer Data Input for NRC Licensees." Copies of these instructions NUREG/BR-0006 and NMMSS Report D-24, "Personal Computer Data Input for NRC Licensees" may be obtained either by writing the U.S. Nuclear Regulatory Commission, Division of Fuel Cycle Safety and Safeguards, Washington, DC 20555-0001, or by e-mail to *RidsNmssFcsc@nrc.gov*. Each licensee who transfers the material shall submit a Nuclear Material Transaction Report in computer-readable format as specified in the instructions no later than the close of business the next working day. Each licensee who receives the material shall submit a Nuclear Material Transaction Report in computer-readable format in accordance with instructions within ten (10) days after the material is received. This prescribed computer-readable format replaces the DOE/NRC Form 741 which has been previously submitted in paper form.

* * * * *

(c) Each licensee who ships special nuclear material in a quantity of one gram or more of contained uranium-235, uranium-233, or plutonium to foreign recipient shall complete in computer-readable format the supplier's portion of the Nuclear Material Transaction Report. The licensee shall complete the receiver's portion of the Nuclear Material Transaction Report only if a significant shipper-receiver difference as described in §§ 74.31, 74.43, or 74.59 of this part, as applicable, is identified.

* * * * *

PART 150—EXEMPTIONS AND CONTINUED REGULATORY AUTHORITY IN AGREEMENT STATES AND IN OFFSHORE WATERS UNDER SECTION 274

14. The authority citation for Part 150 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended, sec. 274, 73 Stat. 688 (42 U.S.C. 2201, 2021); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Sections 150.3, 150.15, 150.15a, 150.31, 150.32 also issued under secs. 11e(2), 81, 68 Stat. 923, 935, as amended, secs. 83, 84, 92 Stat. 3033, 3039 (42 U.S.C. 2014e(2), 2111, 2113, 2114). Section 150.14 also issued under sec. 53, 68 Stat. 930, as amended (42 U.S.C. 2073). Section 150.15 also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 150.17a also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 150.30 also issued under sec. 234, 83 Stat. 444 (42 U.S.C. 2282).

15. In § 150.3, a new definition, Reconciliation, is added in alphabetical order to read as follows:

§ 150.3 Definitions.

* * * * *

Reconciliation means the process of evaluating and comparing licensee reports required under this part to the projected material balances generated by the Nuclear Materials Management and Safeguards System. This process is considered complete when the licensee resolves any differences between the reported and projected balances, including those listed for foreign obligated materials.

* * * * *

16. In § 150.8, paragraph (c)(1) is revised, paragraph (c)(2) is redesignated as a new paragraph (c)(3), and a new paragraph (c)(2) is added to read as follows:

§ 150.8 Information collection requirements: OMB approval.

* * * * *

(c) * * *

(1) In § 150.16, DOE/NRC FORM 741 and its computer-readable format are approved under control number 3150-0003.

(2) In § 150.17, DOE/NRC Form 742 and its computer-readable format are approved under control number 3150-0004, and DOE/NRC Form 742C and its computer-readable format are approved under control number 3150-0058.

* * * * *

17. In § 150.16, the section heading and paragraph (a) are revised to read as follows:

§ 150.16 Submission to Commission of nuclear material transaction reports.

(a)(1) Each person who transfers, receives, or adjusts the inventory in any manner of special nuclear material in a quantity of one gram or more of contained uranium-235, uranium-233, or plutonium under an Agreement State license shall complete and submit in computer-readable format Nuclear Material Transaction Reports as specified in the instructions in NUREG/BR-0006 and NMMSS Report D-24, "Personal Computer Data Input for NRC Licensees." Each licensee who receives special nuclear material in a quantity of one gram or more of contained uranium-235, uranium-233, or plutonium from a foreign source, or who ships special nuclear material in a quantity of one gram or more of contained uranium-235, uranium-233, or plutonium to a foreign source, shall submit the licensee portion of this information as specified in the instructions in this part. The applicable foreign facility portion of the form must be completed and submitted for imports. The foreign facility portion of the form must be completed for exports only if a significant shipper-receiver difference as described in §§ 74.31, 74.43, or 74.59, of this part, as applicable, is identified. Each person who transfers the material shall submit a Nuclear Material Transaction Report in computer-readable format as specified in the instructions no later than the close of business the next working day. Each person who receives special nuclear material shall submit in the computer-readable format as specified in the instructions within ten (10) days after the special nuclear material is received. Copies of these instructions may be obtained either by writing to the U.S. Nuclear Regulatory Commission, Division of Fuel Cycle Safety and Safeguards, Washington, DC 20555-0001, or by e-mail to *RidsNmssFcsc@nrc.gov*. These prescribed computer-readable formats replace the DOE/NRC Form 741s which have been previously submitted in paper form.

(2) Except as specified in §§ 150.17(d) and 150.17a, each person who, under an Agreement State specific license: transfers, receives, or adjusts the inventory in any manner, of uranium or thorium source material with foreign obligations by one kilogram or more; imports or exports one kilogram or more of uranium or thorium source material; or uses one kilogram or more of any uranium or thorium source material in enrichment services, downblending uranium that has an initial enrichment of the U235 isotope of 10 percent or more, or in the fabrication of mixed-

oxide fuels, shall complete and submit in computer-readable format Nuclear Material Transaction Reports as specified in the instructions in NUREG/BR-0006 and NMMSS Report D-24, "Personal Computer Data Input for NRC Licensees." Each person who, under an Agreement State specific license exports one kilogram or more of uranium or thorium source material shall complete in the format listed above the licensee's portion of the Nuclear Material Transaction Report unless there is indication of loss, theft, or diversion as discussed in § 40.64(c)(1) of this chapter is identified, in which case both the licensee's and the foreign facility's information shall be reported. For imports, the shipper's portion of the form must also be completed. Copies of the instructions may be obtained either by writing to the U.S. Nuclear Regulatory Commission, Division of Fuel Cycle Safety and Safeguards, Washington, DC 20555-0001, or by e-mail to RidsNmssFcsc@nrc.gov. Each licensee who transfers the material shall submit a Nuclear Material Transaction Report in computer-readable format as specified in the instructions no later than the close of business the next working day. Each licensee who receives the material shall submit a Nuclear Material Transaction Report in computer-readable format in accordance with instructions within ten (10) days after the material is received. The Commission's copy of the report must be submitted to the address specified in the instructions. These prescribed computer-readable forms replace the DOE/NRC Form 741 which have been previously submitted in paper form.

* * * * *

18. In § 150.17, the section heading and paragraphs (a) and (b) are revised to read as follows:

§ 150.17 Submission to Commission of nuclear material status reports.

(a) Except as specified in paragraph (d) of this section and § 150.17a, each person possessing, or who had possessed in the previous reporting period, at any one time and location, under an Agreement State license, special nuclear material in a quantity totaling one gram or more of contained uranium-235, uranium-233, or plutonium, shall complete and submit, in computer-readable format Material Balance Reports concerning special nuclear material that the licensee has received, produced, possessed, transferred, consumed, disposed of, or lost. This prescribed computer-readable report replaces the DOE/NRC Form 742 which has been previously submitted in paper form. The Physical Inventory

Listing Report must be submitted with each Material Balance Report. This prescribed computer-readable report replaces the DOE/NRC Form 742C which has been previously submitted in paper form. Each licensee shall prepare and submit the reports described in this paragraph as specified in the instructions in NUREG/BR-0007 and NMMSS Report D-24 "Personal Computer Data Input for NRC Licensees." Copies of these instructions may be obtained from the U.S. Nuclear Regulatory Commission, Division of Fuel Cycle Safety and Safeguards, Washington, DC 20555-0001, or by e-mail to RidsNmssFcsc@nrc.gov. Each person subject to this requirement shall submit a report no later than March 31 of each year. The Commission may, when good cause is shown, permit a licensee to submit Material Balance Reports and Physical Inventory Listing Reports at other times. Each licensee required to report material balance, and inventory information, as described in this part, shall resolve any discrepancies identified during the report review and reconciliation process within 30 calendar days of notification of a discrepancy identified by NRC.

(b) Except as specified in paragraph (d) of this section and § 150.17a, each person possessing, or who had possessed in the previous reporting period, at any one time and location, under an Agreement State license:

(1) One kilogram or more of uranium or thorium source material with foreign obligations, shall document holdings as of September 30 of each year and submit to the Commission within 30 days. Alternatively, these reports may be submitted with the licensee's material status reports on special nuclear material filed under parts 72 or 74 of this chapter.

(2) One kilogram or more of uranium or thorium source material in the operation of enrichment services, downblending uranium that has an initial enrichment of the U235 isotope of 10 percent or more, or in the fabrication of mixed-oxide fuels shall complete and submit, in computer-readable format, Material Balance and Physical Inventory Listing Reports concerning source material that the licensee has received, produced, possessed, transferred, consumed, disposed of, or lost. Reports must be submitted for each Reporting Identification Symbol (RIS) account including all holding accounts. Each licensee shall prepare and submit these reports as specified in the instructions in NUREG/BR-0007 and NMMSS Report D-24, "Personal Computer Data Input for NRC Licensees." These reports

must document holdings as of September 30 of each year and be submitted to the Commission within 30 days. Alternatively, these reports may be submitted with the licensee's material status reports on special nuclear material filed under parts 72 or 74 of this chapter. Copies of the reporting instructions may be obtained by writing to the U.S. Nuclear Regulatory Commission, Division of Fuel Cycle Safety and Safeguards, Washington, DC 20555-0001, or by e-mail to RidsNmssFcsc@nrc.gov. Each licensee required to report material balance, and inventory information, as described in this part, shall resolve any discrepancies identified during the report review and reconciliation process within 30 calendar days of the notification of a discrepancy identified by the NRC.

* * * * *

Dated at Rockville, Maryland, this 30th day of January 2007.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. E7-1867 Filed 2-5-07; 8:45 am]

BILLING CODE 7590-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2006-26775; Directorate Identifier 2007-CE-01-AD]

RIN 2120-AA64

Airworthiness Directives; Air Tractor, Inc. Model AT-602 Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Air Tractor, Inc. (Air Tractor) Model AT-602 airplanes. This proposed AD would require you to install access holes to do repetitive detailed visual inspections for cracks in the horizontal stabilizer brace tube assembly, and if any cracks are found as a result of a visual inspection, to replace the horizontal stabilizer brace tube assembly with a new design horizontal stabilizer brace tube assembly. The installation of the new design horizontal stabilizer brace tube assembly is terminating action for the repetitive inspection requirement. This proposed

AD results from two reports of Model AT-602 airplanes with cracked horizontal stabilizer brace tube assemblies. We are proposing this AD to detect and correct cracks in the horizontal stabilizer brace tube assembly, which could result in failure of the horizontal stabilizer. This failure could affect the ability to control pitch with consequent loss of control.

DATES: We must receive comments on this proposed AD by April 9, 2007.

ADDRESSES: Use one of the following addresses to comment 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 20590-0001.

- 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.

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

For service information identified in this proposed AD, contact Air Tractor Inc., P.O. Box 485, Olney, Texas 76374; telephone: (940) 564-5616; fax: (940) 564-5612.

FOR FURTHER INFORMATION CONTACT:

Andrew McAnaul, Aerospace Engineer, ASW-150 (c/o MIDO-43), 10100 Reunion Place, Suite 650, San Antonio, Texas 78216; telephone: (210) 308-3365; fax: (210) 308-3370.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments regarding this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number, "FAA-2006-26775; Directorate Identifier 2007-CE-01-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 we receive concerning this proposed AD.

Discussion

We have received two reports of Model AT-602 airplanes with cracked horizontal stabilizer brace tube assemblies. One tube was cracked completely in two. The horizontal stabilizer brace tube assemblies failed as a result of fatigue. Air Tractor has also identified excessive corrosion as a potential contributing factor.

This condition, if not corrected, could result in failure of the horizontal stabilizer. This failure could affect the ability to control pitch with consequent loss of control.

Air Tractor has developed an improved design horizontal stabilizer brace tube assembly with a larger shank.

Relevant Service Information

We have reviewed Snow Engineering Co. Service Letter #129A, dated August 7, 2004, revised November 15, 2005; Service Letter #235, dated August 25, 2004, revised October 23, 2006; and

Drill Template—602, Drawing Number SL129-602, dated August 2, 2004.

The service information describes procedures for:

- Installing access holes for visual inspection of the horizontal stabilizer brace tube assembly (part number (P/N) 30012-7);

- Conducting a detailed visual inspection for cracks in the horizontal stabilizer brace tube assembly (P/N 30012-7); and

- Replacing the horizontal stabilizer brace tube assembly (P/N 30012-7) with a new design horizontal stabilizer brace tube assembly (P/N 30766-1).

FAA's Determination and Requirements of the Proposed AD

We are proposing this AD because we evaluated all information and determined the unsafe condition described previously is likely to exist or develop on other products of the same type design. This proposed AD would require you to:

- Install access holes to do visual inspections;

- Do repetitive detailed visual inspections for cracks in the horizontal stabilizer brace tube assembly; and

- If any cracks are found as a result of a visual inspection, replace the horizontal stabilizer brace tube assembly with a new design horizontal stabilizer brace tube assembly.

The installation of the new design horizontal stabilizer brace tube assembly is terminating action for the repetitive inspection requirement.

Costs of Compliance

We estimate that this proposed AD would affect 128 airplanes in the U.S. registry.

We estimate the following costs to do the proposed installation of access holes to do visual inspections:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
1 work-hour × \$80 per hour = \$80	\$5	\$85	\$10,880

We estimate the following costs to do each visual inspection for cracks of the

horizontal stabilizer brace tube assembly:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators for initial inspection
1 work-hour × \$80 per hour = \$80	Not Applicable	\$80	\$10,240

We estimate the following costs to do any necessary replacement of the

horizontal stabilizer brace tube assembly with a new design horizontal

stabilizer brace tube assembly that would be required based on the results

of the proposed inspection or as the terminating action for the repetitive

inspection requirement. We have no way of determining the number of

airplanes that may need this replacement:

Labor cost	Parts cost	Total cost per airplane
35 work-hours × \$80 per hour = \$2,800	\$896	\$3,696

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.

Examining the AD Docket

You may examine the AD docket that contains the proposed AD, the regulatory evaluation, any comments received, and other information on the Internet at <http://dms.dot.gov>; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone (800) 647-5227) is located at the street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

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 adding the following new AD:

Air Tractor Inc.: Docket No. FAA-2006-26775; Directorate Identifier 2007-CE-01-AD.

Comments Due Date

(a) We must receive comments on this airworthiness directive (AD) action by April 9, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Model AT-602 airplanes, all serial numbers through 602-0695 that:

(1) have horizontal stabilizer brace tube assembly, part number (P/N) 30012-7, installed; and

(2) are certificated in any category.

Unsafe Condition

(d) This AD results from two reports of Model AT-602 airplanes with cracked horizontal stabilizer brace tube assemblies. We are issuing this AD to detect and correct cracks in the horizontal stabilizer brace tube assembly, which could result in failure of the horizontal stabilizer. This failure could affect the ability to control pitch with consequent loss of control.

Compliance

(e) To address this problem, you must do the following, unless already done:

Actions	Compliance	Procedures
(1) Do the following: (i) Install access holes for visual inspection of the part number (P/N) 30012-7 horizontal stabilizer brace tube assembly. (ii) Conduct a detailed visual inspection for cracks in the P/N 30012-7 horizontal stabilizer brace tube assembly. (2) Replace the P/N 30012-7 horizontal stabilizer brace tube assembly with a new design P/N 30766-1 horizontal stabilizer brace tube assembly. (3) Do not install any P/N 30012-7 horizontal stabilizer brace tube assembly.	Install the access holes and do the initial inspection upon accumulating 2,000 hours time-in-service (TIS) or within the next 60 days after the effective date of this AD, whichever occurs later. Repetitively inspect thereafter at intervals not to exceed 100 hours TIS. Replacement of the P/N 30012-7 horizontal stabilizer brace tube assembly with a new design P/N 30766-1 horizontal stabilizer brace tube assembly following paragraph (e)(2) of this AD is terminating action for the repetitive inspection requirement of this AD. Before further flight after any inspection required by paragraph (e)(1) of this AD where cracks are found. The installation of a new design P/N 30766-1 horizontal stabilizer brace tube assembly is terminating action for the repetitive inspection requirement of this AD. As of the effective date of this AD	Follow Snow Engineering Co. Service Letter #235, dated August 25, 2004, revised October 23, 2006. Follow Snow Engineering Co. Service Letter #129A, dated August 7, 2004, revised November 15, 2005; Snow Engineering Co. Service Letter #235, dated August 25, 2004, revised October 23, 2006; and Snow Engineering Co. Drill Template—602, Drawing Number SL129-602, dated August 2, 2004. Not Applicable.

Alternative Methods of Compliance (AMOCs)

(f) The Manager, Fort Worth Airplane Certification Office, FAA, ATTN: Andrew McAnaul, Aerospace Engineer, ASW-150 (c/o MDO-43), 10100 Reunion Place, Suite 650, San Antonio, Texas 78216; telephone: (210) 308-3365; fax: (210) 308-3370, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

Related Information

(g) To get copies of the service information referenced in this AD, contact Air Tractor Inc., P.O. Box 485, Olney, Texas 76374; telephone: (940) 564-5616; fax: (940) 564-5612. To view the AD docket, go to the Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC, or on the Internet at <http://dms.dot.gov>. The docket number is Docket No. FAA-2006-26775; Directorate Identifier 2007-CE-01-AD.

Issued in Kansas City, Missouri, on January 31, 2007.

Margaret Kline,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7-1874 Filed 2-5-07; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2007-27154; Directorate Identifier 2006-NM-139-AD]

RIN 2120-AA64

Airworthiness Directives; Airbus Model A310 Airplanes and Model A300 B4-600, B4-600R, and F4-600R Series Airplanes, and Model C4-605R Variant F airplanes (Collectively Called A300-600 Series Airplanes)

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all Airbus Model A310 airplanes and Model A300-600 series airplanes. This proposed AD would require revising the Airworthiness Limitations section of the Instructions for Continued Airworthiness by incorporating new and revised certification maintenance requirements. This proposed AD results from the manufacturer determining that additional and revised certification maintenance requirements are necessary in order to ensure continued operational safety of the affected airplanes. We are proposing this AD to prevent safety-significant latent failures that would, in combination with one or more other specific failures or events, result in a hazardous or catastrophic failure condition of avionics, hydraulic

systems, fire detection systems, fuel systems, or other critical systems.

DATES: We must receive comments on this proposed AD by March 8, 2007.

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: Tom Stafford, Aerospace Engineer, International Branch, ANM-116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; 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 proposed AD. Send your comments to an address listed in the **ADDRESSES** section. Include the docket

number "FAA-2007-27154; Directorate Identifier 2006-NM-139-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 Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, notified us that Part 3, "Certification Maintenance Requirements (CMR)" of the Airworthiness Limitations section

(ALS) for Airbus Model A310 airplanes and Airbus Model A300-600 series airplanes has been updated. The new CMRs, among other things, introduce new inspections. CMRs are intended to detect safety-significant latent failures that would, in combination with one or more other specific failures or events, result in a hazardous or catastrophic failure condition of avionics, hydraulic systems, fire detection systems, fuel systems, or other critical systems.

Relevant Service Information

Airbus has issued A310 Certification Maintenance Requirements AI/ST5/849/85, Issue 12, dated February 2005, to Part 3 of the ALS for Model A310. Airbus has also issued A300-600 Certification Maintenance Requirements AI/ST5/829/85, Issue 12, dated February 2005, to Part 3 of the ALS for Model A300-600. Issue 12 of the documents:

- Adds two new Two Star CMR tasks for the thrust reverser actuation and cowlings;
- Corrects existing CMRs; and
- For Model A300-600: Extends the applicability of a CMR and corrects the effectivity paragraph of the CMR.

Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. The DGAC mandated the service information and issued French airworthiness directive F-2005-123, dated July 20, 2005, to ensure the continued airworthiness of these airplanes in France.

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 this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation

described above. We have examined the DGAC's findings, evaluated all pertinent information, and determined that we need to issue an AD for airplanes of this type design that are certificated for operation in the United States.

Therefore, we are proposing this AD, which would require revising the Airworthiness Limitations section of the Instructions for Continued Airworthiness by incorporating new and revised CMRs.

Clarification of Compliance Time Between the Proposed AD and the French Airworthiness Directive

The French airworthiness directive specifies to conform to the CMRs within two months with the exception of one CMR, MSI 78.30.99 (thrust reverser actuation and cowlings tasks for airplanes that have installed a third line of defense). The French airworthiness directive specifies to conform to MSI 78.30.99 within three months or before the accumulation of 7,000 flight hours since installation of a third line of defense, whichever occurs later.

However, this proposed AD would require revising the Airworthiness Limitations section of the Instructions for Continued Airworthiness by incorporating new and revised certification maintenance requirements within three months after the effective date of the proposed AD. In developing an appropriate compliance time for this action, we considered the urgency associated with the subject unsafe condition, the availability of required parts, and the practical aspect of affected operators accomplishing the operational and functional tests of critical systems and power plants and inspections for damage of certain parts that are specified in the CMRs.

Costs of Compliance

The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Revision of maintenance program	1	\$80	\$80	203	\$16,240

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-2007-27154; Directorate Identifier 2006-NM-139-AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by March 8, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Airbus Model A310 airplanes, Model A300 B4-601, B4-603, B4-620, and B4-622 airplanes, Model A300 B4-605R and B4-622R airplanes, Model A300 F4-605R and F4-622R

airplanes, and Model A300 C4-605R Variant F airplanes, certificated in any category.

Note 1: This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these actions is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (g) of this AD. The request should include a description of changes to the required inspections that will ensure the continued damage tolerance of the affected structure. The FAA has provided guidance for this determination in Advisory Circular (AC) 25.1529-1.

Unsafe Condition

(d) This AD results from the manufacturer determining that additional and revised certification maintenance requirements are necessary in order to ensure continued operational safety of the affected airplanes. We are issuing this AD to prevent safety-significant latent failures that would, in combination with one or more other specific failures or events, result in a hazardous or catastrophic failure condition of avionics, hydraulic systems, fire detection systems, fuel systems, or other critical systems.

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.

Revise the Airworthiness Limitations Section of the Instructions for Continued Airworthiness

(f) Within three months after the effective date of this AD, revise the Airworthiness Limitations section of the Instructions for Continued Airworthiness by incorporating Airbus A300-600 Certification Maintenance Requirements (CMRs) AI/ST5/829/85, Issue 12, dated February 2005 (for Model A310 airplanes); or Airbus A310 CMR AI/ST5/849/85, Issue 12, dated February 2005 (for Model A300 B4-601, B4-603, B4-620, and B4-622 airplanes, Model A300 B4-605R and B4-622R airplanes, Model A300 F4-605R and F4-622R airplanes, and Model A300 C4-605R Variant F airplanes); as applicable. Accomplish the actions specified in the applicable CMRs at the times specified in the applicable CMRs. The actions must be accomplished in accordance with the applicable CMRs.

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) French airworthiness directive F-2005-123, dated July 20, 2005, also addresses the subject of this AD.

Issued in Renton, Washington, on January 29, 2007.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7-1872 Filed 2-5-07; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2006-26494; Directorate Identifier 2006-CE-79-AD]

RIN 2120-AA64

Airworthiness Directives; Alpha Aviation Design Limited (Type Certificate No. A48EU previously held by APEX Aircraft and AVIONS PIERRE ROBIN) Model R2160 Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

* * * unchecked corrosion developing on the wing spars due to access for inspections being difficult under normal maintenance practices, which could lead to an unsafe condition and possibly a failure of the wing.

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by March 8, 2007.

ADDRESSES: You may send comments by any of the following methods:

- **DOT Docket Web site:** Go to <http://dms.dot.gov> and follow the instructions for sending your comments electronically.

- **Fax:** (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.

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://dms.dot.gov>; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647-5227) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329-4146; fax: (816) 329-4090.

SUPPLEMENTARY INFORMATION:

Streamlined Issuance of AD

The FAA is implementing a new process for streamlining the issuance of ADs related to MCAI. The streamlined process will allow us to adopt MCAI safety requirements in a more efficient manner and will reduce safety risks to the public. This process continues to follow all FAA AD issuance processes to meet legal, economic, Administrative Procedure Act, and **Federal Register** requirements. We also continue to meet our technical decision-making responsibilities to identify and correct unsafe conditions on U.S.-certificated products.

This proposed AD references the MCAI and related service information that we considered in forming the engineering basis to correct the unsafe condition. The proposed AD contains text copied from the MCAI and for this reason might not follow our plain language principles.

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA-2006-26494; Directorate Identifier 2006-CE-79-AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the

closing date and may amend this proposed AD because 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 we receive about this proposed AD.

Discussion

The Civil Aviation Authority of New Zealand, which is the airworthiness authority for New Zealand, has issued AD DCA/R2000/37, dated September 28, 2006 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

* * * unchecked corrosion developing on the wing spars due to access for inspections being difficult under normal maintenance practices, which could lead to an unsafe condition and possibly a failure of the wing, remove the main landing gear legs and all the wing inspection panels per the instructions in the aircraft Maintenance Manual.

The MCAI Requires:

Inspect the visible parts of the spar web, the front face of the spar and the upper and lower boom angle per Avions Pierre Robin Service Letter No. 19 and Service Bulletin No. 99.

It may be necessary to cut inspection holes or remove the wings to achieve this. Inspection holes must be prepared to a manufacturer approved repair scheme (approved by FAA).

If corrosion is found, treat per SL No. 19 and SB No. 99 before further flight.

If corrosion is found that exceeds the limits specified in Service Letter No. 19, repair per a manufacturer approved repair scheme before further flight.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

AVIONS PIERRE ROBIN (recent type certificate responsibility was with APEX Aircraft and current responsibility with Alpha Aviation Design Limited) issued Avions Pierre Robin Service Letter No. 19, dated October 1980, and Avions Pierre Robin Service Bulletin No. 99, dated June 24, 1983. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of the Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with this State of Design Authority, they have notified us of the unsafe condition described in the

MCAI and service information referenced above. We are proposing this AD because we evaluated all information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This Proposed AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a note within the proposed AD. These requirements, if ultimately adopted, will take precedence over the actions copied from the MCAI.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 10 products of U.S. registry. We also estimate that it would take about 28 work-hours per product to comply with the proposed AD. The average labor rate is \$80 per work-hour.

Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be \$22,400, or \$2,240 per product.

We have no way of determining the number of products that may need any necessary follow-on actions. Since the corrosion damage would vary from airplane to airplane, we are not able to estimate the costs of each follow-on action.

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 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 this 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.

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 adding the following new AD:

Alpha Aviation Design Limited (Type Certificate No. A48EU previously held by APEX Aircraft and AVIONS PIERRE ROBIN): Docket No. FAA-2006-26494; Directorate Identifier 2006-CE-79-AD

Comments Due Date

(a) We must receive comments by March 8, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Model R2160 airplanes, serial numbers 001 through 378, certificated in any category.

Subject

(d) Air Transport Association of America (ATA) Code 57: Wings.

Reason

(d) The mandatory continuing airworthiness information (MCAI) states: * * * unchecked corrosion developing on the wing spars due to access for inspections being difficult under normal maintenance practices, which could lead to an unsafe condition and possibly a failure of the wing.

Actions and Compliance

(e) Unless already done, do the following actions within 66 months after aircraft date of manufacture or within 6 months after the effective date of this AD, whichever occurs later, unless already done within the last 24 months, and thereafter at intervals not to exceed 24 months. Accomplishment of European Aviation Safety Agency (EASA) AD 2005-0028 satisfies the requirement of this AD. If the spars are replaced, the inspections at intervals of 24 months must be resumed within 60 months from the date of replacement:

(1) Inspect the visible parts of the spar web, the front face of the spar, and the upper and lower boom angle following Avions Pierre Robin Service Letter No. 19, dated October 1980, and Avions Pierre Robin Service Bulletin No. 99, dated June 24, 1983.

(2) If corrosion is found as a result of the inspection required by paragraph (e)(1) of this AD that does not exceed the limits in the service bulletins, before further flight, treat the corrosion following Avions Pierre Robin Service Letter No. 19, dated October 1980, and Avions Pierre Robin Service Bulletin No. 99, dated June 24, 1983.

(3) If corrosion is found as a result of the inspection required by paragraph (e)(1) of this AD that does exceed the limits specified in Avions Pierre Robin Service Letter No. 19, dated October 1980, before further flight, repair following a manufacturer approved repair scheme.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(f) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Staff, FAA, ATTN: Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329-4146; fax: (816) 329-4090, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120-0056.

Related Information

(g) Refer to MCAI New Zealand Civil Aviation Authority AD DCA/R2000/37, dated September 28, 2006, and Avions Pierre Robin Service Letter No. 19, dated October 1980; and Avions Pierre Robin Service Bulletin No. 99, dated June 24, 1983, for related information.

Issued in Kansas City, Missouri, on January 31, 2007.

Margaret Kline,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7-1873 Filed 2-5-07; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 121, 125, and 135

[Docket No. FAA-2006-26135; Notice No. 06-16]

RIN 2120-AI79

Filtered Flight Data

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); extension of comment period.

SUMMARY: This action extends the comment period for an NPRM published on November 15, 2006. In that document, the FAA proposed to amend the digital flight data recorder regulations by prohibiting the filtering of some original parameter sensor signals. This extension is a result of a request from The Boeing Company to extend the comment period for the NPRM.

DATES: Send your comments on the NPRM on or before April 16, 2007.

ADDRESSES: You may send comments on the NPRM or this extension [identified by Docket Number 2006-26135] using any of the following methods:

- *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 20590-001.

• *Fax:* 1-202-493-2251.

• *Hand Delivery:* Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For more information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document and the NPRM.

Privacy: We will post all comments we receive, without change, to <http://dms.dot.gov>, including any personal information you provide. For more information, see the Privacy Act discussion in the **SUPPLEMENTARY INFORMATION** section of the NPRM.

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: Timothy W. Shaver, Avionics Systems Branch, Aircraft Certification Service, AIR-130, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 385-4686; facsimile (202) 385-4651; e-mail tim.shaver@faa.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA continues to invite interested persons to take part in this rulemaking by submitting written comments, data, or views about the NPRM. We also invite comments about the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in the NPRM. The most helpful comments reference a specific portion of the NPRM, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

Background

On November 15, 2006, the Federal Aviation Administration (FAA) published Notice No. 06-16 in the **Federal Register** (Filtered Flight Data, 71 FR 66634) (the NPRM). The comment period for this NPRM ends on February 13, 2007.

By letter dated January 12, 2007, The Boeing Company (Boeing) asked the FAA to extend the NPRM's comment period for sixty days. Boeing intends to submit comments that will include an

assessment of those parameters that fall within the proposed definition of filtered data for each of its affected airplanes. Boeing also intends to provide cost data related to the proposed requirements to analyze in-service airplanes. Boeing states that it needs an additional sixty days to complete these assessments.

The FAA agrees with Boeing's request for an extension of the comment period. We recognize the assessments being performed by Boeing are time-consuming, but are expected to produce valuable information.

We have determined that an additional sixty days will be enough for potential commenters to collect the cost and operational data necessary to provide meaningful comments to the NPRM. Absent unusual circumstances, the FAA does not anticipate any further extension of the comment period for this NPRM.

Extension of Comment Period

In accordance with 14 CFR 11.47(c), the FAA has reviewed the petition submitted by Boeing for an extension of the comment period to the NPRM. The FAA finds that an extension of the comment period for Notice No. 06-16 is consistent with the public interest, and that good cause exists for taking this action. The FAA also has determined that Boeing has a substantive interest in the proposed rule and has shown good cause for the extension.

Accordingly, the comment period for Notice No. 06-16 is extended until April 16, 2007.

Issued in Washington, DC, on January 29, 2007.

John J. Hickey,

Director, Aircraft Certification Service.

[FR Doc. E7-1834 Filed 2-5-07; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. 2006P-0069]

RIN 0910-AF94

Food Labeling: Health Claims; Soluble Fiber From Certain Foods and Risk of Coronary Heart Disease

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to

amend the regulation authorizing a health claim on the relationship between soluble fiber from certain foods and risk of coronary heart disease (CHD). The amendment proposes to exempt certain foods from the nutrient content requirement of "low fat." The exemption would apply if the food exceeds this requirement due to fat content derived from whole oat sources. FDA is taking this action in response to a petition submitted by the Quaker Oats Company (the petitioner). The amendment would expand the use of this health claim to some whole oat products that are currently ineligible for the health claim.

DATES: Submit written or electronic comments by April 23, 2007.

ADDRESSES: You may submit comments, identified by Docket No. 2006P-0069, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following ways:

• Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

• Agency Web site: <http://www.fda.gov/dockets/ecomments>. Follow the instructions for submitting comments on the agency Web site.

Written Submissions

Submit written submissions in the following ways:

• FAX: 301-827-6870.

• Mail/Hand delivery/Courier (for paper, disk, or CD-ROM submissions): Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

To ensure more timely processing of comments, FDA is no longer accepting comments submitted to the agency by e-mail. FDA encourages you to continue to submit electronic comments by using the Federal eRulemaking Portal or the agency Web site, as described in the *Electronic Submissions* portion of this paragraph.

Instructions: All submissions received must include the agency name and docket number and Regulatory Information Number (RIN) for this rulemaking. All comments received may be posted without change to <http://www.fda.gov/ohrms/dockets/default.htm>, including any personal information provided. For additional information on submitting comments, see the "Comments" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or

comments received, go to <http://www.fda.gov/ohrms/dockets/default.htm> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT:

Vincent de Jesus, Center for Food Safety and Applied Nutrition (HFS-830), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740-3835, 301-436-1450.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Nutrition Labeling and Education Act of 1990

The Nutrition Labeling and Education Act of 1990 (the 1990 amendments) (Public Law 101-535) amended the Federal Food, Drug, and Cosmetic Act (the act) in a number of important ways. Among other changes, the 1990 amendments clarified FDA's authority to regulate health claims on food labels and in food labeling. FDA issued several new regulations in 1993 to implement the health claim provisions of the 1990 amendments. Among these were § 101.14 (21 CFR 101.14), *Health claims: general requirements* (58 FR 2478, January 6, 1993), which sets out the rules for the authorization and use of health claims, and § 101.70 (21 CFR 101.70), *Petitions for health claims* (58 FR 2478, January 6, 1993), which sets out a process for petitioning the agency to authorize health claims about substance-disease relationships, and sets out the types of information that any such petition must include. Each of these regulations became effective on May 8, 1993.

When implementing the 1990 amendments, FDA also conducted a review of evidence for a relationship between dietary fiber and cardiovascular disease (CVD). Based on this review, FDA concluded that the available scientific evidence did not justify authorization of a health claim relating dietary fiber to reduced risk of CVD (58 FR 2552 at 2572, January 6, 1993). However, the agency did conclude that there was significant scientific agreement that the totality of publicly available scientific evidence supported an association between diets relatively high in foods that are low in saturated fat and cholesterol and that naturally are good sources of soluble dietary fiber (i.e., fruits, vegetables, and grain products) and reduced risk of

coronary heart disease (CHD)¹ (id.). Therefore, FDA authorized a health claim about the relationship between diets low in saturated fat and cholesterol and high in vegetables, fruit, and grain products that contain soluble fiber and a reduced risk of CHD (§ 101.77 (21 CFR 101.77)) (58 FR 2552 at 2572). In the preamble to the 1993 dietary fiber and CVD final rule, FDA commented that if a manufacturer could document with appropriate evidence that consumption of the type of soluble fiber in a particular food has the effect of lowering blood (serum or plasma) low density lipoprotein (LDL) cholesterol, and has no adverse effects on other heart disease risk factors (e.g., high density lipoprotein (HDL) cholesterol), the manufacturer should petition for authorization of a health claim specific for that particular dietary fiber-containing food (58 FR 2552 at 2567).

B. Soluble Fiber From Certain Foods and Coronary Heart Disease Health Claim (§ 101.81 (21 CFR 101.81))

In 1995, FDA received a petition for a health claim on the relationship between oat bran and rolled oats and reduced risk of CHD. FDA concluded there was significant scientific agreement that the totality of publicly available scientific evidence supported the relationship between consumption of whole oat products and reduced risk of CHD. FDA further concluded that the type of soluble fiber found in whole oats, i.e., beta-glucan soluble fiber, is the component primarily responsible for the hypocholesterolemic effects associated with consumption of whole oat foods as part of a diet that is low in saturated fat and cholesterol (62 FR 3584 at 3597 through 3598, January 23, 1997). As such, the final rule authorized a health claim relating the consumption of beta-glucan soluble fiber in whole oat foods, as part of a diet low in saturated fat and cholesterol, and reduced risk of CHD (the oat beta-glucan health claim). The source of beta-glucan soluble fiber in foods bearing this health claim had to be one of three eligible whole oat products, i.e., oat bran, rolled oats, or whole oat flour (see § 101.81(c)(2)(ii)(A)). In 2002, FDA amended § 101.81 to add oatrim as a fourth source of beta-glucan soluble fiber eligible for the oat beta-glucan health claim (67 FR 61773, October 2, 2002). Oatrim is the soluble fraction of alpha-amylase hydrolyzed oat bran or whole oat flour.

¹ Cardiovascular disease means diseases of the heart and circulatory system. Coronary heart disease, one form of cardiovascular disease, refers to diseases of the heart muscle and supporting blood vessels.

In order to bear the oat beta-glucan health claim, a food must, among other requirements, provide at least 0.75 grams (g) of soluble fiber per reference amount customarily consumed (RACC) and meet the nutrient content requirements in § 101.62 (21 CFR 101.62) for a "low saturated fat," "low cholesterol," and "low fat" food (§ 101.81(c)(2)(iii)(C)).

II. Petition and Grounds

The Quaker Oats Company (the petitioner), submitted a petition to FDA on November 7, 2005, under section 403(r)(4) of the act (21 U.S.C. 343(r)(4)) (Ref. 1). The petition requested that FDA amend the soluble fiber from certain foods and CHD health claim at § 101.81 so that foods that exceed the nutrient content requirement in § 101.62 for "low fat" due to fat content derived from whole oat sources (i.e., oat bran, rolled oats, whole oat flour, and oatrim) listed in § 101.81(c)(2)(ii)(A) would be eligible to bear the health claim. On February 15, 2006, FDA notified the petitioner that the agency had completed its initial review of the petition and that the petition had been filed for further action in accordance with section 403(r)(4) of the act. If the agency does not act, by either denying the petition or issuing a proposed regulation to authorize the health claim, within 90 days of the date of filing for further action, the petition is deemed to be denied unless an extension is mutually agreed upon by the agency and the petitioner (section 403(r)(4)(A)(i) of the act and § 101.70(j)(3)(iii)). On April 28, 2006, FDA and the petitioner mutually agreed to extend the deadline to September 30, 2006. On September 25, 2006, FDA and the petitioner mutually agreed to extend the deadline again to March 30, 2007.

The petition described a problem certain products have in meeting the eligibility criteria of the soluble fiber and CHD health claim. Quaker Oats Company produces, among other things, flavored varieties of reduced sugar instant oatmeal products as well as unmodified (with respect to sugar content) instant oatmeal products. The petition stated that Quaker Oats Company's flavored, unmodified instant oatmeal products are eligible to bear the soluble fiber and CHD health claim, but flavored, reduced sugar instant oatmeal products are not because the latter products do not meet the nutrient content requirement in § 101.62 for "low fat."

The petition stated that the formulation of flavored instant oatmeal products with "reduced sugar" (the term consistent with 21 CFR

101.60(c)(5)) made these products technically ineligible to bear the oat beta-glucan health claim because by reducing sugar, the products contain more whole oats (and fat from whole oats) per RACC. The petition provided the information on the amount of rolled oats, sugar, and total fat per packet and total fat content per 55 g RACC for both flavored unmodified instant oatmeal and flavored reduced sugar instant oatmeal. Both products contain the same amount of rolled oats (28 g) and total fat (2 g) per packet but differ in sugar content: 15 g per packet of flavored unmodified instant oatmeal and 3 g per packet of flavored reduced sugar instant oatmeal. According to the petition, the 12 g difference in sugar content corresponds with a 12 g difference in packet weight (31 g packet weight for the flavored reduced sugar instant oatmeal and 43 g packet weight for the flavored unmodified product). Therefore, at the RACC for flavored instant oatmeal (55 g), the reduced sugar product has more rolled oats than the unmodified instant oatmeal. The petition computed total fat per 55 g RACC to be 2.558 g for flavored unmodified instant oatmeal and 3.548 g for flavored reduced sugar instant oatmeal. Because the total fat content of the flavored reduced sugar instant oatmeal exceeds 3 g per 55 g RACC (even considering permissible rounding), this product is not eligible for the health claim.

The petition requested that FDA amend § 101.81(c)(2)(iii)(C) such that the “low fat” eligibility standard would not be applicable to foods exceeding this standard due to the total fat inherent in whole oat sources. The petition stated that such an amendment would have no impact on the benefit described in the soluble fiber and CHD health claim and discussed that the *2000 Dietary Guidelines for Americans* modified recommendations regarding total fat intake from a diet low in total fat to a diet moderate in total fat. The petition further stated that the total fat content and fatty acid composition of whole oats are consistent with the current authoritative understanding of dietary patterns likely to promote health and reduce risk of CHD, and referenced the executive summary of the *2005 Dietary Guidelines for Americans* for recommending less than 10 percent of total calories from saturated fatty acids and 20 to 35 percent of total calories from total fat, mostly from sources of polyunsaturated and monounsaturated fatty acids. The petition noted that the percent of calories from saturated fat and total fat in whole oats is 3 percent

and 16 percent, respectively, and the ratio of saturated fatty acids to polyunsaturated plus monounsaturated fatty acids in whole oats is approximately 1:5.

The petition stated that amending the soluble fiber from certain foods and CHD health claim regulation to allow use of the claim on products with greater fat content due to a greater proportion of whole oat sources would: (1) Encourage food manufacturers to create products that are lower in added sugar while still retaining the heart-protective qualities of these whole oat-based foods and (2) enhance consumer's ability to incorporate beta-glucan soluble fiber into their diets while reducing their sugar consumption. The petition also stated that the additional level of inherent fat in whole oats would not have a negative impact on the benefit of the oat beta-glucan health claim.

The petition requested the following specific changes in the regulation governing the oat beta-glucan health claim:

- Modify § 101.81(c)(2)(iii)(C) to state “The food shall meet the nutrient content requirement in § 101.62 for a ‘low saturated fat’ and ‘low cholesterol’ food” and
- Create a new paragraph (c)(2)(iii)(D) stating “The food shall meet the nutrient content requirement in § 101.62 for a ‘low fat’ food, unless it exceeds this requirement due to fat content solely derived from whole oat sources listed in paragraph (c)(2)(ii)(A).”

III. Decision To Amend the Health Claim

In regulations authorizing CHD-related health claims, FDA has required, with a few exceptions, that foods bearing such claims meet the “low fat” criterion defined by § 101.62(b)(2),² the “low saturated fat” criterion defined by § 101.62(c)(2), and the “low cholesterol” criterion defined by § 101.62(d)(2) (see authorized claims in 21 CFR 101.75, 101.77, 101.81, 101.82, and 101.83) rather than applying the total fat, saturated fat, and cholesterol content disqualifying levels specified in the general requirement for health claims (§ 101.14(a)(4)). The “low fat” criterion is currently applied to the soluble fiber

from certain foods and CHD health claim in § 101.81(c)(2)(iii)(C).

As set out in § 101.62(b)(2), for purposes of the requirements for “low fat,” the measure of a food's total fat is the total fat per RACC (if the food has a RACC of 30 g or less or 2 tablespoons or less, the total fat measure is also based per 50 g of food). Hot dry breakfast cereals have two separate RACCs: 55 g for flavored, sweetened dry cereal and 40 g for plain dry cereal (21 CFR 101.12(b)). Thus, flavored, sweetened dry cereal has to contain 3 g or less of fat per 55 g, whereas plain dry cereal has to contain 3 g or less of fat per 40 g to meet the “low fat” criterion.

The petition discussed that the Quaker Oats Company's flavored reduced sugar instant oatmeal products are ineligible for the oat beta-glucan health claim because these products do not meet the “low fat” criterion, whereas its flavored, unmodified instant oatmeal product containing the same amount of rolled oats and fat, but 12 g more sugar per packet does meet the criterion. The petition stated that removing sugar from the flavored unmodified instant oatmeal product results in more whole oats (and thus fat from whole oats) per RACC. The petition requested an exemption to the requirement of “low fat” for foods that exceed this requirement due to fat contained in whole oat soluble fiber sources listed in § 101.81(c)(2)(ii)(A) (i.e., oat bran, rolled oats, whole oat flour, and oatrim).

To determine if the requested amendment is appropriate, the agency examined the amount of fat in the whole oat soluble fiber sources (i.e., whole oat flour, rolled oats, oat bran, and oatrim) eligible to bear the claim. The total fat content is about 6.9 g per 100 g for whole oats (same as whole oat flour) (Ref. 2), 6.3 g per 100 g for rolled oats (Ref. 2), 7.0 g per 100 g for oat bran (Ref. 2), and 2.1 g per 100 g for oatrim (Ref. 3). Whole oats contain a higher amount of total fat than barley (2.3 g per 100 g) or other cereal grains such as whole wheat (1.9 g per 100 g whole wheat flour), rice (2.9 g per 100 g brown rice), or corn (1.2 g per 100 g dry corn grits) (Ref. 2). As a result, it is possible that a product could exceed the maximum total fat permitted under the “low fat” requirement solely due to fat from whole oat sources. However, most whole oat products that are essentially all whole oats meet the “low fat” requirement unless fat from other sources are added. For some products that do not meet the “low fat” requirement due to fat from whole oat sources, the amount of fat exceeding the “low fat” requirement may be small. For

² “Low fat” food is defined in § 101.62(b)(2) as follows: (1) A food that has a RACC greater than 30 g or greater than 2 tablespoons and contains 3 g or less of fat per RACC or (2) a food that has a RACC of 30 g or less or 2 tablespoons or less and contains 3 g or less of fat per RACC and per 50 g of food. Further, meal products and main dish products, as defined in 21 CFR 101.13(l) and (m), respectively, are “low fat” if they contain 3 g or less of total fat per 100 g and not more than 30 percent of calories from fat (§ 101.62(b)(3)).

example, if a flavored, sweetened instant oatmeal product were made almost entirely of whole oats, the total fat content of this product would exceed the 3 g per RACC maximum to meet the “low fat” requirement, but would not exceed 4 g per RACC.

FDA also evaluated the type of fat in whole oats. Whole oats contain 1.2 g saturated fatty acids, 2.2 g monounsaturated fatty acids, and 2.5 g polyunsaturated fatty acids per 100 g (Ref. 2). Thus, polyunsaturated and monounsaturated fatty acids are the predominant types of fat in whole oats. Whole oats do not contain cholesterol. The *2005 Dietary Guidelines for Americans* (Ref. 4) recommended that total fat intake be kept between 20 and 35 percent of calories, with most fats coming from sources of polyunsaturated and monounsaturated fatty acids, that less than 10 percent of calories come from saturated fatty acids, and that cholesterol intake be less than 300 milligrams (mg) per day. Thus, the fat profile of whole oats is consistent with the *2005 Dietary Guidelines for Americans* recommendation of consuming a moderate amount of total fat with most sources coming from polyunsaturated and monounsaturated fatty acids, and limiting intake of saturated fatty acids and cholesterol.

FDA tentatively concludes that, for purposes of the oat beta-glucan health claim, it is appropriate to exempt foods that exceed the “low fat” criterion due to fat contained in whole oat sources listed in § 101.81(c)(2)(ii)(A) (i.e., oat bran, rolled oats, whole oat flour, and oatrim) from the requirement of “low fat” because: (1) The fat profile in whole oats is consistent with the *2005 Dietary Guidelines for Americans*; (2) the consumption of foods containing beta-glucan soluble fiber, such as whole oat products, is helpful in reducing the risk of CHD; and (3) the amount by which the fat content from whole oat sources may exceed the criterion of 3 g of fat per RACC (e.g., by no more than 1 g) is not likely to be a health concern.

FDA agrees with the petitioner that foods eligible for the oat beta-glucan health claim should meet the nutrient content requirement for a “low fat” food, unless it exceeds this requirement due to fat content solely derived from whole oat sources. The agency is aware that some whole oat products contain a small amount of fat from ingredients other than whole oat sources. Examples of the sources of fat included in these products are vitamin A palmitate, hydrogenated soybean oil, and soy lecithin. The petition has only requested that an exemption to the “low fat” requirement be given to foods that

exceed this requirement “due to fat content solely derived from whole oat sources listed in paragraph (c)(2)(ii)(A).” Therefore, a food product that contains any fat from ingredients other than whole oat sources would not be exempt from the “low fat” requirement. The agency has not been given any justification why whole oat foods that contain sources of fat other than whole oat sources should be exempt from the “low fat” requirement. However, the agency would like to ensure that this proposed rule achieves its intent of providing consumers with more choices of whole oat products. Therefore, FDA asks for comment on whether or not whole oat food products that contain sources of fat other than whole oat sources should be exempt from the “low fat” requirement and, if so, how much and what type(s) of fat contributed by these sources would be acceptable.

IV. Description of Amendments to § 101.81

In light of the FDA’s tentative decision to accept the petitioner’s request, the agency is proposing to amend § 101.81(c)(2)(iii)(C) by removing the phrase, “low fat” food and creating a new § 101.81(c)(2)(iii)(D) to specify that the food shall meet the “low fat” food requirement, unless the food exceeds this requirement due to fat content derived from whole oat sources listed in § 101.81(c)(2)(ii)(A).

V. Environmental Impact

FDA has determined under 21 CFR 25.32(p) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VI. Analysis of Impacts

A. Preliminary Regulatory Impact Analysis

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

action as defined by the Executive order.

1. The Need for Regulation

Current § 101.81 authorizes a health claim on foods for the relationship between soluble fiber from certain foods and reduced risk of CHD. One of the requirements for the claim is the nutrient content requirement for “low fat.” In order to bear the claim, foods must contain no more than 3 g of fat per RACC. The RACC for plain oatmeal is 40 g dry weight and the RACC for flavored, sweetened oatmeal is 55 g dry weight, assuming that 15 g of sugar is added. The amount of fat in 40 g of rolled oats is just below 3 g, mostly polyunsaturated fatty acids and monounsaturated fatty acids. A recently introduced flavored reduced-sugar oatmeal does not meet the criterion of 3 g or less of fat per 55 g dry weight. Because the amount of added sugar in this reduced-sugar oatmeal is less than 15 g, the proportional amount of fat, essentially all from whole oats, is slightly more than 3 g of fat per 55 g of the product compared to the sweetened oatmeal, even though the total amount of fat in both the sweetened and reduced-sugar oatmeal products is the same.

The ineligibility of reduced-sugar oatmeal for this health claim, due to less added sugar, is an unintended consequence of the regulation. The current regulation, without amendment, causes distortion in the market, where products are essentially penalized for adding less sugar or filler. In certain instances where two products are identical at the package level, except for the amount of sugar added, only the product with more sugar is able to carry the CHD health claim because the product with less sugar has more oats per RACC and exceeds the “low fat” requirement. The proposed rule is needed to remove this unintended consequence.

2. Regulatory Options Considered

The proposed rule would amend the regulation authorizing a health claim on the relationship between soluble fiber from certain foods and risk of CHD. The amendment would exempt certain foods from the nutrient content requirement of “low fat.” The exemption applies if the food exceeds this requirement due to fat content derived from oat sources.

In drafting this document, FDA considered two regulatory alternatives in addition to these proposed amendments. The agency considered: (1) No additional regulatory action and (2) general relaxation of the total fat requirement, while keeping in place

restrictions on saturated fat and cholesterol. This proposed rule would not be an economically significant regulatory action. FDA is not quantitatively estimating the benefits and costs of the regulatory alternatives to the proposed rule. In the following paragraphs, FDA qualitatively compares the costs and benefits of the regulatory options to the costs and benefits of the proposed rule.

a. *Option one.* The first option would be no action. As stated earlier in this document, the current rule as it stands causes an unintended distortion in the market. Consumers have a higher than necessary search cost to find products that are both reduced in sugar and that have similar attributes of those currently carrying the CHD claim. Furthermore, taking no action stifles the innovation of new products that have all of the attributes of those with the CHD claim and that are reduced in sugar.

b. *Option two.* A second alternative to the proposed rule is a general relaxation of the total fat requirement from all fat sources for all products covered by the rule, while keeping in place restrictions on saturated fat and cholesterol. Relaxing the restriction for total fat from whole oat sources will not dampen the signal of the CHD claim (i.e., it will not reduce the clarity of the message that products bearing that claim in their labeling may reduce the risk of CHD), whereas a general relaxation of total fat from all fat sources in such products may have a deleterious effect in that the fat content may be excessive and increase the risk of CHD and negate the health benefits from the beta-glucan soluble fiber sources. The total fat content is about 6.9 g per 100 g for whole oats (same as whole oat flour) (Ref. 2), 6.3 g per 100 g for rolled oats (Ref. 2), 7.0 g per 100 g for oat bran (Ref. 2), and 2.1 g per 100 g for oatrim (Ref. 3). Whole oats contain a higher amount of total fat than barley (2.3 g per 100 g) or other cereal grains such as whole wheat (1.9 g per 100 g whole wheat flour), rice (2.9 g per 100 g brown rice), or corn (1.2 g per 100 g dry corn grits) (Ref. 2). However, most whole oat products that are essentially all whole oats meet the "low fat" requirement unless fat from other sources is added. For some products that do not meet the "low fat" requirement due to fat from whole oat sources, the amount of fat exceeding the "low fat" requirement may be small. For example, if a flavored sweetened oatmeal product were made almost entirely of whole oats, the total fat content of this product would not exceed 4 g per 55 g of RACC.

Further, whole oats contain 1.2 g saturated fatty acids, 2.2 g

monounsaturated fatty acids, and 2.5 g polyunsaturated fatty acids per 100 g (Ref. 2), and thus, polyunsaturated and monounsaturated fatty acids are the predominant types of fat in whole oats. Whole oats do not contain cholesterol. The *2005 Dietary Guidelines for Americans* (Ref. 4) recommends total fat intake be kept between 20 to 35 percent of calories, with most fats coming from sources of polyunsaturated and monounsaturated fatty acids, and less than 10 percent of calories from saturated fatty acids, and cholesterol intake be kept at less than 300 mg per day. Thus, the fat profile of whole oats is consistent with the *2005 Dietary Guidelines for Americans* recommendation of a moderate amount of total fat with most sources coming from polyunsaturated and monounsaturated fatty acids, and limiting intake of saturated fatty acids and cholesterol. Relaxing the total fat requirement for fat from whole oats will not have a negative health effect and will allow the CHD claim to retain clarity when directing consumers to products consistent with a diet that is low in saturated fat and cholesterol, and high in soluble fiber.

Relaxing the total fat requirement for fat from all fat sources in whole oat products may weaken the CHD claim signal that products bearing that claim in their labeling may reduce the risk of CHD. Under this scenario, products carrying the CHD claim could contain up to 13 g of fat per 55 g serving (i.e., the total fat disqualifying level for an individual food). The total fat disqualifying level is the level of total fat in a food above which the food will be disqualified from making a health claim (§ 101.14(a)(4)). Unlike whole oat sources, other products may have significantly more than the 3 g of fat per RACC that is the current total fat allowance for products carrying the CHD claim, and some may even approach the 13 g per RACC. Consumers using these products could easily increase their fat intake to levels above those recommended by the *2005 Dietary Guidelines for Americans* (Ref. 4). Furthermore, under current regulation that only stipulates disqualifying levels for saturated fat, cholesterol, and total fat, some of the increased fat intake could include *trans* fat.

The potential health benefits would therefore be lower and the costs higher under this option than under the proposed rule.

3. The Proposed Rule

This section details the potential costs and benefits of the proposed rule. The baseline in this case is the current rule,

option 1 listed earlier in this section. Thus, the benefits of the proposed rule are derived from an increase in the number of products that carry the CHD claim from which consumers may choose. The costs of the proposed rule are the health effects associated with the potential net increase in fat intake and the new labeling costs if a manufacturer decides to voluntarily use the health claim.³

a. *Coverage of the rule.* FDA asks for comment on the number of products currently on the market that will qualify for the CHD claim if FDA finalizes the rule to permit the relaxation of the total fat requirement for fat from whole oat sources. FDA also requests comment on the number of new products that may be introduced due to the proposed rule. Because much of the information required to assess whether a product will qualify for the CHD claim is not required on the Nutrition Facts panel (NFP), FDA does not know with certainty how many products currently marketed will be affected by the proposed rule.⁴ Furthermore, FDA cannot predict how many new products will be introduced because of the proposed rule.

In estimating the baseline number of products, FDA identified 5 products in the 2001 Food Label and Package Survey (FLAPS) (Ref. 5) that use the fiber related CHD claim. Of these products, three are hot cereals, one is a cold cereal, and one is wheat germ. Wheat germ products will not be affected by the proposed rule. Other types of products containing whole oats, such as cereal and snack bars, muffins, and cookies, will also not likely be affected by the proposed rule, as these products typically contain fat from sources other than whole oat sources, and would not be eligible to carry the CHD claim.

FLAPS is only a sample of all of the products available on the market. The five hot cereal products sampled made up 90 percent of all hot cereal sales in 2001. Therefore, it is possible that one or two products on the market that carry the CHD claim in 2001 were missed by the survey. The six cold cereals sampled

³ As discussed in detail in section VI.A.3.c of this document, firms will not choose to label their product with the CHD claim if they could not make up the cost in higher margins for their products, increased volume of sales, or a combination of the two. Further, consumers would not pay the higher margin, or CHD claim premium, if they did not value the product relatively more than other products not carrying the claim. This increase in consumer willingness to pay for the CHD claim, though not to be confused with health benefits, will offset the private cost of the new labels.

⁴ For example, the source of the fat content is not required on the NFP.

made up only 18 percent of all cold cereal sales in 2001. Assuming the sample is representative implies that six or more products carrying the CHD claim were not included in the survey. Since 2001, new products carrying the claim may have entered the market and some products may have dropped out. FDA requests comment on the baseline number of products carrying the CHD claim.

Through a search of the web and local grocery stores, FDA identified a single “lower sugar” hot cereal product that does not currently qualify for the CHD claim, but might under the proposed rule. The company that produces this product also produces two other “lower sugar” hot cereal products that qualify for the claim under the current rule. Beyond this single product, it is difficult to accurately predict how many products will be developed that would qualify for the claim under the proposed rule. Other “lower sugar” flavors might be developed. Furthermore, “no sugar added” products could be developed that could qualify for the CHD claim. Based on the current, limited information FDA estimates that between 1 and 10 current and future products will be affected by this proposed rule. FDA requests comment on this estimate.

b. *Benefits.* The principal benefits of the proposed rule are derived from an increase in the number of products that carry the CHD claim from which consumers may choose. Society benefits from the increased number of CHD claim products in two ways: (1) Increased consumer information and (2) a potential health benefit.

i. *Increased consumer information.* Consumers place a premium on products bearing a reduced CDH risk claim. That is, they value these products more than similar products not carrying the CHD claim. Part of this premium is due to a perceived health benefit. Part of it is also due to the fact that the CHD claim on the label, if consistent,⁵ instantly gives the consumer a lot of information about the product and therefore reduces search costs. The proposed rule, for example, will greatly increase the efficiency of a consumer's search for a product that is lower in sugar and also has all the qualities of a product carrying the CHD claim. FDA requests comment on the magnitude of this benefit.

ii. *Potential health benefit.* If consumers substitute the new CHD claim products for less healthy

alternatives, the proposed rule would have a positive health effect. If a consumer is currently eating a product daily that is “lower in sugar” but happens to be relatively high in saturated fat and cholesterol, that consumer could potentially enjoy better health by switching to the new “lower in sugar” product that also carries the CHD claim. For example, some evidence suggests that the risk of CHD may be decreased by more than 2 percent for every 1 g of oat bran consumed daily (Ref. 6). Without data allowing a prediction of consumer response, FDA cannot quantify this effect. Because the number of new products is likely to be small and the total dietary intake of consumers across the population is not likely to change drastically due to substitution between breakfast cereals, the health benefit is expected to be small.

c. *Costs.* The principal costs of the proposed rule are the new labeling costs, if a manufacturer decides to voluntarily use the health claim, and the possible negative health effect due to a potential increase in fat intake.

i. *Labeling costs.* Although voluntary labeling costs are necessarily less than the consumer premium placed on the products, it is useful to estimate the costs. Doing so gives a better idea of the costs generated and provides a lower bound to the total consumer utility gained from such products.

FDA used the 2004 FDA Labeling Cost Model (Ref. 7) to calculate the potential new labeling costs produced by the proposed rule. The model calculates the cost of a new label based on the product type, label type, type of analytical and market tests necessary to develop the new label, compliance time, and inflation. Because the label is voluntary, firms can choose when to add the CHD label to their packaging and therefore can control the cost of the new label. If the firm chooses to immediately add the new label to the packaging, the full cost of redoing the label can be attributed to the CHD claim. Costs in this case will fall between \$4.9 thousand and \$10.6 thousand (mean = \$6.8 thousand) per unique product. Firms typically update their label about every 3 years. If firms add the CHD claim when they would normally update their label, the cost of adding the new information on the package approaches zero.

New products that are developed because of the proposed rule will not incur new labeling costs due to the CHD claim label. They will simply work the claim into their initial label development. Because FDA only identified one current existing product that may qualify for the CHD claim

because of the relaxation of the total fat requirement in the proposed rule, the one-time new labeling costs may fall between zero and \$10.6 thousand.

ii. *Potential increase in fat intake.* One other potential cost arises if total fat intake increases as a result of this claim. Total fat intake could either increase or decrease due to the proposed rule. Under the proposed rule, products carrying the CHD claim will, on average, contain more total fat than under the current rule. If there is no substitution between CHD claim products and other products, then the total intake of mostly polyunsaturated and monounsaturated fats would increase slightly in the population currently consuming CHD claim products. There is no evidence that a small increase in unsaturated fatty acids due to increased consumption of whole oat sources, even for a person eating multiple servings daily, would cause a negative health effect. In fact, a person with such a diet would still easily fall within the recommended fat intake (Ref. 4). If there is substitution between other products and CHD claims products (for example, between CHD claims cereal and other cereals that are higher in fat), it is possible that new CHD claims products might actually cause a decrease in total fat consumption.

Due to the small number of products likely to make the CHD claim in the future, the health effect is likely to be small, but because some substitution from higher fat products is likely to occur, the health effect of the proposed rule with respect to fat intake will probably be positive.

d. *Summary of benefits and costs.* Benefits and costs of the proposed rule are likely to be small because few products will be affected. Voluntary labeling costs for those manufacturers who choose voluntarily to use the health claim are small (less than a one-time cost of \$11 thousand) and necessarily less than the consumer premium placed on the products. Furthermore it is likely that, with more product choices available bearing the CHD claim, there will be a net shift towards these products carrying the claim and away from other products. Although the size of this shift cannot be estimated with available data, it would result in a public health benefit.

B. Small Entity Analysis

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

⁵ In section VI.A.2.b of this document, we assert that the relaxation of the total fat requirement for products made primarily of whole oats does not decrease the consistency or strength of the signal given by the CHD claim.

agencies to analyze the regulatory options that would lessen the economic effect of the rule on small entities. This proposed rule relaxes the total fat content requirement in the soluble fiber and CHD health claim for products whose fat content is derived solely from whole oat sources. Without this proposed rule, the more restrictive total fat content requirement would disqualify some products from being marketed with a CHD health claim. The proposed rule will not generate any compliance costs for any small entities because it does not require small entities to undertake any new activity. FDA therefore certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities.

C. Unfunded Mandate Analysis

Title II of the Unfunded Mandates Reform Act of 1995 (Public Law 104-4) requires cost-benefit and other analyses before any rulemaking if the rule would include a "Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year." The current threshold after adjustment for inflation is \$118 million, using the most current (2004) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this proposed rule, if finalized, to result in 1-year expenditures that would meet or exceed this amount and has determined that this proposed rule does not constitute a significant rule under the Unfunded Mandates Reform Act of 1995.

VII. The Paperwork Reduction Act of 1995

FDA tentatively concludes that labeling provisions of this proposed rule are not subject to review by the Office of Management and Budget because they do not constitute a "collection of information" under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). Rather, the food labeling health claim on beta-glucan soluble fiber and CHD risk is a "public disclosure of information originally supplied by the Federal Government to the recipient for the purpose of disclosure to the public." (see 5 CFR 1320.3(c)(2)).

VIII. Federalism

FDA has analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the proposed rule, if finalized as proposed, would have a preemptive effect on State law. Section 4(a) of the Executive Order requires

agencies to "construe * * * a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute." Section 403A of the act (21 U.S.C. 343-1) is an express preemption provision. Section 403A(a)(5) of the act (21 U.S.C. 343-1(a)(5)) provides that: "* * * no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce—* * *(5) any requirement respecting any claim of the type described in section 403(r)(1) of the act made in the label or labeling of food that is not identical to the requirement of section 403(r) * * *".

Currently, this provision operates to preempt States from imposing health claim labeling requirements concerning soluble fiber from certain foods and reduced risk of CHD because no such requirements had been imposed by FDA under section 403(r) of the act. This proposed rule, if finalized as proposed, would amend existing food labeling regulations to provide an exemption for certain foods from the nutrient content requirement of "low fat." Although the final rule would have a preemptive effect in that it would preclude States from issuing any health claim labeling requirements for soluble fiber from certain foods and a reduced risk of CHD that are not identical to those required by this proposed rule, this preemptive effect is consistent with what Congress set forth in section 403A of the act. Section 403A(a)(5) of the act displaces both state legislative requirements and state common law duties. *Medtronic v. Lohr*, 518 U.S. 470, 503 (1996) (Breyer, J., concurring in part and concurring in judgment); id. at 510 (O'Connor, J., joined by Rehnquist, C.J., Scalia, J., and Thomas, J., concurring in part and dissenting in part); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (plurality opinion); id. at 548-49 (Scalia, J., joined by Thomas, J., concurring in judgment in part and dissenting in part).

FDA believes that the preemptive effect of the proposed rule, if finalized as proposed, is consistent with Executive Order 13132. Section 4(e) of the Executive order provides that "when an agency proposes to act through adjudication or rulemaking to preempt State law, the agency shall provide all affected State and local officials notice and an opportunity for appropriate participation in the proceedings." FDA's

Division of Federal and State Relations is inviting the States' participation in this rulemaking by providing notice via fax and e-mail transmission to State health commissioners, State agriculture commissioners, food program directors, and drug program directors as well as FDA field personnel of FDA's publication of the proposed amendment to the health claim regulation authorizing the health claim for soluble fiber from certain foods and CHD (§ 101.81). The notice provides the States with further opportunity for input on the rule. It advises the States of FDA's publication of this proposed rule and encourages the States and local governments to review the notice of proposed rulemaking and to provide any comments to the docket (Docket No. 2006P-0069).

In conclusion, the agency has determined that the preemptive effects of this proposed rule, if finalized as proposed, are consistent with Executive Order 13132.

IX. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

X. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday. (FDA has verified the Web site addresses, but FDA is not responsible for any subsequent changes to the Web sites after this document publishes in the **Federal Register**.)

1. The Quaker Oats Company, "Petition for Amendment of Health Claim Regulation (21 CFR § 101.81)—Beta-Glucan Soluble Fiber from Whole Oat Sources and Risk of Coronary Heart Disease," Item CP1, Docket 2005P-0449, November 7, 2005.
2. U.S. Department of Agriculture, Agricultural Research Service, *USDA National Nutrient Database for Standard Reference, Release 18*, Nutrient Data Laboratory Home Page (<http://www.ars.usda.gov/Services/docs.htm?docid=13747>), 2005.
3. The Quaker Oats Company and Rhodia, Inc., "Oatrim [Beta Trim™] Health Petition,"

HCN1, vol. 1, Docket No. 01A-0313, April 12, 2001.

4. U.S. Department of Health and Human Services and U.S. Department of Agriculture, *Dietary Guidelines for Americans, 2005*, 6th Edition, Washington, D.C.: U.S. Government Printing Office, (<http://www.health.gov/dietaryguidelines/dga2005/document/>), January 2005.

5. U.S. Food and Drug Administration, CFSAN/Office of Nutritional Products, Labeling, and Dietary Supplements, *Food Label and Package Survey 2000-2001*, (<http://www.cfsan.fda.gov/~dms/lab-flap.html>), May 2006.

6. Institute of Medicine of the National Academies, *Dietary Reference Intakes for Energy, Carbohydrate, Fiber, Fat, Fatty Acids, Cholesterol, Protein, and Amino Acids*, the National Academies Press, Washington, D.C., pp. 367-368, 2005.

7. RTI International, *FDA Labeling Cost Model, Final Report*, (<http://www.foodrisk.org/lcm.htm>), October 2004.

List of Subjects in 21 CFR Part 101

Food Labeling, Nutrition, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, and redelegated to the Deputy Director for Regulatory Affairs, it is proposed that 21 CFR part 101 be amended as follows:

PART 101—FOOD LABELING

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

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

2. Section 101.81 is amended by revising paragraph (c)(2)(iii)(C) and by adding new paragraph (c)(2)(iii)(D) to read as follows:

§ 101.81 Health claims: Soluble fiber from certain foods and risk of coronary heart disease (CHD).

* * * * *

(c) * * *

(2) * * *

(iii) * * *

(C) The food shall meet the nutrient content requirement in § 101.62 for a “low saturated fat” and “low cholesterol” food; and

(D) The food shall meet the nutrient content requirement in § 101.62(b)(2) for a “low fat” food, unless the food exceeds this requirement due to fat content derived from whole oat sources listed in paragraph (c)(2)(ii)(A) of this section.

* * * * *

Dated: January 30, 2007.

Michael M. Landa,

Deputy Director, Regulatory Affairs, Center for Food Safety and Applied Nutrition.

[FR Doc. E7-1849 Filed 2-5-07; 8:45 am]

BILLING CODE 4160-01-S

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 914

[Docket No. IN-156-FOR]

Indiana Regulatory Program

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

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are announcing receipt of a proposed amendment to the Indiana regulatory program (Indiana program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The Indiana Department of Natural Resources, Division of Reclamation (IDNR, department, or Indiana) proposes revisions to its rules concerning the definition of “government-financed construction”; underground mining reclamation plans for siltation structures, impoundments, dams, embankments, and refuse piles; performance bond release; surface mining permanent and temporary impoundments; surface mining primary roads; and inspections of sites. Indiana intends to revise its program to be consistent with the corresponding Federal regulations, to clarify ambiguities, and to improve operational efficiency.

This document gives the times and locations that the Indiana program and proposed amendments to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4 p.m., e.t., March 8, 2007. If requested, we will hold a public hearing on the amendment on March 5, 2007. We will accept requests to speak at a hearing until 4 p.m., e.t. on February 21, 2007.

ADDRESSES: You may submit comments, identified by Docket No. IN-156-FOR, by any of the following methods:

• *E-mail:* IFOMAIL@osmre.gov. Include Docket No. IN-156-FOR in the subject line of the message.

• *Mail/Hand Delivery:* Andrew R. Gilmore, Chief, Alton Field Division—Indianapolis Area Office, Office of Surface Mining Reclamation and Enforcement, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Room 301, Indianapolis, Indiana 46204.

• *Fax:* (317) 226-6182.

• *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the “Public Comment Procedures” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to review copies of the Indiana program, this amendment, a listing of any scheduled public hearings, and all written comments received in response to this document, you must go to the address listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSM’s Indianapolis Area Office: Andrew R. Gilmore, Chief, Alton Field Division—Indianapolis Area Office, Office of Surface Mining Reclamation and Enforcement, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Room 301, Indianapolis, Indiana 46204, *Telephone:* (317) 226-6700, *E-mail:* IFOMAIL@osmre.gov.

In addition, you may review a copy of the amendment during regular business hours at the following location: Indiana Department of Natural Resources, Division of Reclamation, R.R. 2, Box 129, Jasonville, Indiana 47438-9517, *Telephone:* (812) 665-2207.

FOR FURTHER INFORMATION CONTACT: Andrew R. Gilmore, Chief, Alton Field Division—Indianapolis Area Office. *Telephone:* (317) 226-6700. *E-mail:* IFOMAIL@osmre.gov.

SUPPLEMENTARY INFORMATION:

- I. Background on the Indiana Program
- II. Description of the Proposed Amendment
- III. Public Comment Procedures
- IV. Procedural Determinations

I. Background on the Indiana Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders

by demonstrating that its program includes, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act." See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Indiana program effective July 29, 1982. You can find background information on the Indiana program, including the Secretary's findings, the disposition of comments, and the conditions of approval of the Indiana program in the July 26, 1982, **Federal Register** (47 FR 32071). You can also find later actions concerning the Indiana program and program amendments at 30 CFR 914.10, 914.15, 914.16, and 914.17.

II. Description of the Proposed Amendment

By letter dated December 11, 2006 (Administrative Record No. IND-1741), Indiana sent us an amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). Indiana sent the amendment in response to a required program amendment at 30 CFR 914.16(ff) and to include changes made at its own initiative. Below is a summary of the changes proposed by Indiana. The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES**.

A. 312 IAC 25-1-57 "Government-Financed Construction" Defined

Indiana proposes to revise its definition of "government-financed construction" to read as follows:

"Government-financed construction" means construction funded at fifty percent (50%) or more by funds appropriated from a government financing agency's budget or obtained from general revenue bonds. Government financing at less than fifty percent (50%) may qualify if the construction is undertaken as an approved reclamation project under Title IV of the Federal Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 through 30 U.S.C. 1328) and IC 14-34-19. Construction funded through:

- (1) A government financing agency guarantee;
 - (2) Insurance;
 - (3) A loan;
 - (4) Funds obtained through industrial revenue bonds or their equivalent; or
 - (5) An in-kind payment;
- does not qualify as government-financed construction.

B. 312 IAC 25-4-87 Underground Mining Permit Applications; Reclamation Plan for Siltation Structures, Impoundments, Dams, Embankments, and Refuse Piles

1. Indiana proposes to restructure and/or make minor wording changes to subsections (a)(1)(B); (a)(2)(A) and (C); (c); (e)(1) and (e)(4); and (f)(1).

2. At subsection (g)(3), Indiana proposes to remove the following sentence:

If necessary to protect the health or safety of persons or property or the environment, even though the volume of water impounded is less than one hundred (100) acre feet, the director may require an application to be made.

C. 312 IAC 25-5-16 Performance Bond Release; Requirements

1. At subsection (a)(7), Indiana proposes to revise this subsection to remove the provision that allows persons to request an informal conference.

2. Indiana proposes to recodify existing subsections (b) through (f) as subsections (c) through (g), and existing subsection (h) as subsection (i). Indiana also proposes to remove the language in existing subsections (g) and (i), which pertains to filing written objections to proposed bond releases and requesting and holding a public hearing. A portion of the provisions in existing subsection (g) is currently found in subsection (a) and portions of the provisions in existing subsections (g) and (i) are found in newly added subsection (j).

3. Indiana proposes to add new subsection (b) to allow the director of IDNR to initiate an application for the release of bond. If a bond release application is initiated by the director of IDNR, the department will have to perform the notification and certification requirements otherwise imposed on the permittee.

4. At new subsection (d)(4) [existing subsection (c)(4)], Indiana proposes to change the last sentence to read as follows:

The department shall notify, in writing, the permittee and any other interested person of a decision whether to release all or part of the performance bond or deposit within sixty (60) days after receipt of the request if no public hearing or informal conference is held under subsection (i) or (j) or if an informal conference is held under subsection (i) or public hearing is held under subsection (j) within thirty (30) days after the informal conference or public hearing is completed.

5. Indiana proposes to add new subsection (h) to read as follows:

(h) A determination by the director under the provisions of this article or IC 14-34 is subject to review. An affected person may

obtain administrative review under IC 4-21.5 and 312 IAC 3-1. The division of hearings of the commission shall, as soon as practicable, conduct any appropriate proceeding.

6. Indiana proposes to revise new subsection (i) [existing subsection (h)] to read as follows:

(i) Upon receipt of written objection or a request for public hearing under subsection (a), the department, at the discretion of the director, may set a dispute under this section for an informal conference to resolve the objection. Conduct of an informal conference does not alter or prejudice the rights and responsibilities under this section of any of the following:

- (1) A permittee.
- (2) A person who files objections.
- (3) The department.
- (4) Another interested person.

8. Indiana proposes to add new subsection (j) to read as follows:

(j) If objections filed under subsection (a) are not resolved through an informal conference, the department shall hold a public hearing within a reasonable time following the receipt of the request. The public hearing shall be conducted as follows:

(1) The date, time, and location of the public hearing shall be sent to the permittee and other parties to the hearing and advertised by the department in a newspaper of general circulation in the county where the surface coal mining and reclamation operation proposed for bond release is located one (1) time each week for two (2) consecutive weeks.

(2) The requirements of IC 4-21.5-3 shall not apply to the conduct of the public hearing. The public hearing shall be conducted by a representative of the director, who may accept oral or written statements and any other relevant information from any party to the public hearing. An electronic or stenographic record shall be made unless waived by all parties. The record shall be maintained and shall be accessible to the parties of the public hearing until final release of the applicant's performance bond or other equivalent guarantee under this article.

(3) The department shall furnish all parties of the public hearing with the following:

(A) The written findings of the director based on the public hearing.

(B) The reasons for the finding.

(4) If all parties requesting the public hearing withdraw their request before the conference is held, the public hearing may be canceled.

D. 312 IAC 25-6-20 Surface Mining; Hydrologic Balance; Permanent and Temporary Impoundments

1. Indiana proposes to restructure and/or make minor wording changes to subsections (a)(1); (a)(3)(A), (B), and (C); (a)(5); (a)(6); (a)(7)(B)(iii); (a)(9)(A) and (D); (b)(3); (b)(8)(B); (c)(1) and (2); (d); and (e).

2. Indiana proposes to remove the language "and located where failure would not be expected to cause loss of

life or serious property damage” from subsection (a)(3)(B). By removing this language, all impoundments not meeting the Class B or C criteria for dams in the Natural Resource Conservation Service (NRCS) publication Technical Release No. 60 (TR 60) or size or other criteria of 30 CFR 77.216(a) [except for coal mine waste impounding structures] must have a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions.

3. Indiana also proposes to redesignate subsection (a)(9)(E)(ii) as new subsection (a)(9)(E)(iii), and to add the following new language at subsection (a)(9)(E)(ii):

(ii) Impoundments that are entirely contained within an incised structure such that the incised structure would completely contain the waters of the impoundment should failure occur and failure would not create a potential threat to public health and safety or threaten significant environmental harm.

E. 312 IAC 25–6–66 Surface Mining; Primary Roads

1. At subdivision (2), Indiana proposes to revise the introductory paragraph to read as follows:

(2) Each primary road embankment shall have a minimum static safety factor of one and three-tenths (1.3) or be designed in compliance with the following design standards:

2. Indiana proposes to restructure and/or make minor wording changes to subdivisions (2)(A), (C), and (H); and (4)(B)(i).

F. 312 IAC 25–7–1 Inspections of Sites

1. Indiana proposes to restructure and/or make minor wording changes to subsections (f)(3)(E) and (F); (g)(2); (h)(1)(D)(ii); and (h)(3)(A).

2. At subsection (h)(1)(D)(i), Indiana proposes to remove the language “or permit revocation proceedings have been initiated and are being pursued diligently.” By removing this language, the definition of “abandoned site” (if the site has previously been permitted or bonded) no longer includes a site where permit revocation proceedings have been initiated and are being pursued diligently.

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the State program.

Written Comments

Send your written or electronic comments to OSM at the address given above. Your written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of your recommendations. We will not consider or respond to your comments when developing the final rule if they are received after the close of the comment period (see **DATES**). We will make every attempt to log all comments into the administrative record, but comments delivered to an address other than the Indianapolis Area Office may not be logged in.

Electronic Comments

Please submit Internet comments as an ASCII or Word file avoiding the use of special characters and any form of encryption. Please also include “Attn: Docket No. IN–156–FOR” and your name and return address in your Internet message. If you do not receive a confirmation that we have received your Internet message, contact the Indianapolis Area Office at (317) 226–6700.

Availability of Comments

We will make comments, including names and addresses of respondents, available for public review during normal business hours. We will not consider anonymous comments. If individual respondents request confidentiality, we will honor their request to the extent allowable by law. Individual respondents who wish to withhold their name or address from public review, except for the city or town, must state this prominently at the beginning of their comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public review in their entirety.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m., e.t. on February 21, 2007. If you are disabled and need special accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold a hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at the

public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

IV. Procedural Determinations

Executive Order 12630—Takings

The provisions in the rule based on counterpart Federal regulations do not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulations. The revisions made at the initiative of the State that do not have Federal counterparts have also been reviewed and a determination made that they do not have takings implications. This determination is based on the fact that this rulemaking has no takings implications.

Executive Order 12866—Regulatory Planning and Review

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

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory

programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

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

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. This determination is based on the fact that the Indiana program does not regulate coal exploration and surface coal mining and reclamation operations on Indian lands. Therefore, the Indiana program has no effect on Federally-recognized Indian tribes.

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

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

of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

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

Paperwork Reduction Act

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

Regulatory Flexibility Act

The Department of the Interior certifies that a portion of the provisions in this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because they are based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this part of the rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations. The Department of the Interior also certifies that the provisions in this rule that are not based upon counterpart Federal regulations will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This determination is based upon the fact that the provisions are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of \$100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment,

productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that a portion of the State provisions are based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule. For the portion of the State provisions that is not based upon counterpart Federal regulations, this determination is based upon the fact that the State provisions are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

Unfunded Mandates

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

List of Subjects in 30 CFR Part 914

Intergovernmental relations, Surface mining, Underground mining.

Dated: December 22, 2006.

Charles E. Sandberg,

Regional Director, Mid-Continent Region.

[FR Doc. E7-1863 Filed 2-5-07; 8:45 am]

BILLING CODE 4310-05-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 926

[SATS No. MT-027-FOR]

Montana Regulatory Program

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

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We are announcing receipt of a proposed amendment to the Montana

regulatory program (hereinafter, the "Montana program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Montana proposes revisions to and additions of rules about civil penalties. These are based on legislation it recently passed. Montana intends to revise its program to provide additional safeguards, clarify ambiguities, and improve operational efficiency.

This document gives the times and locations that the Montana program and proposed amendment to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4 p.m., m.s.t. March 8, 2007. If requested, we will hold a public hearing on the amendment on March 5, 2007. We will accept requests to speak until 4 p.m., m.s.t. on February 21, 2007.

ADDRESSES: You may submit comments, identified by the SATS number MT-027-FOR:

- *E-mail:* JFleischman@osmre.gov. Include "MT-027-FOR" in the subject line of the message.
- *Mail/Hand Delivery/Courier:* Jeffrey W. Fleischman, Director, Casper Field Office, Office of Surface Mining Reclamation and Enforcement, 150 East B Street, Room 1018, Casper, WY 82601-1018, 307/261-6550, E-mail address: JFleischman@osmre.gov.

- *Fax:* 307/261-6552.
- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and MT-027-FOR. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Public Comment Procedures" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: Access to the docket, to review copies of the Montana program, this amendment, a listing of any scheduled public hearings, and all written comments received in response to this document, may be obtained at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting Office of Surface Mining Reclamation and Enforcement's (OSM) Casper Field Office. In addition, you may review a copy of the amendment during regular business hours at the following locations:

Jeffrey W. Fleischman, Director, Casper Field Office, Office of Surface Mining Reclamation and Enforcement, 150 East B Street, Room 1018, Casper, WY 82601-1018, 307/261-6550, E-mail address: JFleischman@osmre.gov.

Neil Harrington, Chief, Industrial and Energy Minerals Bureau, Montana Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, MT 59620-0901, 406/444-4973, E-mail address: NHarrington@state.mt.us.

FOR FURTHER INFORMATION CONTACT:

Jeffrey Fleischman, Director, Casper Field Office, Telephone: 307/261-6550, E-mail address: JFleischman@osmre.gov.

SUPPLEMENTARY INFORMATION:

- I. Background on the Montana Program
- II. Description of the Proposed Amendment
- III. Public Comment Procedures
- IV. Procedural Determinations

I. Background on the Montana Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act." See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Montana program on April 1, 1980. You can find background information on the Montana program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Montana program in the April 1, 1980, **Federal Register** (45 FR 21560). You can also find later actions concerning Montana's program and program amendments at 30 CFR 926.15, 926.16, and 926.30.

II. Description of the Proposed Amendment

By letter dated November 6, 2006, Montana sent us a proposed amendment to its program, administrative record No. MT-24-1, under SMCRA (30 U.S.C. 1201 *et seq.*). Montana sent the amendment to include changes made at its own initiative. The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES**.

The provisions of the Administrative Rules of Montana (ARM) that the State proposes to revise/add/delete are: ARM

17.24.1206, Notices, Orders of Abatement and Cessation Orders: Issuance and Service; ARM 17.24.1211, Procedure for Assessment and Waiver of Civil Penalties; ARM 17.24.1212, Point System for Civil Penalties and Waivers; ARM 17.24.1218, Individual Civil Penalties: Amount; ARM 17.24.1219, Individual Civil Penalties: Procedure for Assessment; ARM 17.24.1220, Individual Civil Penalties: Payment; ARM 17.24.301, Purpose; ARM 17.24.302, Definitions; ARM 17.24.303, Base Penalty; ARM 17.24.304, Adjusted Base Penalty—Circumstances, Good Faith and Cooperation, Amounts Voluntarily Expended; ARM 17.24.305, Total Adjusted Penalty, Days of Violation; ARM 17.24.306, Total Penalty—History of Violation, Economic Benefit; ARM 17.24.307, Economic Benefit; and ARM 17.24.308, Other Matters as Justice May Require.

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the Montana program.

Written Comments

Send your written or electronic comments to OSM at the address given above. Your comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of your recommendations. We will not consider or respond to your written comments when developing the final rule if they are received after the close of the comment period (see **DATES**). We will make every attempt to log all comments into the administrative record, but comments delivered to an address other than the Casper Field Office may not be logged in.

Electronic Comments

Please submit Internet comments as an ASCII or Word file avoiding the use of special characters and any form of encryption. Please also include "Attn: SATS No. MT-027-FOR" and your name and return address in your Internet message. If you do not receive a confirmation that we have received your Internet message, contact the Casper Field Office at 307/261-6550. In the final rulemaking, we will not consider or include in the administrative record any electronic comments received after the time indicated under **DATES** or at e-addresses other than the Casper Field Office.

Availability of Comments

We will make comments, including names and addresses of respondents, available for public review during normal business hours. We will not consider anonymous comments. If individual respondents request confidentiality, we will honor their request to the extent allowable by law. Individual respondents who wish to withhold their name or address from public review, except for the city or town, must state this prominently at the beginning of their comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public review in their entirety.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m., m.s.t. on February 21, 2007. If you are disabled and need special accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold the hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at a public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

IV. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

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

Executive Order 12988—Civil Justice Reform

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

Executive Order 13132—Federalism

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

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on federally

recognized Indian Tribes and have determined that the rule does not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes. The rule does not involve or affect Indian Tribes in any way.

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

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

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

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

a. Does not have an annual effect on the economy of \$100 million;

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

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

This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 926

Intergovernmental relations, Surface mining, Underground mining.

Dated: December 15, 2006.

Allen D. Klein,

Director, Western Region.

[FR Doc. E7-1858 Filed 2-5-07; 8:45 am]

BILLING CODE 4310-05-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

[PA-149-FOR]

Pennsylvania Regulatory Program

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

ACTION: Proposed rule; public comment period and opportunity for public hearing on a proposed amendment.

SUMMARY: We are announcing receipt of a proposed amendment to the

Pennsylvania regulatory program (the "Pennsylvania program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Pennsylvania proposes to revise its program to exclude coal extraction on government-financed construction projects from regulation under the surface coal mining regulations. The proposed amendment is intended to revise the Pennsylvania program to be consistent with the corresponding Federal regulations and to include provisions at its own initiative.

This document gives the times and locations that the Pennsylvania program and this amendment are available for your inspection, the comment period during which you may submit written comments, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments until 4 p.m., local time March 8, 2007. If requested, we will hold a public hearing on March 5, 2007. We will accept requests to speak at a hearing until 4 p.m., local time on February 21, 2007.

ADDRESSES: You may submit comments, identified by "PA-149-FOR", by any of the following methods:

- *E-mail:* grieger@osmre.gov. Include "PA-149-FOR" in the subject line of the message;
- *Mail/Hand Delivery:* Mr. George Rieger, Chief, Pittsburgh Field Division Office of Surface Mining Reclamation and Enforcement 415 Market Street, Room 304, Harrisburg, PA 17101 Telephone: (717) 782-4036.

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency docket number "PA-149-FOR" for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Public Comment Procedures" section in this document. You may also request to speak at a public hearing by any of the methods listed above or by contacting the individual listed under **FOR FURTHER INFORMATION CONTACT**.

Docket: You may review copies of the Pennsylvania program, this amendment, a listing of any scheduled public hearings, and all written comments received in response to this document at OSM's Pittsburgh Field Division Office at the address listed above during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSM's Pittsburgh Field Division's Harrisburg Office. In

addition, you may receive a copy of the submission during regular business hours at the following location: Joseph P. Pizarchik, Director, Bureau of Mining and Reclamation, Pennsylvania Department of Environmental Protection, Rachel Carson State Office Building, P.O. Box 8461, Harrisburg, Pennsylvania 17105-8461, Telephone: (717) 787-5015.

FOR FURTHER INFORMATION CONTACT: Mr. George Rieger, Chief, Pittsburgh Field Division, Telephone: (717) 782-4036. E-mail: grieger@osmre.gov.

SUPPLEMENTARY INFORMATION:

- I. Background on the Pennsylvania Program
- II. Description of the Proposed Amendment
- III. Public Comment Procedures
- IV. Procedural Determinations

I. Background on the Pennsylvania Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act." See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Pennsylvania program on July 30, 1982. You can find background information on the Pennsylvania program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Pennsylvania program in the July 30, 1982, **Federal Register** (47 FR 33050). You can also find later actions concerning the Pennsylvania program and program amendments at 30 CFR 938.11, 938.12, 938.13, 938.15 and 938.16.

II. Description of the Proposed Amendment

By letter dated December 18, 2006 (Administrative Record Number PA 891.00), Pennsylvania sent us a proposed amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). The amendment adds new section 25 Pennsylvania Code (PA Code) 86.6 which provides for the exemption from the permitting requirements of 25 PA Code Chapters 87 and 88 when extraction of coal is incidental to government-financed construction or government-financed reclamation projects and specified requirements are

met. The Pennsylvania Department of Environmental Protection (PADEP or Department) believes that this amendment is consistent with the Federal program and is no less effective than the Federal regulations at 30 CFR part 707 (Exemption for Coal Extraction Incident to Government-Financed Highway or Other Construction).

The full text of the proposed amendment is quoted below:

§ 86.6 Extraction of coal incidental to government-financed construction or government-financed reclamation projects.

(a) Extraction of coal incidental to government-financed construction or government-financed reclamation projects is exempt from the permitting requirements of the Surface Mining Conservation and Reclamation Act Construction [sic] and this chapter as it relates to surface mining activities and operations, and Chapters 87 and 88 (relating to surface mining of coal; and anthracite coal) if the following conditions are met:

(1) During the project site selection process and prior to development of final construction plans or reclamation plans for projects located within coal bearing regions, the government entity financing the construction or reclamation has provided the Department with an opportunity to provide comments on the potential environmental impacts of the project.

(2) The extraction of coal is necessary to enable the construction or reclamation to be accomplished. Only that coal extracted from within the right-of-way, in the case of a road, railroad, utility line or other similar construction, or within the boundaries of the area directly affected by other types of government-financed construction or government-financed reclamation, may be considered incidental to that construction or reclamation.

(3) The construction or reclamation is funded by a Federal, Commonwealth, county, municipal, or local unit of government, or a department, bureau, agency, or office of the unit which, directly or through another unit of government, finances the construction or reclamation.

(4) The construction or reclamation is funded 50% or more by funds appropriated from the government unit's budget or obtained from general revenue bonds. Funding at less than 50% may qualify if the construction is undertaken as a Department-approved reclamation contract or project.

(5) The construction or reclamation is performed under a bond, contract and specifications that substantially provide for and require protection of the environment, reclamation of the affected area, and handling of excavated materials in a manner consistent with the acts and regulations implementing the acts.

(6) The Department has approved the standards and specifications for protection of the environment that will apply to the project when potential adverse environmental impacts have been identified.

(b) Construction funded through government financing agency guarantees, insurance, loans, funds obtained through

industrial revenue bonds or their equivalent or in-kind payments do not qualify as government-financed construction.

(c) A person extracting coal incidental to government-financed construction or government-financed reclamation who extracts more than 250 tons of coal or affects more than 2 acres shall maintain on the site of the extraction operation and make available for inspection the following documents:

(1) A written description of the construction or reclamation project.

(2) A map showing the exact location of the construction or reclamation, right-of-way or the boundaries of the area which will be directly affected by the construction or reclamation.

(3) A statement identifying the government agency that is providing the financing and the kind and amount of public financing, including the percentage of the entire construction costs represented by the government financing.

(4) When the area delineated in paragraph (2) is wholly or partially within an area designated unsuitable for mining by the EQB [Environmental Quality Board] under section 86.130 (relating to areas designated as unsuitable for mining), a copy of the detailed report required by section 86.124(e) (relating to procedures: Initial processing, recordkeeping and notification requirements).

(d) Government-financed construction projects and government-financed reclamation shall comply with Chapters 91–96, 102 and 105.

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the Pennsylvania program.

Written Comments

Send your written comments to OSM at the address given above. Your written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of your recommendations. We may not consider or respond to your comments when developing the final rule if they are received after the close of the comment period (see “DATES”). We will make every attempt to log all comments into the administrative record, but comments delivered to an address other than the Pittsburgh Field Division identified above may not be logged in.

Electronic Comments

Please submit Internet comments as an ASCII file avoiding the use of special characters and any form of encryption. Please also include “Attn: PA-149–FOR” and your name and return address in your Internet message. If you do not

receive a confirmation that we have received your Internet message, contact the Pittsburgh Field Division's Harrisburg Office at (717) 782–4036.

Availability of Comments

We will make comments, including names and addresses of respondents, available for public review during normal business hours. We will not consider anonymous comments. If individual respondents request confidentiality, we will honor their request to the extent allowable by law. Individual respondents who wish to withhold their name or address from public review, except for the city or town, must state this prominently at the beginning of their comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public review in their entirety.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m., local time on February 21, 2007. If you are disabled and need special accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold the hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at a public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the submission, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make

a written summary of each meeting a part of the administrative record.

IV. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulations.

Executive Order 12866—Regulatory Planning and Review

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

Executive Order 12988—Civil Justice Reform

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

Executive Order 13132—Federalism

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

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The basis for this determination is that our decision is on a State regulatory program and does not involve a Federal program involving Indian lands.

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

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

National Environmental Policy Act

Section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that a decision on a proposed State regulatory program provision does not constitute major Federal action within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(c)). A determination has been made that such decisions are categorically excluded from the NEPA process (516 DM 13.5(A)(2)).

Paperwork Reduction Act

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

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State amendment that is the subject of this rule is based on counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not

have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of \$100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, geographic regions, or Federal, State or local governmental agencies; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose a cost of \$100 million or more in any given year on any governmental entity or the private sector.

List of Subjects in 30 CFR Part 938

Intergovernmental relations, Surface mining, Underground mining.

Dated: January 12, 2007.

H. Vann Weaver,

Acting Regional Director, Appalachian Region.

[FR Doc. E7-1862 Filed 2-5-07; 8:45 am]

BILLING CODE 4310-05-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 110

[CGD01-06-023]

RIN 1625-AA98

Anchorage Regulations; Port of New York and Vicinity

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to expand the boundary of a Special Anchorage Area on the Hudson River at Nyack, NY. This proposed action is necessary to facilitate safe navigation in that area and provide safe and secure anchorages for vessels not more than 20 meters in length. This proposed action is intended to increase the safety of life and property on the Hudson River, improve the safety of anchored vessels, and provide for the overall safe and efficient flow of recreational vessel traffic and commerce.

DATES: Comments and related material must reach the Coast Guard on or before April 9, 2007.

ADDRESSES: You may mail comments and related material to Waterways Management Division (CGD01-06-023), Coast Guard Sector New York, 212 Coast Guard Drive, room 321, Staten Island, New York 10305. The Waterways Management Division of Coast Guard Sector New York 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 room 321, Coast Guard Sector New York, between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander M. McBrady, Waterways Management Division, Coast Guard Sector New York at (718) 354-2353.

SUPPLEMENTARY INFORMATION:**Request for Comments**

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD01-06-023), 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 the Waterways Management Division 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

As part of a waterfront revitalization effort, the Village of Nyack is encouraging waterfront use by the general public. This proposed rule is in response to a request made by the Village of Nyack to ensure the safe navigation of increased vessel traffic expected to arrive along the village waterfront due to this revitalization effort.

The Coast Guard is designating the area as a special anchorage area in accordance with 33 U.S.C. 471. In accordance with that statute, vessels will not be required to sound signals or exhibit anchor lights or shapes which are otherwise required by rule 30 and 35 of the Inland Navigation Rules, codified at 33 U.S.C. 2030 and 2035. The proposed expanded special anchorage area will be located on the west side of the Hudson River about 1,600 yards north of the Tappan Zee Bridge, well removed from the channel and located where general navigation will not endanger or be endangered by unlighted vessels. Providing an anchorage well removed from the channel and general navigation would greatly increase navigational safety.

Discussion of Proposed Rule

The proposed rule would expand the boundary of a current special anchorage area located on the Hudson River at the Village of Nyack, NY. It would include all waters of the Hudson River bound by the following points: 41°06'06.8" N, 073°54'55.5" W; thence to 41°06'06.8" N, 073°54'18.0" W; thence to 41°05'00.0" N, 073°54'18.0" W; thence to 41°05'00.0" N, 073°55'02.2" W; thence along the shoreline to the point of origin (NAD 1983). The boundaries of the special anchorage area would increase from its current size of approximately 735 yards by approximately 1,030 yards to approximately 935 yards by approximately 2,250 yards. The 200 yard expansion beyond the current boundary would occur on the eastern side and the 2,250 yard expansion would occur on the southern side of the special anchorage area.

All proposed coordinates are North American Datum 1983 (NAD 83).

The expanded special anchorage area would be limited to vessels no greater than 20 meters in length. Vessels not

more than 20 meters in length are not required to sound signals as required by rule 35 of the Inland Navigation Rules (33 U.S.C. 2035) nor exhibit anchor lights or shapes required by rule 30 of the Inland Navigation Rules (33 U.S.C. 2030) when at anchor in a special anchorage area. Additionally, mariners utilizing the expanded anchorage area are encouraged to contact local and State authorities, such as the local harbor master, to ensure compliance with additional applicable State and local laws. Such laws may involve, for example, compliance with direction from the local harbor master when placing or using moorings within the anchorage.

Vessels would not be authorized to anchor within a buoyed fairway within the expanded special anchorage area. The fairway will be marked to prevent vessels from anchoring near an active cable.

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.

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation is unnecessary.

This finding is based on the fact that the proposal conforms to the changing needs of the Village of Nyack and the changing needs of recreational vessels along the Hudson River. The proposed eastern boundary of the special anchorage area is approximately 970 yards from the 12-foot contour on the west side of the Hudson River and approximately 2,600 yards from the 12-foot contour on the eastern side of the Hudson River. The resulting impact to vessel transits in this area is so minimal because the special anchorage area leaves more than enough room for the navigation of all vessels. This will allow for greater safety of navigation and traffic in the area, while also providing for a substantial improvement to the safety of anchorages in the 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 proposed rule would affect the following entities, some of which might be small entities: the owners or operators of recreational or commercial vessels intending to transit in a portion of the Hudson River near the expanded special anchorage area. However, this special anchorage area would not have a significant economic impact on these entities for the following reasons. The proposed eastern boundary of the special anchorage area is approximately 970 yards from the 12-foot contour on the west side of the Hudson River and approximately 2,600 yards from the 12 foot contour on the eastern side of the Hudson River. It is also about 1,700 yards from the 600-foot wide Hudson River Federal Project Channel. The eastern boundary of this proposed expanded Special Anchorage Area only extends an additional 200 yards from the Nyack shoreline. This is more than enough room for the types of vessels currently operating on the river, which include both small and large commercial vessels. Thus, this special anchorage area will not impede safe and efficient vessel transits on the Hudson River.

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 Commander M. McBrady, Waterways Management Division, Coast Guard Sector New York at (718) 354–2353. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

This proposed rule 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.ID and Department of Homeland Security Management Directive 5100.1, which guide 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)(f), of the Instruction, from further environmental documentation. This rule fits the category selected from paragraph (34)(f) as it would expand a special anchorage area.

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 the rule should be categorically excluded from further environmental review.

List of Subjects in 33 CFR Part 110

Anchorage grounds.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 110 as follows:

PART 110—ANCHORAGE REGULATIONS

1. The authority citation for part 110 continues to read as follows:

Authority: 33 U.S.C. 471, 1221 through 1236, 2030, 2035 and 2071; 33 CFR 1.05–1(g); and Department of Homeland Security Delegation No. 0170.1.

2. Amend § 110.60, by revising paragraph (o–2) to read as follows:

§ 110.60 Port of New York and vicinity.

* * * * *

(o) * * *

(o–2) Hudson River, at Nyack. That portion of the Hudson River bound by the following points: 41°06'06.8" N, 073°54'55.5" W; thence to 41°06'06.8" N, 073°54'18.0" W; thence to 41°05'00.0" N, 073°54'18.0" W; thence to 41°05'00.0" N, 073°55'02.2" W; thence along the shoreline to the point of origin (NAD 1983), excluding a fairway in the charted cable area that is marked with buoys.

Note: The area is principally for use by yachts and other recreational craft. A mooring buoy is permitted.

* * * * *

Dated: January 24, 2007.

Timothy S. Sullivan,

*Rear Admiral, U.S. Coast Guard Commander,
First Coast Guard District.*

[FR Doc. E7–1882 Filed 2–5–07; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–2006–23882]

RIN 2127–AH34

Federal Motor Vehicle Safety Standards; Door Locks and Door Retention Components

AGENCY: National Highway Traffic Safety Administration, Department of Transportation (NHTSA).

ACTION: Final rule.

SUMMARY: We are amending our safety standard on door locks and door retention components in order to add and update requirements and test procedures and to harmonize with the world's first global technical regulation for motor vehicles. Today's final rule adds test requirements and test procedures for sliding doors, adds secondary latched position requirements for doors other than hinged side doors and back doors, provides a new optional test procedure for assessing inertial forces, and extends the application of the standard to buses with a gross vehicle weight rating (GVWR) of less than 10,000 pounds, including 12–15 passenger vans. Today's final rule also eliminates an exclusion from the requirements of the standard for doors equipped with wheelchair platform lifts.

DATES: Today's final rule is effective September 1, 2009. Optional early compliance is permitted on and after February 6, 2007. Petitions for reconsideration must be received by March 23, 2007.

ADDRESSES: Petitions for reconsideration must be submitted to: Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Nassif Building, Washington, DC 20590–0001.

FOR FURTHER INFORMATION, CONTACT: *For technical issues:* Mr. Maurice Hicks, Structures and Special Systems Division, Office of Crashworthiness Standards, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590; telephone (202) 366–6345; telefax (202) 493–2739; Maurice.hicks@dot.gov.

For legal issues: Ms. Rebecca Schade, Office of the Chief Counsel, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590; telephone (202) 366–2992; telefax (202) 366–3820.

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I. Executive Summary

Between 1995 and 2003, over 54,000 motor vehicle occupants were ejected annually from their vehicles. Ejections through glazing (*i.e.*, ejections through a vehicle window) comprised 59 percent of all ejections. Twenty-six percent of all ejections occurred through openings other than side glazing and doors, such as windshields, open convertible tops, and open truck beds. The remaining 15 percent of ejections occurred through a vehicle door. Given the sources and magnitude of the overall safety problem posed by ejections from vehicles, the agency is addressing the problem comprehensively, focusing on ejections through glazing as well as ejections through doors.¹ This final rule focuses on those ejections that occur through a vehicle door.

Currently, passenger cars, trucks, and multipurpose passenger vehicles must comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 206, *Door locks and door retention components*. Most of this standard's requirements were established in the early 1970s, in

¹ On September 15, 2004, the agency proposed revisions to FMVSS No. 214, *Side impact protection*, which would likely induce vehicle manufacturers to use side curtains as a countermeasure (69 FR 55550). The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) added a provision to 49 U.S.C. Chapter 301 which requires the agency to conduct a rulemaking proceeding to establish performance standards to reduce complete and partial ejections of vehicle occupants. See 49 U.S.C. 30128(c)(1). Containment requirements for side curtains may be one of the countermeasures to prevent ejections through side glazing.

order to minimize the likelihood of occupant ejections through side door openings. In 1995, these requirements were expanded to address back doors. While these requirements have significantly improved door performance over the level of pre-standard doors, occupants continue to be ejected through doors.

Crashes such as offset frontals, near side impacts, and especially rollovers lead to complex loading conditions, which cause doors to open. Additionally, less complex load conditions may occur in many non-rollover conditions. While the agency is continuing to develop a repeatable and practicable test procedure that will address complex loading, today's final rule updates the existing requirements and test procedures to ensure the strength of individual latch components for load conditions that are less complex, such as those that occur in many non-rollover collisions.

The agency's efforts to improve the requirements and test procedures of FMVSS No. 206 to address door ejections in a more satisfactory way coincided with the adoption of the initial Program of Work under the 1998 Global Agreement.² The agency sought to work collaboratively on door ejections with other contracting parties to the 1998 Global Agreement, particularly Transport Canada, the European Union (EU), and Japan. Through the exchange of information on ongoing research and testing and through the leveraging of resources for testing and evaluations, the agency led successful efforts that culminated in the establishment of the first global technical regulation (GTR) under the 1998 Agreement.

This first GTR demonstrated that U.S./EU regulatory cooperation can achieve increased safety and harmonized standards that are science-based and free of unjustified requirements. If adopted into domestic law by the U.S. and EU, the GTR on door locks and door retention systems would essentially eliminate the differences between the U.S. and EU standards for reducing the likelihood that a vehicle's doors will open in a crash, thus allowing the ejection of the vehicle's occupants. Adopting amendments based on the GTR will not

only result in improvements to the U.S. standard, but also to the EU standard. This will also benefit other countries since the EU standard is the United Nations' Economic Commission for Europe regulation (ECE R.11), which is used by the majority of the world community.

The U.S., as a Contracting Party of the 1998 Global Agreement that voted in favor of establishing this GTR at the November 18, 2004 Session of the Executive Committee, was obligated under the Agreement to initiate the process for adopting the provisions of the GTR.³ On December 15, 2004, we issued a notice of proposed rulemaking closely based on the GTR, which satisfied this obligation (69 FR 75020; Docket No. NHTSA-2004-19840; NPRM). The provisions of the GTR proposed in the NPRM and adopted in today's final rule will improve the current requirements and test procedures of FMVSS No. 206, and reduce deaths and injuries from door ejections.

This final rule improves the current FMVSS No. 206 requirements in several areas. First and foremost, with respect to sliding doors, it replaces the existing requirement with new requirements and an associated full vehicle test procedure. It requires that sliding side doors either have a secondary latched position, which serves as a backup to the fully latched position and increases the likelihood that a striker will remain engaged with the latch when the door is incompletely closed, or a system to signal that the door is not fully closed and latched. The fully latched and secondary latched positions are also required to meet load test requirements and to meet inertial requirements the same way as the latches on hinged doors.

Second, this final rule requires a secondary latched position for a latch system on double-doors (previously referred to as "cargo-doors"). Third, it adds a dynamic inertial test procedure to FMVSS No. 206 as an optional alternative to the current inertial calculation. Such a test procedure has been conducted in Europe for type approval purposes. Fourth, this document adds new requirements for side doors with rear mounted hinges to prevent potential inadvertent openings while the vehicle is moving. Fifth, this document adds minor modifications to our door lock requirements.

³ While the Agreement obligates such contracting parties to begin their processes, it leaves the ultimate decision of whether to adopt the GTR into their domestic law to the parties themselves.

This document also extends the application of FMVSS No. 206 to buses with a gross vehicle weight rating (GVWR) of 4,536 kg (10,000 pounds) or less, including 12–15 passenger vans. Finally, today's final rule eliminates an exclusion from the requirements of FMVSS No. 206 previously provided to vehicle doors that were equipped with wheelchair platform lifts.

With the improvements adopted in this rule to address non-rollover door ejections, we estimate that we will prevent 7 deaths and 4 serious injuries, annually. These benefits come primarily from the changes to the sliding door requirements and test procedure. The total costs of these improvements are estimated to be slightly over \$8 million.

Vehicle manufacturers, and ultimately, consumers, both here and abroad, can expect to achieve cost savings through the harmonization of differing sets of standards when the contracting parties to the 1998 Global Agreement implement the new GTR. Further, adopting amendments based on the GTR not only result in improvements to the FMVSS No. 206, but also to the door lock and door retention component regulation of the United Nations' Economic Commission for Europe (ECE R.11), which is used by the majority of the world community. In addition to the sliding door test procedure, the side door with rear mounted hinge requirements, and the inertial test procedure that are discussed above, ECE R.11, when amended per the GTR, will benefit from the inclusion of back door requirements and rear door locking requirements. To date, those requirements have been in place only in the U.S. and Canada.

II. Background

A. Safety Problem

As originally established, FMVSS No. 206 was intended to reduce the likelihood of occupant deaths and injuries resulting from ejections through door openings by keeping vehicle doors closed in crashes. The opening of these doors was primarily due to structural failures in the latch, striker, or hinges. Sheet metal failures in the door structure or the B-pillar were rare. In crashes involving the opening of doors, the latch, striker, and hinges were subjected to tensile and compressive forces along the vehicle's longitudinal (forward-to-aft) and lateral (side-to-side) axes. Based on these findings, the automotive community concluded that the most effective means of reducing door openings would be through increasing the strength of the door retention components. In 1964, the

² The 1998 Global Agreement was concluded under the auspices of the United Nations and provides for the establishment of globally harmonized vehicle regulations. This Agreement, whose conclusion was spearheaded by the United States, entered into force in 2000 and is administered by the UN Economic Commission for Europe's World Forum for the Harmonization of Vehicle Regulations (WP.29).

Society of Automotive Engineers (SAE) developed and issued the first test procedures designed to address door retention components: SAE Recommended Practice J839, *Passenger Car Side Door Latch Systems* (SAE J839); and SAE Recommended Practice J934, *Vehicle Passenger Door Hinge Systems* (SAE J934).

As initially issued in the early 1970s, FMVSS No. 206 was based, in large part, on the SAE recommended practices in existence at that time, except that NHTSA increased the test force requirement in the lateral direction.⁴ Aside from the changes made in 1995 to address back door openings, no significant changes have been made to the current regulation since the early 1970s. Even with the strengthened door retention components required by the standard, ejections due to door openings still account for 15 percent of all ejections.

In further analyzing the door ejections, the agency found that, on an annual basis, during the study period, of the 15 percent (7,622) of vehicle ejections that occurred through a door, 4,533 ejections occurred in non-rollover crashes (*i.e.*, frontal, side, and rear impact crashes) versus 3,089 ejections in rollover crashes.⁵

A portion of door ejections due to non-rollover door openings occurred through sliding door openings and from doors in 12–15 passenger vans. Of those ejected through a sliding door, approximately 20 people are killed and 30 people are seriously injured each year, based on the 1995–2003 data from NASS. Based on the 2003 sales data, about 85 percent of vans sold in the U.S. have sliding doors. Only 15 percent of vans sold have double doors.

We are particularly concerned that the individuals with the greatest exposure to sliding door failures are children. Children sit in the back of vehicles in disproportionately high numbers.⁶ We do not believe that this exposure is acceptable when measures can be taken to minimize the likelihood that a sliding door would open in a crash. With the increasing popularity of vehicles with

sliding doors on both the driver and passenger side of the vehicle, we expect the number of overall sliding door failures to increase unless the doors are required to be designed in a way that reduces the likelihood of a door opening.

B. Harmonization Efforts and the Proposed Upgrade

1. Global Technical Regulation (GTR)

The agency's efforts to update the requirements and test procedures of FMVSS No. 206 in order to address the safety issues elucidated above coincided with the adoption of the initial Program of Work of the 1998 Global Agreement. Globally, there are several existing regulations, directives, and standards that pertain to door lock and door retention components. As all share similarities, the international motor vehicle safety community tentatively determined that these components might be amenable to the development of a GTR under the 1998 Agreement. The Executive Committee of the 1998 Agreement charged the Working Party on Passive Safety (GRSP) to form an informal working group to discuss and evaluate relevant issues concerning requirements for door locks and door retention components and to make recommendations regarding a potential GTR.⁷

The United States of America (U.S.) led the efforts to develop the recommended requirements for the GTR. The U.S., through this agency, sought to work collaboratively on door ejections with other contracting parties to the 1998 Global Agreement, particularly Transport Canada, the European Union, and Japan. The GRSP considered all relevant standards, regulations, and directives and evaluated alternative requirements and test procedures developed and presented by the U.S. and Canada, as well as refinements suggested by other GRSP delegates and representatives. The GRSP concluded its work and agreed to recommend the establishment of a GTR to the Executive Committee. A detailed discussion of the development of the GTR was provided in the NPRM.

On November 18, 2004, the Executive Committee approved establishment of the GTR. The established GTR includes improvements over the current FMVSS

No. 206. With respect to sliding doors, the GTR provides a replacement for the existing U.S. requirements and a new full vehicle test procedure. It also specifies that sliding doors either have a secondary latched position or a door closure warning system that signals if a door is not fully closed. For vehicles with side doors with rear mounted hinge systems, the GTR adds new requirements to prevent potential inadvertent openings while a vehicle is moving. The U.S., as a Contracting Party of the 1998 Agreement that voted in favor of establishing this global technical regulation, was obligated to initiate rulemaking to adopt the provisions of the GTR.

2. Notice of Proposed Rulemaking

On December 15, 2004, the agency issued a notice of proposed rulemaking proposing to update FMVSS No. 206 and provide consistency with the GTR (69 FR 75020). First and foremost, with respect to sliding doors, we proposed to replace the existing requirement with new requirements and an associated full vehicle test procedure. We also proposed to require sliding doors to have either a secondary latched position or a door closure warning system to signal that a door is not fully closed. Under the proposal, the fully latched and secondary latched positions would also be required to meet load test requirements and inertial requirements the same way as the latches on hinged doors.

Second, we proposed to require a secondary latched position for double-doors, currently referred to as "cargo-doors." This requirement already exists in the European and Japanese regulations. Third, we proposed in the NPRM to add a dynamic inertial test procedure to FMVSS No. 206 as an optional alternative to the current inertial calculation. Such a test procedure has been conducted in Europe for type approval purposes. Fourth, we proposed to add new requirements for side doors with rear mounted hinges. Fifth, we proposed to revise the requirements for door locks. Finally, we proposed to extend the application of FMVSS No. 206 to buses with a GVWR of 4,536 kg (10,000 pounds) or less, including 12–15 passenger vans, and to remove an exclusion for vehicles equipped with wheelchair platform lift systems.

3. Public Comments

The agency received comments in response to the NPRM from motor vehicle manufacturers, motor vehicle manufacturer trade associations, vehicle component manufacturers, an advocacy

⁴ The force was increased to reduce the number of door openings resulting from occupant impacts on the interior of the door. SAE responded by adopting the same lateral force requirement in SAE J839.

⁵ The rate for ejection through a door in rollover crashes (0.75 percent) is higher than in non-rollover crashes (0.10 percent). However, the actual number of ejections in non-rollover crashes is higher. For further discussion on rates of rollover and ejection see Section IV. Scope of the Safety Problem, in the NPRM.

⁶ "Child Restraint use in 2002: Results from the 2002 NOPUS Controlled Intersection Study." <http://www.nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/Rpts/2003/ChildRestraints.pdf>.

⁷ The GRSP is made up of delegates from many countries around the world, and who have voting privileges. Representatives from manufacturing and consumer groups also attend and participate in the GRSP and informal working groups that are developing GTRs. Those that chose not to participate are kept apprised of the GTR progress from progress reports presented at the GRSP meetings.

organization, and an individual citizen. Comments were submitted by: Nissan North America (Nissan); Porsche Cars North America (Porsche); America Honda Motor Company Limited (Honda); Blue Bird Body Company, a bus manufacturer (Blue Bird); Alliance of Automobile Manufacturers (Alliance); Association of International Automobile Manufacturers, Inc. (AIAM); Truck Manufacturers Association (TMA); TriMark Corporation, a door latch manufacturer (TriMark); Delphi, a vehicle component manufacturer; Advocates for Highway Safety, an advocacy organization (Advocates); and Barb Sachau, a private citizen.

Vehicle component manufacturers, motor vehicle manufacturers, and their representative associations generally supported the proposed rulemaking as well as the GTR process. These commenters did raise issues regarding some of the proposed test requirements and test procedure specifications. Some of these commenters also requested additional clarification of the proposed rule.

Advocates generally opposed the GTR process as lacking an opportunity for involvement from public interest groups. Advocates also generally opposed the proposed rulemaking, stating that it was not stringent enough and would not provide adequate protection against passenger ejection. Ms. Sachau generally requested stronger standards for vehicle doors.

III. SAFETEA-LU

On August 10, 2005, the President signed into law the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU; Pub. L. 109-59; 119 Stat. 1144). SAFETEA-LU contains a variety of provisions directing the Secretary of Transportation to undertake rulemakings for the purpose of improving motor vehicle safety. Specifically, § 10301(a) requires that the rulemaking proceeding initiated to upgrade FMVSS No. 206 be completed no later than 30 months after the enactment of SAFETEA-LU. Today's final rule fulfills that directive.

IV. Upgrade to FMVSS No. 206

A. The GTR Process

As explained above, our proposal to revise and update FMVSS No. 206 was coincident to the international effort to establish a GTR for door latch systems and locks. Advocates expressed concern that by coordinating efforts to update FMVSSs with the GTR process, there would be only marginal changes in vehicle safety protection and

performance. Advocates also expressed concern with the apparent lack of opportunity for safety organizations to be involved in the GTR process, and that an "after-the-fact" presentation of a draft GTR threatens to abridge the agency's authority.

This comment by Advocates reflects a fundamental misunderstanding of the GTR process. Contrary to Advocates' comment, consumer groups have an opportunity to be involved in all aspects of the GTR process.

The GTR process was transparent to country delegates, industry representatives, and public interest groups. Information regarding the meetings and negotiations was publicly available through notices published periodically by the agency and the UNECE Web site.⁸ Consumer groups, through Consumer International, participated in the debates and negotiations of GRSP. In the U.S., notice of the proposal to develop a door lock and door retention GTR was published in the *Federal Register* (68 FR 5333; February 3, 2003; Docket No. NHTSA-03-14395). Comments were received and considered from Advocates and the Insurance Institute of Highway Safety. On October 8, 2004, the agency again discussed the GTR proposal (69 FR 60460; October 8, 2004; Docket No. NHTSA-03-14395). No comments were received on this notice.

Further, once the GTR is agreed upon, all contracting parties that voted in favor of adopting it must then initiate their domestic rulemaking process to adopt the GTR. NHTSA published a proposal to implement the GTR and offered its justifications for adopting the proposed changes. Those justifications were not simply a recitation that the changes were in the GTR. Instead, NHTSA offered a point-by-point explanation of why it believed the proposed changes were better policy for the American public. The public was given the same opportunity to comment and be involved in this proposed rulemaking as any other NHTSA rulemaking.

NHTSA then evaluates those comments and makes appropriate changes to the proposal in response to the comments and other new information that may become available. The fact that the proposal was developed from a GTR doesn't free the agency of its legal obligations, including the obligation to respond to all significant comments. Thus, it is not apparent why Advocates suggested that

comments on proposals based on GTRs are "after the fact."

Of course, when NHTSA does not adopt the proposed version of a GTR, the agency will report the changes made in the United States back to the Executive Committee of the 1998 Agreement. Based on comments to the NPRM in this rulemaking, there are some minor differences between the Final Rule and the GTR. With the acceptance of the GTR, the GRSP recognized that further refinements and improvements to the language and test procedures would be needed and planned to identify these through the U.S. regulatory process. Over the last year, NHTSA has reported to GRSP that, as a result of comments to the NPRM, we would be making minor clarifications to the test procedures and the regulatory language in the U.S. safety standard. Once the Final Rule is published, the GRSP is expecting the U.S. proposal to amend the GTR to align the text of both requirements.

We repeat that the GTR process offers tangible benefits for the American public. By participating in the GTR process, we were able to develop a better regulation by advancing our research efforts and leveraging resources through partnering with other countries. If we were to have undertaken revisions to FMVSS No. 206 independent of the GTR process, the agency would have incurred higher costs and would have required additional time to move forward with the rulemaking. The international effort helped identify concerns and difficulties that were present in requirements and test procedures that NHTSA was planning on proposing in the NPRM and resulted in improvements that the agency could not have achieved on its own. Through this international cooperation the sliding door test procedures were validated by another country, which identified problems in the existing test procedures which resulted in the improved procedure and regulatory language adopted in this document. Additionally, from testing already conducted in Europe, we were able to add a test procedure for the existing optional dynamic inertial test for which NHTSA had no test procedure previously.

B. Definitions

The agency is essentially adopting the definitions for FMVSS No. 206 as proposed, and with additional clarification of the definitions for "primary door latch" and "auxiliary door latch." Today's rule requires that each hinged door system be equipped with at least one primary door latch

⁸ See www.unece.org; click on "Meetings," and Committee on Inland Transportation.

system, which is defined as consisting of at a minimum, a primary door latch and a striker. A primary latch was defined in the NPRM and GTR as a latch equipped with both a fully latched and a secondary latched position. Conversely, an auxiliary latch was defined as a latch equipped with a fully latched position and fitted to a door or door system equipped with a primary latch. An auxiliary latch may be equipped with a secondary latched position, but it is not required to meet the secondary latch requirements mandated for a primary latch.

A problem occurs in identifying the primary latch on a door or door system if the door or door system is also equipped with an auxiliary latch that has a secondary latch position. If both latches have a secondary latched position, it is not obvious which latch is the primary latch. At the GRSP, the International Organizations of Motor Vehicle Manufacturers (OICA) requested that the definitions of primary and auxiliary latches be revised in order to differentiate between the two types of latches for compliance purposes. Today's rule requires manufacturers to designate one of the latches as the primary latch in connection with their certification of compliance and to identify the primary door latch when asked to do so by the agency. Such a request would be made in connection with an agency inquiry regarding compliance with the standard. Also the definition of "auxiliary latch" adopted in today's document clarifies that an auxiliary latch may be equipped with a secondary latched position. NHTSA has already proposed an amendment to the GTR to reflect these clarifications, and the amendment was accepted by GRSP.

C. Hinged Doors Requirements

1. Load Tests

FMVSS No. 206 specifies load test requirements for latch and hinge systems on hinged side doors in the longitudinal and transverse directions. We did not propose significant changes to the existing requirements for latches on hinged side doors. Consistent with the GTR, we proposed regulatory text that removed any implication that the latch load is applied relative to the vehicle orientation. In the NPRM, we proposed to require a secondary latched position for "double doors," which had been referred to as cargo-doors in FMVSS 206. To the extent a requirement for the secondary positions may prevent inadvertent door openings, we believe it would be beneficial for double doors. This requirement already exists in the ECE standard. We also

proposed for the transverse requirement to apply to a primary door latch system in the fully latched and secondary latch position and to an auxiliary door latch system in the fully latched position. We are adopting the load test requirements as proposed, but with corrections and clarifications as suggested by commenters.

Comments from manufacturers generally supported the side door hinge system requirements as proposed. The Alliance generally agreed with the proposed rule as applied to hinged doors but requested additional clarification and corrections to the requirements as proposed. It requested clarification that the vertical hinge load requirement at S4.1.2.1(d) applies to back doors only. TMA requested clarification as to whether the vertical load test procedure in S5.1.2.3(c) applies only to back doors. The Alliance also requested that the sign conventions used for the vehicle coordinate reference system be changed to correspond to SAE J1100 Feb 2001 and SAE J211-1 Dec 2003. The Alliance requested that the section titles for S4.1.1 and S5.1.1 be revised to reflect that these sections apply to primary and auxiliary latches and latch systems. It commented that the test plate specification for the secondary latched position (S5.1.1.1(b)(4)) should also apply to the fully latched position. The Alliance also noted that the reference to S4.2.3 in S5.1.1.4 appears incorrect.

The Alliance and TMA are correct in that the vertical load requirement of S4.1.2.1(d) and the vertical load test procedure in S5.1.2.3(c) apply only to back doors that open upward. The regulatory text has been changed to clarify the application of these sections. Today's rule also incorporates sign conventions for the vehicle coordinate reference system consistent with SAE J1100 Feb 2001 and SAE J211-1 Dec 2003. Consistent use of sign conventions between FMVSS No. 206 and the SAE standards will minimize any potential for confusion. Today's rule also amends the headings for S4.1.1 and S5.1.1 to reflect that these sections apply to primary and auxiliary latches and latch systems. We are also revising S5.1.1.4 to correctly reference S4.2.1.3, instead of S4.2.3. The above clarifications will also be included in the U.S. proposal to amend the GTR.

Advocates commented that the requirements for latch systems on hinged side doors as proposed were not stringent enough and that primary and auxiliary latch systems should be subject to the same requirements. The commenter stated that the load requirements do not replicate real world

crash levels and continue to allow the use of the forkbolt striker engagement design. Advocates also objected to double door auxiliary latches not being subject to transverse load requirements. Advocates further commented, that while it supported the agency's proposal for secondary latching on double doors, the proposed load test is incomplete and does not replicate real-world crash forces that could result in the failure of the traditional fork/bolt and pin/striker designs used for double door closures.

NHTSA does not agree with Advocates' assertion that the proposed requirements were not sufficiently stringent. NHTSA has done numerous studies regarding real-world door latch loading. See Docket No. 3705. The analyses of the data in those studies concluded that there is no evidence that increased latch strength would reduce ejections through the door. First door openings in a crash are an infrequent event. Using the 1995 to 2003 NASS data, door openings occur in less than one percent of all vehicle crashes. When door openings do occur, they are overwhelmingly a result of a failure of the supporting structure, not the latch mechanism. See Docket No. 3705-11.

As discussed in the NPRM for this rulemaking, NHTSA has devoted its efforts to developing a test that will assess the potential for structural failure. This combination test procedure would be capable of testing at higher and more complex loading conditions, and would better simulate loading in rollover crashes. However, as also discussed in the NPRM for this rulemaking, that test is not yet sufficiently developed to allow us to propose it in this rulemaking. Nevertheless, NHTSA is continuing its work on this test.

The GRSP made the following commitments with respect to the combination test:

The adoption of the combination test into the GTR is not supported at this time due to the technical difficulties in conducting the test. Instead, the Working Party delegates and representatives will continue to review work on the modification of the United States of America-based procedure, or the development of a new procedure, to capture the benefits associated with a test addressing door failures due to simultaneous compressive longitudinal and tensile lateral loading of latch systems in real world crashes. Any acceptable procedure developed could then be added to the GTR as an amendment. ECE/TRANS/180/Add.1; page 11.

Thus, there is a consensus within GRSP that devoting resources to developing a test that assesses the latch performance and includes an

assessment of structural failure is the approach that would reduce ejections through the door. Advocates did not provide any new information to explain why or how it has concluded that increasing the stringency of the proposed requirements would further reduce door ejections. Accordingly, NHTSA is not adopting this comment.

With regard to Advocates' concern with auxiliary latches on double doors, we recognize that there may have been some confusion with the NPRM. The preamble discussion stated that the transverse requirement would apply only to the primary and not the auxiliary door latches. This differs from the current requirement in which the latches on a single double door must jointly resist force loading in the lateral direction, *i.e.*, the transverse load requirement for each latch is determined by dividing a 9,000 N load by the number of latches on a single door. However, the proposed regulatory text would have explicitly required each primary and auxiliary latch on a double door to separately resist the entire transverse load requirement in the fully latched position.

We are adopting the transverse load requirement for latches on side hinged doors as proposed in the regulatory text of the NPRM. This revision establishes uniform latching requirements for all side hinged door latches. Both primary and auxiliary latch systems are required to comply with the entire load requirement in the fully latched position. Also as proposed, this document requires primary latch systems on hinged side doors to comply with a 4,500 N load requirement in the secondary latched position.

2. Inertial Test

FMVSS No. 206 requires that door latch systems on hinged doors and sliding doors remain engaged when subject to an inertial force of 30 g in the longitudinal and transverse directions. As FMVSS No. 206 was originally established, the agency had specified demonstration of compliance with the inertial requirement through a calculation in accordance with Society of Automotive Engineers Recommended Practice J839, or a NHTSA approved procedure.⁹

In the NPRM we proposed a dynamic inertial test as an option to the existing inertial calculation. As proposed, this

provision would replace the existing provision that manufacturers may certify to an agency-approved test procedure. The proposed inertial test procedure was based on the testing conducted for United Nations' Economic Commission for Europe Regulation 11 (ECE R.11) type approval. It places inertial forces on doors, either when installed in the vehicle (full vehicle test) or when tested on a test fixture (in-frame test), in the longitudinal and transverse directions. The proposed test procedure was validated by the U.S. and Canada during the GTR process.¹⁰ In proposing the procedure, we noted that the proposed test is similar to the testing that has been relied upon in Europe for type-approval, but that additional specificity may be required in characterizing the test fixture.

In addition to the longitudinal and transverse tests, a test in the vertical direction was proposed for back doors that open in an upward direction. This was in response to a finding by Transport Canada that the most common failure mode in the inertial tests conducted by Canada was in the direction of door opening.¹¹ We are adopting inertial load requirements and test procedures generally as proposed, but with a clarification regarding the force requirements under the dynamic compliance options.

Today's final rule specifies that under the dynamic compliance options, door latch systems must not disengage when subject to an inertial force as specified in the relevant test procedure. Under the proposal, the requirements for the dynamic options required that the door latch system not disengage when subject to an inertial load of 30g. Today's final rule clarifies that door latch systems must not disengage when subject to a 30g inertial force when applied as specified in the test procedure. Further, the test procedure adopted today specifies that the force is measured based on the acceleration of the sled. This is consistent with the sled test procedure specified in S13 of FMVSS No. 208, *Occupant Crash Protection*. These clarifications and those noted above will be included in the U.S. proposal to amend the GTR.

In its comments, Advocates claimed that vertical force inertial testing should be required for side as well as rear doors, particularly side sliding doors equipped with only a single latch system. Moreover, Advocates contended that reliance on foreign test results is

not acceptable. With respect to the Transport Canada test, Advocates stated that the testing did not rely on a demanding protocol and did not reproduce vertical forces, including roof crush strength demands that would be applied to vehicles in a roll-over.

Advocates did not provide an explanation as to why it believes reliance on foreign test results is not acceptable. The agency believes that one of the benefits of establishing global technical regulations is that it leverages available data from other countries, thereby allowing better allocation of agency resources and establishment of safety requirements more quickly than if the testing and development were conducted solely by NHTSA.

The inertial test requirements and procedures adopted today are based upon those that have been used successfully for many years under type-approval certification systems. However, further specifications for self-certification systems were necessary. Based upon testing performed by Transport Canada in association with NHTSA, we determined that the results and protocol sufficiently validate the feasibility of the procedure, and that the inertial test requirements adequately reflect the crash conditions experienced by the U.S. fleet.

As noted in the NPRM, we believe that secondary latches will be necessary for sliding doors to pass the new test. The primary basis for Advocates' argument for a vertical inertial test appears to be that sliding doors have only one latch. However, we believe the sliding door test requirement will nullify this argument. Furthermore, we at this time have no testing or data to suggest effectiveness of a vertical inertial test requirement, nor did Advocates provide any.

As stated in the NPRM, the focus of the GTR and the NPRM were to address door system failures in non-rollover crashes. As noted above, a combination test procedure was developed to replicate more complex loading experienced in frontal, rear and side offset and oblique crashes. However, difficulties were encountered with the test procedure due to the inability to conduct the test on some types of latches. This inability precluded our adopting the procedure for this rulemaking.

With regard to certification, the Alliance noted that manufacturers often rely on testing a "body-in-white" vehicle (*i.e.*, a pre-production developmental vehicle), whereas the FMVSS No. 206 test procedures specify testing on post-production vehicles. The Alliance requested the agency to

⁹ As discussed in the NPRM, NHTSA approved a GM test procedure in the 1960s. Since that time, no other requests have been approved. Such an approach is inconsistent with the agency's usual practice over its history, which is to include test procedures in the regulatory text of the standard, either directly or by incorporation by reference.

¹⁰ See presentation from Transport Canada in the DOT Docket NHTSA-1999-3705.

¹¹ *Id.*

confirm its understanding that manufacturers are not required to test post production vehicles for purposes of certification.

The Alliance is correct in that the test procedures in FMVSS No. 206 are not requirements. Manufacturers certifying compliance with the safety standards are not required to follow exactly the compliance test procedures set forth in the applicable standard. In fact, manufacturers are not even required to conduct any actual testing before certifying that their products comply with applicable safety standards. However, to avoid liability for civil penalties in connection with any noncompliance that may be determined to exist, manufacturers must exercise "reasonable care" to assure compliance and in making its certification (49 U.S.C. 30115). It may be simplest for a manufacturer to establish that it exercised "reasonable care" if the manufacturer has conducted testing that strictly followed the compliance test procedures set forth in the standard. However, "reasonable care" might also be shown using modified test procedures, such as testing on a body in white, if the manufacturer could demonstrate that the modifications were not likely to have had a significant impact on the test results. In addition, "reasonable care" might be shown using engineering analyses, computer simulations, and the like.

3. Door Hinges

The load testing requirements for door hinges in the GTR are the same as those currently in FMVSS No. 206 and ECE R.11. The agency believes that the side door requirements for hinges, which are based on SAE Recommended Practice J934, *Vehicle Passenger Door Hinge Systems*, adequately test the strength and design of door hinges. NHTSA has fully analyzed its crash data and possible failure modes associated with the failure of door retention components. We have not identified a significant safety problem with door hinges currently installed in vehicles. Accordingly, we are not changing the door hinge requirements of FMVSS No. 206, although we are articulating the test procedure for door hinges rather than relying on a modified incorporation by reference of the applicable SAE J839 recommended practice.

D. Side Sliding Door Requirements

1. Side Sliding Door Latch Requirements

In the NPRM, we proposed to require sliding doors to have either:

1. A primary door latch system that meets the same requirements as primary door latch systems on hinged side doors (*i.e.*, has both a fully and secondary latched position), or

2. A system with a fully latched position and a door closure warning system to alert the driver when the door is not in the fully latched position.

We stated that this second option would "assure vehicle occupants that a sliding door is completely closed." 69 FR 75026.

Advocates objected to the option of equipping a sliding door with a door closure warning system instead of requiring all sliding doors to be equipped with a secondary latch position. Advocates also questioned the effectiveness of a door closure warning system. That commenter stated that the agency should not provide a compliance option that relies on occupant behavior, as opposed to a mechanical solution, to ensure that occupants will not be ejected through a door that is not fully closed.

It is appropriate to begin with the current requirements in FMVSS No. 206 to consider this comment. At present, FMVSS No. 206 does not require either a primary or a secondary latch system for sliding doors. The only requirement currently applicable to sliding side doors in the U.S. is set forth in S4.3, which provides that the track and slide combination shall not separate when a total transverse load of 17,800 Newtons is applied. There are currently no requirements for the individual latch components.

The proposed GTR upgrades the U.S. requirements to require, in addition to the existing loading requirement, a latch with a fully latched position that meets additional loading requirements. We believe these new requirements achieve Advocates' suggestion that a mechanical solution is more dependable than one that requires some human behavior. The fully latched position and the associated loading requirements are vehicle attributes added in this rule.

As a backup, the proposed rule also provided for some supplemental protection. The first option is to permit a reduced level of protection when the latch is not in the fully latched position. Under this alternative, the latch must have a secondary latched position, which is subject to loads 50% or less of what the fully latched position must meet. The second option is to alert the driver that the latch is not in the fully latched position, with the expectation that the driver will close the sliding door so that it is fully latched and receive the protection associated with the fully latched loading requirements.

These options for backup protection for sliding door latches not in the fully latched position have been permitted in the ECE regulations for decades now. During the discussions of the GTR, the European governments said there were no data showing better ejection prevention with either of the options. NHTSA has no data showing a problem, since neither has been required in the United States, and Advocates did not provide any data in its comments. Given that the available data in Europe do not show a problem with either approach, NHTSA has no reason to change its proposed upgrade of the sliding door requirements in Standard No. 206.

2. Side Sliding Door Test Procedure

In addition to the new requirement for side sliding door latches, the NPRM also proposed a sliding door test procedure that evaluates the door as a complete system. FMVSS No. 206 currently does not include a sliding side door test procedure. Since the test produces some level of longitudinal force, in addition to the direct lateral loading, the door components deform and twist. Therefore, compliant door latch systems will be required to more robust than was required in the past.

We proposed a full vehicle test in which a sliding door is tested by applying force against the two edges of the door. The proposed test setup is initiated by placing two loading plates against the interior of the door. The loading plates are placed on top of the latch/striker system located at the door edge. If the door edge has two latch/striker systems along one edge, the loading plate is placed between the two systems. If a door edge does not have a latch/striker system, the loading plate is placed at a point midway along the length of the door edge. An outward lateral force of 18,000 N total is then applied to the loading plates (*i.e.*, 9,000 N is applied to each plate).

The proposed test procedure for the sliding door transverse loading test specifies that the force application device would be mounted on the vehicle floor. A test failure would be indicated by (1) A separation which would permit a sphere with a diameter of 100 mm to pass unobstructed between the interior of the vehicle to the exterior at any point, or (2) the force application device reaching a total displacement of 300 mm. The proposed 100 mm of separation requirement, even if the latch system does not fail, accounts for partial ejections through separation of sliding doors from the frame without the latch system failing. The 100 mm limit is based on a commonly used measurement for

maximum allowable open space in the U.S. and Canada for school bus opening requirements.

In general, we are adopting the sliding door test procedure as proposed. We are making several changes to the test procedure set-up and the test procedure operation in response to concerns raised by manufacturers. The changes noted below will also be included in the U.S. proposal to amend the GTR.

a. Compression Verses Tension

Motor vehicle manufacturers raised several concerns regarding the sliding door test procedure, particularly with the test set-up. The Alliance suggested applying the force loads in tension as opposed to compression.

The procedure adopted in this rule specifies that the force loads are applied in compression. In early testing, Transport Canada applied force loads in tension. However, Transport Canada abandoned this force application method because of the extent of modifications needed to the door being tested and the resulting deformation that occurred at the attachment points. The necessary modifications and the deformation resulted in unacceptable testing variability.

b. Test Device and Set-Up

With regard to the force application device as specified in the proposed test procedure, Nissan and the Alliance favored mounting the device external to the vehicle, instead of on the vehicle floor. These commenters expressed concern that mounting the force application device inside the vehicle could deform the vehicle floor and allow the device to move from its original position when applying a load. This, they stated, would introduce a significant amount of test variability.

The agency experienced similar concerns with the mounting of the test device, but resolved the issue through use of reinforced plates. The reinforcement plates provided a level surface for the support of the loading device. The plates also distribute loading on the floor of the test vehicle to reduce the movement of the device that could otherwise occur due to localized deformation at the attachment points.

During a May 11, 2005 meeting between the agency and the Alliance, the Ford Motor Company presented the results of evaluation testing, which demonstrated that use of the reinforcement plates on the vehicle floor avoids problematic displacement while under loading.¹²

Both the agency and commenters have demonstrated the ability to apply the requisite load to a vehicle door without causing displacement of the force application device. In order to minimize potential test variability, the final rule specifies that a loading device is to be rigidly mounted when applying a load.

As proposed in the NPRM, the load is applied to a vehicle door through force application plates attached to the ram arms of the force application device. Nissan asked if the proposed sizes for the plates are correlated with a potential load area resulting from an occupant that impacts the interior of the door.

NHTSA based the size of the force application plates on three considerations. First, the width of each load plate, 50 mm (2 inches), is designed to locate the center of the load application over the latch on each door edge (a distance of 25 mm (1 inch) from the door edge). Second, the length of the smaller plate (150 mm (6 inches)) is selected to give an area large enough to prevent the loading rams from pushing through the sheet metal of the door. In developmental testing, the 150 mm plate did not push through sheet metal.¹³ Third, the length of the larger load plate (300 mm (12 inches)) is based upon a measurement that is compatible to the interior contour of most door edges. The door edge contours (especially along the top half of the door) of many of vehicles tend to be highly curved, which dictates where the load plates can be positioned. If a plate is too long, the contour of a door may interfere with the load application.

We proposed that a force application plate 300 mm in length, 50 mm in width, and 15 mm in thickness be placed equidistant between the multiple latches on doors that have more than one latch system on a single door edge, and this plate would be used to apply the load to any tested door edge. The Alliance commented that the vertical distance between the latches on a single door could exceed one meter in length. The Alliance stated that applying force to such a door with a plate that is shorter than the distance between the latches could cause the door to bow outwards in a manner that does not directly apply loading to the latches. The Alliance stated that this bowing is not representative of a real-world crash event and recommended that the load plates be extended to a length equal to the distance between the latches plus 150 mm.

The agency is not adopting the Alliance's suggestion with regard to increasing the plate size used for testing

sliding doors with more than one latch/striker system. We have concluded that the force application plate positioning proposed in the NPRM and adopted today is appropriate for testing vehicle doors that have more than one latch system, including door designs in which the latches are widely spaced.

A door edge with latches separated by a large distance (such as up to or greater than 1-meter) could increase the likelihood that an occupant impacting the interior of the door during a crash would force a gap separation. Latches with excessive separation may not provide as much structural support along the length of the entire door edge. The proposed procedure, which places the force application plate equidistant between latches, identifies such weaknesses. Further, the agency was unable to identify any vehicles that had sliding doors equipped with latches systems on a door edge that were separated by a distance comparable to that which concerned the Alliance. Therefore, the sliding door test procedure is adopted as proposed.

The Alliance also stated that vehicles are currently designed with access holes in the door sheet metal, which may not provide practicable surface area to place the force application plates in the location and manner specified in the NPRM. The Alliance recommended the use of a spreader device, which would bridge the access hole and contact the door in a manner in an area capable of transferring the load to the latch.

After reviewing the Alliance's request to specify the use of a spreader device, we conclude that such a device would distribute the load over a large section of a vehicle door instead of at the latch/striker component, which is the intent of the test. Further, a spreader device would act to reinforce a door and alter it from its original manufactured condition.

The agency considered other potential procedures to accommodate the presence of access holes. We evaluated moving the force application plate to accommodate an access hole, covering an access hole with a steel plate, and increasing the length of the force application plate to accommodate the access hole opening. However, each one of these alternatives proved to be unfeasible.

Each one of the considered options would create compliance testing difficulties. Moving the plate to accommodate an access hole would require us to specify an adequate alternative location. This may not be the same location for every vehicle. For vehicles with an exceptionally long access hole or multiple access holes, it

¹² See, Docket No. NHTSA-2004-19840-14.

¹³ See Docket No. NHTSA-2004-19840-14.

could be difficult or impossible to find a suitable location for the plate. Covering an access hole changes the door from its original manufactured condition, which is undesirable for compliance testing. Increasing the length of the load plate to the size of the access hole would create test variability given that not all access holes are uniform in size and location.

With respect to access holes, we are adopting the test procedure as proposed. The Alliance did not provide test data to support an actual problem existing with force application plate size or placement and access holes. While the Alliance identified a vehicle that had access holes located in the area that the load plates would be positioned, the Alliance never conducted a test to demonstrate that the access holes actually created a problem.

Based on our examination of the vehicle identified by the Alliance, we believe that if the vehicle had been tested, the lip of the access hole (approximately, 250 mm in length) would serve to offer some resistance to the plate and eventually, as with all sliding door tests, the interior sheet metal would quickly deform until the plate was in contact with the inside of the exterior door shell. Given this condition, there should be no difference in how the test is conducted, whether with or without an access hole present. If a latch or retention component exists in the boundary of the access hole opening, we believe that there should be no reason why the plate should not be allowed to contact and to apply force loading to that component. In such an instance the load plate would apply the force directly on the retention component.

In its comments, Nissan questioned whether the procedure specified in the NPRM allows for a rotational joint at the connection between the plates and the loading arms. The Alliance noted that longitudinal displacement of the door may occur during testing, causing rotational forces and bending moments to occur between the load plates and the hydraulic rams. The Alliance recommended the procedure specify the use of socket/swivel joints at the end of the loading arms in order for the load plate to translate longitudinally and to adjust for any contour of the door. The Alliance also recommended that the procedure specify that the plate edges be rounded to a 6 mm radius to avoid the edge of the plate acting as a cutting edge that would potentially penetrate a door's sheet metal.

The procedure, as proposed, specified that the plates are permitted to rotate in the longitudinal direction relative to the

loading ram. As proposed in the NPRM, the loading plates are fixed perpendicularly to the hydraulic loading arms in a manner that does not allow for rotation in a transverse direction. Additionally, the loading plates are connected directly to the hydraulic ram shafts by a threaded stud attached to the back of the plate that allows for longitudinal rotation. This longitudinal rotation allowed for better adjustment of the plates to the contour of a vehicle door and provided acceptable results in testing performed by the agency.

With regard to the permitted rotation of the force application plates, we are adopting the procedure as proposed. The agency is not adopting a procedure that would allow for rotation in a transverse direction, such as that which could be experienced if a swivel joint were used. Considerable difference in deformation patterns and in the direction of the force application potentially could result from the use of a swivel joint. The potential rotation from use of a swivel joint, *i.e.*, rotation in both the longitudinal and transverse directions, would introduce an uncontrollable degree of freedom. Past tests have demonstrated that use of a swivel joint causes extensive variability and repeatability problems.¹⁴ Further, the test procedure specifies that the force application plates are to maintain the displacement of the force application device in the transverse direction. This ensures that as force is applied, a door system continues to experience a transverse load.

Although the agency did not experience penetration of door sheet metal from the loading plates, we recognize that without rounded edges on the plates, this may be a problem. Therefore, we are specifying that the loading plates have edges rounded to a radius of 6 mm $\pm$ 1 mm.

The proposed test procedure specified that the loading plates be placed at the "door edge" (S5.2.2.3(f)(3), S5.2.2.3(g)(3), and S5.2.2.3(h)(3)). The proposed test procedure also specified that all of the door trim and decorative components are to be removed during the test set-up.

In its comments Nissan stated that the term "door edge" could be prone to misinterpretation and asked that the term be further defined. Nissan also stated that trim components on a door pillar that overlap a sliding door could interfere with the test set-up.

The agency agrees with both of these points. Therefore, the procedure adopted today further specifies that the

force application plates are placed within 12.5 mm from the interior edge of a sliding door. This specification will ensure that force is applied directly to the portion of the door in which the latch mechanism is installed. Typically, a latch mechanism is within 12.5 mm of the interior edge of a vehicle door. Further, we are specifying that pillar trim and non-structural components that overlap a door be removed to permit proper placement of the loading plates.

The Alliance commented that during its evaluation of the proposed test procedure, the loading plates would slide as the door inner panel deflected under loading. The Alliance recommended the addition of a spreader bar with swivels to be used as a connection between the load application devices. The Alliance contends that the spreader bar would: (1) Limit the longitudinal motion of the loading plates while assuring that the lateral load of 9000 N is attained at both the fore and aft edges of the door; (2) reduce sliding of the loading plates and moments into the load cells that lead to erroneous load measurements; (3) reduce the bending moments sufficiently to make the test more practicable; (4) reduce the likelihood of damage to the test equipment; and (5) reduce the risk to laboratory technicians.

Both NHTSA and Transport Canada have used a spreader bar, similar to the one requested by the Alliance, in previous testing when developing the sliding door test procedure. Based on these tests we concluded that use of a spreader bar confines the movement of the force application device, thus making it inappropriate for testing. Because the fore and aft loading plates displace unequally, a spreader bar causes the load plates to rotate and move towards one another. In testing, this resulted in abnormal bending forces produced at the connection between the plates and spreader.

The force loading device specified in NHTSA Vehicle Research and Test Center testing used to validate the proposed test procedure incorporates 5 cm box beams for the support of the structure.¹⁵ The box beams provide adequate support and are less prone to allow displacement of the hydraulic rams. In its initial testing, the Alliance did not incorporate supports that provide the same level of support as the ones specified in today's test procedure. Therefore, we are not amending the

¹⁴ See Docket No. NHTSA-1998-3705-33.

¹⁵ Docket No. NHTSA-1998-3705-33.

procedure to include use of a spreader bar.

However, to control for movement of the load application device in order to further minimize test variability, the procedure adopted today limits longitudinal and vertical movements of the force application device by specifying that a device is to be rigidly mounted.

c. Application of Force

The sliding test door procedure proposed in the NPRM specified that each force application device be moved at a rate of 20–90 mm per minute until a force of 9,000 N is achieved on each device, or until either force application device reaches a total displacement of 300 mm. As proposed, if the 9,000 N force is achieved, it is held for 10 seconds.

The Alliance raised several concerns with the specified procedure for operating the force application devices. First, the Alliance requested that a 500 N pre-load be applied prior to determining the initial position of the ram arms for the purpose of measuring the transverse displacement of the ram arms. The Alliance stated that a pre-load of 500 N would ensure that the loading plates are correctly positioned and would improve repeatability of the test by eliminating the effect of free play in the system. Specifying a pre-load is consistent with the force application test procedure specified in S11 of FMVSS No. 225, *Child restraint anchorage systems*.

We agree with the Alliance that a pre-load for the sliding door test procedure would be appropriate. Therefore, we are specifying that the test loading device achieve a pre-load of 500 N. Once the pre-load is achieved the displacement measuring devices are then zeroed.

The Alliance also requested that the test procedure define the location and procedure for measuring the 300 mm of displacement. The commenter recommended that the displacement of the loading device be measured relative to an undisturbed part of the vehicle.

As explained above, we are specifying that a pre-load be applied to a sliding door, at which point the displacement measuring devices are to be zeroed. Given that we establish the point at which the displacement of the devices are zeroed and limit the movement of the force application test device, we do not believe it further necessary to measure displacement against an undisturbed portion of the vehicle. The portion of a vehicle that remains undisturbed could be different for each vehicle model, or even for each individual vehicle. By relying on the

pre-load to establish the initial position of ram arm, there is no need to specify a portion of the vehicle against which to measure displacement.

Third, the Alliance recommended that the test procedure control the load force application rather than displacement. As stated above, the NPRM proposed to control the displacement (20–90 mm per minute) until a load of 9000 N is reached, and then holding the resulting load for 10 seconds. The commenter stated that controllers currently in use do not allow for simultaneous control of both displacement and load, and that the procedure as specified would raise practicability concerns.

In response to the Alliance's concern, the procedure adopted today specifies that the load be controlled at a rate not to exceed 2,000 N per minute. In the vehicle testing conducted by NHTSA, a load rate of 2,000 N per minute resulted in a displacement rate comparable to the proposed 20–90 mm displacement rate. However, we recognize that given the controllers currently in use, controlling for the load is a more practical procedure.

Additionally, we are revising the procedure to specify holding the maximum load for 30 seconds. This duration was recommended by the Alliance. We also agree that this is sufficient time to measure any gap separations between the door and doorframe as specified by the procedure.

d. Performance Requirement

The NPRM, consistent with the GTR, specified that a test failure is indicated by a 100 mm separation of the interior of the door from the exterior of the vehicle's doorframe at any point. There must not be more than 100 mm of separation even if the latch holds, to protect against partial ejections. The 100 mm limit is based on a commonly used measurement for maximum allowable open space in the U.S. and Canada for school bus opening requirements.

The Alliance recommended that we specify the use of a 100 mm sphere to on an extension rod to test the gap separation requirement. The Alliance also requested eliminating S5.2.2.3(j) from the test procedure. As proposed, this section specified that any equipment used for measuring gap separations be attached to the vehicle prior to the testing. The Alliance stated that this is not practical because a manufacturer may not be able to predict where a separation will occur.

We recognize that as a practical manner the agency and many manufacturers likely will use a test method similar to that described by the

Alliance, i.e., through the use of a sphere with a 100 mm diameter attached to a rod. The agency has used a similar procedure in its sliding door evaluation testing as well as for compliance testing under FMVSS No. 217, Bus emergency exit and window retention and release. The agency has been able to perform this procedure while maintaining the safety of the technicians. However, this is only one method that could be used to measure a gap and other viable methods may be developed, such as laser or telescoping measuring devices. While compliance is described in terms of passing a sphere, we are not adopting the sphere procedure as recommended by the Alliance. We are eliminating the sphere specification in S5.2.2.3(j) to facilitate the use of the sphere method or other similar techniques.

Nissan requested clarification as to whether a noncompliance would occur in a case in which a gap separation occurred where the gap measured greater than 100 mm at the exterior opening, but less than 100 mm at the interior of the opening.

We clarify that the separation throughout the gap must exceed 100 mm for a determination of noncompliance. The example provided by Nissan would not be a noncompliance. This is consistent with the intent to limit ejections through a separation.

Both Nissan and the Alliance expressed concern that the specified period of 10 seconds for maintaining the load was not adequate to permit measurement of separations between a vehicle body and the sliding door. Nissan stated that based on its experience it could take up to a minute to make the necessary measurements. The Alliance recommended a period of 30 seconds. The Alliance stated that this would be adequate to limit deformation of the door sheet metal and still provide enough time for the necessary measurements.

The agency is revising the test procedure to specify that the load be maintained for 30 seconds. As suggested by the Alliance, we believe that it is practical to make the specified measurements in this time. As stated above, we have successfully been able to perform this measuring procedure for compliance testing under FMVSS No. 217.

E. Door Locks

As proposed, we are adopting two minor changes to the door lock requirements. First, we are distinguishing between exterior and interior door locks. All exterior door

locks must be capable of being unlocked from the interior of the vehicle by means of a lock release device which, when engaged, shall prevent operation of the exterior door handle or other exterior latch release control and which has an operating means and a lock release/engagement device located within the interior of the vehicle. Interior door locks are subject to the same requirements except that for rear side doors and back doors, this release mechanism must require a separate action distinct from the simple actuation of the door handle, and the release device must be readily accessible to the driver of the vehicle or an occupant seated adjacent to the door.

The Alliance commented that the proposed door lock provision would prohibit a common European rear door lock design that permits a vehicle door to be unlocked and unlatched with a single pull of the handle so long as the vehicle has a child safety lock or an automatic door locking device. The Alliance stated that a requirement for a separate action distinct from the simple actuation of the door handles to release rear side door and back door interior locks effectively precludes designs that have been in use for many years in Europe as well as other markets. The Alliance stated that NHTSA did not provide data demonstrating a negative effect of the GTR provision that permits these designs on motor vehicle safety, and therefore did not provide justification for not proposing the provision as contained in the GTR.

This was a subject that was discussed extensively while developing the GTR. The standard in the United States and Canada has always mandated that the interior release mechanism for the door locks on side and rear doors must require a separate action distinct from the simple actuation of the door handle. This requirement is in place because of our concern that children could inadvertently open the back door simply by playing with the door handle. A system in which a child could open a locked door with a single motion would almost certainly increase the number of inadvertent door openings and place child occupants at greater risk of ejection.

The standard for Europe and Japan has always permitted rear vehicle doors to be unlocked and unlatched with a single pull of the door handle, provided that the vehicle has a child safety lock or an automatic door locking device. This regulatory structure reflects a concern that rescuers be able to quickly open rear doors to assist passengers after a crash. These regions believe that the requirement for child safety locks

allows drivers to disable this feature when children are riding in the rear seat.

Both of these are plausible safety concerns. Neither side to the dispute could provide data to resolve the problem. Absent a way to resolve this difference, the parties agreed to address the problem of inadvertent door openings by children by either the U.S./Canada approach of requiring a separate action to release locked doors in the rear or by the European/Japanese approach of requiring vehicles to have child safety locks or automatic door locking.

Against this background, the Alliance comment is not persuasive. NHTSA agrees there are no data to show that drivers wouldn't always engage the child safety locks in their vehicles. However, if even a few drivers were to fail to engage their child safety locks and a few children in the rear were to open a locked door simply by playing with the door handle, those children would be at risk for ejection, even absent a crash. This risk can be ameliorated simply by continuing to follow the same requirements that have been in place for the interior rear door locks of every new car and light truck sold in the United States since 1968. Moreover, this approach is entirely consistent with the GTR.

F. Applicability

In the NPRM, the agency proposed expanding the applicability of the standard to buses with a GVWR of less than 10,000 lb and removing an exclusion for doors equipped with a wheelchair platform lift. Historically, FMVSS No. 206 has not applied to buses in general because the types of doors installed on buses in the 1960s were not amenable to testing under the standard. The exclusion of wheelchair platform lift equipped doors was originally adopted in 1985, at which time wheelchair lift designs typically provided a barrier to occupant protection when retracted. When retracted, wheelchair lift platforms typically covered the doorway opening. Changes in the vehicle fleet and in technology from the time of original adoption of these provisions necessitate revisions to the applicability of FMVSS No. 206.

The Alliance commented that the final rule should not expand applicability of FMVSS No. 206 beyond that of the GTR. The Alliance stated that expanding the applicability undermines the GTR and mitigates the benefits of a common global technical requirement.

The agency believes that all buses with a GVWR less than 10,000 lbs should be subject to the requirements of

FMVSS No. 206. These buses are often equipped with traditional side-hinged doors as opposed to folding doors. With the advent of 12- and 15-passenger vans, smaller buses are now more frequently equipped with traditional side hinged doors. For those buses that are equipped with folding doors, we are adopting a definition of "folding door" that will accommodate those types of doors that remain unsuitable for testing. Hinged doors on buses with a GVWR less than 10,000 are the same door systems as those found on smaller vans, which are required to comply with the standard. Additionally, we anticipate that the impact of the extension will have little additional cost to vehicle manufacturers. The agency is aware that all 12–15 passengers vans, which are classified as buses, currently share the same door system and latching components as other smaller size vans, which already meet the requirements of our standard.

Expanding the applicability of the standard to include these buses is not inconsistent with the GTR process. The GTR preamble notes that, "to address concerns about the applicability of door retention requirements of heavier vehicles, it was proposed that the [GTR] only apply to passenger cars, light commercial vehicles, and vans, and that other vehicles be excluded initially, then added in the future after further evaluation of various door designs." As buses with a GVWR of less than 10,000 lbs have door designs identical to that of vehicles subject to the GTR, there is no reason to delay the inclusion of these vehicles under FMVSS No. 206. The agency intends to recommend that a similar provision be adopted by the GTR in subsequent revisions.

Today's rule also eliminates the exclusion of doors equipped with platform lifts from the FMVSS No. 206 requirements. Blue Bird stated that the elimination of this exclusion appeared only in the NPRM regulatory text, but was not discussed in the preamble. Blue Bird commented that the platform lift exclusion is important to the industry and requested that it be retained in the final rule.

As explained in the NPRM, the agency adopted the wheelchair platform lift exclusion in 1985 in response to a petition from Thomas Built Buses (50 FR 12029; March 27, 1985). At that time, wheelchair platform lifts typically retracted so as to cover the doorway opening and provide an adequate barrier to occupant ejections. When we established the exclusion the agency stated that the barrier created by a retracted wheelchair platform lift would be sufficient to prevent ejections.

A 1998 evaluation revealed that wheelchair lift designs have evolved such that they no longer provide adequate protection for vehicle occupants as contemplated when the exclusion was adopted. The intent of the exclusion was that doors could be modified for use with wheelchair lifts and could have noncompliant latching systems, if the wheelchair lift platform could be used to barricade the vehicle doorway when in the retracted and stored position. This intent is no longer met by current wheelchair lift systems, which have platforms not covering or only partially covering the vehicle doorway. For example, some wheelchair lift systems connect only to one side of a vehicle door frame or have platforms that are stored horizontally above the vehicle floor and not serving as a barricade to the vehicle doorway. Also, some power-assisted door openers completely disable the OEM door latching systems. Disabled door latches and a horizontal stored platform would not provide an adequate barrier to preventing occupant ejection if the door were to open during a crash. Further, current wheelchair lift designs can be installed without modifying the OEM door system; installation of a wheelchair platform lift does not necessitate removal of a vehicle door from compliance with FMVSS No. 206. Vehicle manufacturers are now providing power assisted components for the installation of wheelchair adaptive equipment. Therefore, the exclusion is not necessary for doors modified for use with wheelchair lift systems.

V. Certification Information

Along with its comments, Trimark also submitted a series of questions that while related to FMVSS No. 206, were not directly related to the NPRM. Trimark's questions dealt more with compliance testing procedures and self-certification requirements in general. Trimark also asked about the agency's plans to address additional door lock and door latch requirements in the future. We have addressed Trimark's questions below.

Trimark notes that S4.1.1.4 requires each primary door latch and auxiliary door latch system to meet either the dynamic requirements specified in paragraphs (a) and (b) of that section or the calculation requirement. Trimark then asked a series of questions regarding the calculation. What is the definition of the calculation?

As explained in the NPRM and presented in the proposed regulatory text, the agency uses the SAE J 839 definition for the calculation. This is

consistent with the current FMVSS No. 206 requirements.

Trimark further asked if a computer simulation could be used, and could a pulse be applied in the simulation as it is in the dynamic requirement?

As explained above, FMVSS test procedures specify the procedures that will be used by the agency to determine if a motor vehicle complies with the appropriate requirements. We understand Trimark's questions regarding the computer simulation to refer to a simulation of the dynamic requirements. If using reasonable care, Trimark relies on modeling to certify to the dynamic test, it may do so. However, if Trimark were to certify to the dynamic test, the agency would perform the appropriate dynamic test as specified in the standard to determine if a vehicle complies.

Trimark noted that in the NPRM the agency referenced a comprehensive plan to address vehicle rollover. Trimark asked if the plan was subject for public review.

In June 2003 the agency released the report, "Initiatives to Address the Mitigation of Vehicle Rollover." This report is available at <http://www-nrd.nhtsa.dot.gov/vrtc/ca/capubs/IPTRolloverMitigationReport/>.

Trimark also noted that the agency stated that we developed test procedures for door closure and operability requirements, but that these tests need to be validated before issuing a separate notice. Trimark asked if these test procedures are available for public review.

The agency has not yet proposed door closure and operability requirements. Therefore, test procedures have not been published for review and comment in a notice of proposed rulemaking. Research results for the test procedures can be reviewed in Docket NHTSA-2004-19840.

VI. Costs, Benefits, and the Effective Date

This document adds and updates test procedures for door latches. We believe that only one of these, a new sliding door test procedure for FMVSS No. 206, will add costs to vehicles and provide quantifiable benefits for consumers. The agency determined that, aside from sliding doors that require the addition of a second latch in order to comply with the requirements as tested under the procedure adopted in the final rule, the current fleet complies with the final rule adopted today. Further, manufacturers failed to provide any data which indicates that non-compliant vehicles will need significant changes or extended timing to come into

compliance with the proposed upgrades.

The average annual ejections through sliding doors from 1995-2003 resulted in 20 fatalities and 30 injuries. When an occupant is retained in a vehicle and the ejection is eliminated, it does not necessarily mean that the occupant escapes injury. When all vehicles with sliding doors meet this proposal, annually an estimated 7 fatalities and 4 occupants with serious to severe injuries will be reduced in severity to minor injuries (AIS 1) as a result of remaining inside the vehicle.

There were almost 1.4 million vans with sliding doors sold in 2003. The total number of sliding doors (more than 2 million) of these vans is higher because some of the vans have two sliding doors. The sliding door requirement, as tested according to the new test procedure, essentially requires sliding doors to have two latches. An estimated 1.2 million sliding doors (60%) on 660,000 vans (48%) need a second latch to comply. Most of the affected vans have two sliding doors. The incremental cost of adding a second latch is estimated to average \$7.00 per door. Total costs are estimated at \$8.4 million (in 2003 economics).

The Alliance requested that manufacturers be permitted to comply with the final rule according to a phase-in schedule consistent with that proposed by the agency for the side impact upgrade (69 FR 27990; May 17, 2004; Docket No. NHTSA-2004-17694). The Alliance stated that vehicles which will require the addition of a second latch would require major structural modifications to the B-pillars and doors to accommodate a two-latch design.

After considering the comments, the agency has decided to establish an effective date of September 1, 2009. Optional early compliance is permitted immediately. This provides manufacturers adequate time to make the necessary design changes. We do not believe it would be appropriate to tie the effective date for this rule with that of the side impact upgrade, since that would result in unnecessary delay in obtaining the benefits from this rule. The tests for the two rulemakings are very different, and the test for this rule is not a dynamic crash test. As mentioned above, the majority of vehicles already comply with the proposed upgrades of this rulemaking, and those not currently complying should not need significant changes to come into compliance.

VII. Regulatory Analyses and Notices

A. Vehicle Safety Act

Under 49 U.S.C. Chapter 301, *Motor Vehicle Safety* (49 U.S.C. 30101 *et seq.*), the Secretary of Transportation is responsible for prescribing motor vehicle safety standards that are practicable, meet the need for motor vehicle safety, and are stated in objective terms. 49 U.S.C. 30111(a). When prescribing such standards, the Secretary must consider all relevant, available motor vehicle safety information. 49 U.S.C. 30111(b). The Secretary must also consider whether a proposed standard is reasonable, practicable, and appropriate for the type of motor vehicle or motor vehicle equipment for which it is prescribed and the extent to which the standard will further the statutory purpose of reducing traffic accidents and associated deaths. *Id.* Responsibility for promulgation of Federal motor vehicle safety standards was subsequently delegated to NHTSA. 49 U.S.C. 105 and 322; delegation of authority at 49 CFR 1.50.

The agency carefully considered these statutory requirements in adopting these amendments to FMVSS Nos. 206.

The amendments to FMVSS No. 206 will be practicable. This document does not adopt significant changes to the current requirements of FMVSS No. 206. With regard to the sliding door requirement tested according to the new test procedure, 40 percent of current sliding doors already would comply. Additionally, the amendments harmonize the U.S. requirements with the global technical regulation.

These amendments are appropriate for the vehicles subject to the requirements. Today's final rule continues to exclude vehicle doors for which the requirements and test procedures are impractical or unnecessary (*e.g.*, folding doors, roll-up doors).

Finally, the agency has determined that the amendments provide objective procedures for determining compliance. The test procedures have been evaluated by the agency, and we have determined that they produce repeatable and reproducible results. The sliding door load test procedure and the inertial test procedure have also been evaluated by the international automotive community, which has determined them to be practicable. Further, we are adopting test procedures to provide additional objectivity to existing requirements.

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735, October 4, 1993), provides for making determinations whether a regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and to the requirements of the Executive Order. The Order defines a "significant regulatory action" as one that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

We have considered the impact of this rulemaking action under Executive Order 12866 and the Department of Transportation's regulatory policies and procedures. This rulemaking will not have an annual effect on the economy of \$100 million or more, but is significant due to public interest in the issues. Therefore, this document was reviewed by the Office of Management and Budget under E.O. 12866, "Regulatory Planning and Review." This document amends 49 CFR Part 571.206 by adding new performance requirements for hinged side doors and a new compliance test procedure for side sliding doors. These requirements must be met by vehicle manufacturers. The reason for Federal regulation is that consumers do not have any practical way of obtaining information relating to the strength and safety of sliding doors.

The cost of modifications for sliding doors with one latch is estimated to be \$7.00 per door, for a total cost to the entire fleet of approximately \$8.4 million (2003 dollars). For a further explanation of the estimated costs, see the Final Regulatory Evaluation provided in the docket for this rule.

C. Executive Order 13132

NHTSA has examined today's final rule pursuant to Executive Order 13132 (64 FR 43255, August 10, 1999) and concluded that no additional

consultation with States, local governments or their representatives is mandated beyond the rulemaking process. The agency has concluded that the rule does not have federalism implications because the rule 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."

Further, no consultation is needed to discuss the preemptive effect of today's rule. NHTSA rules can have preemptive effect in at least two ways. First, the National Traffic and Motor Vehicle Safety Act contains an express preemptive provision: "When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter." 49 U.S.C. 30103(b)(1). It is this statutory command that preempts State law, not today's rulemaking, so consultation would be inappropriate.

In addition to the express preemption noted above, the Supreme Court has also recognized that State requirements imposed on motor vehicle manufacturers, including sanctions imposed by State tort law, can stand as an obstacle to the accomplishment and execution of a NHTSA safety standard. When such a conflict is discerned, the Supremacy Clause of the Constitution makes their State requirements unenforceable. *See Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). NHTSA has not outlined such potential State requirements in today's rulemaking, however, in part because such conflicts can arise in varied contexts, but it is conceivable that such a conflict may become clear through subsequent experience with today's standard and test regime. NHTSA may opine on such conflicts in the future, if warranted. *See id.* at 883–86.

D. Executive Order 13045

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rulemaking that: (1) Is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental, health or safety risk that NHTSA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the planned rule on children, and explain why the

planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by us.

This rulemaking is not subject to the Executive Order because it is not economically significant as defined in E.O. 12866.

E. Executive Order 12988

With respect to the review of the promulgation of a new regulation, section 3(b) of Executive Order 12988, "Civil Justice Reform" (61 FR 4729, February 7, 1996) requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect; (2) clearly specifies the effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting simplification and burden reduction; (4) clearly specifies the retroactive effect, if any; (5) adequately defines key terms; and (7) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. This document is consistent with that requirement.

Pursuant to this Order, NHTSA notes as follows. The preemptive effect of this rule is discussed above. NHTSA notes further that there is no requirement that individuals submit a petition for reconsideration or pursue other administrative proceeding before they may file suit in court.

F. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996) whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule would not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities.

I certify that this final rule does not have a significant economic impact on a substantial number of small entities. The following is the agency's statement

providing the factual basis for the certification (5 U.S.C. 605(b)).

The final rule directly affects motor vehicle manufacturers and business that design and manufacture door latch systems. According to the Small Business Administration's small business size standards (see 5 CFR 121.201), a motor vehicle manufacturer (NAICS code 336111, Automobile Manufacturing) must have 1000 or fewer employees to qualify as a small business. A business that designs and manufactures door latch systems (NAICS code 336399, All Other Motor Vehicle Parts Manufacturing) must have 750 or fewer employees to qualify as a small business. There are four motor vehicle manufacturers in the United States which would qualify as a small business for the purpose of the Regulatory Flexibility Act. None of these manufacturers make vehicles with sliding doors. Vehicle manufacturers typically have their door latches designed and produced by wholly-owned subsidiaries, and would not be small businesses for the purpose of the Regulatory Flexibility Act. Accordingly, there are very few independent vehicle door latch manufacturers.

G. National Environmental Policy Act

We have analyzed this final rule for the purposes of the National Environmental Policy Act and determined that it does not have any significant impact on the quality of the human environment.

H. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. The final rule does not contain any new information collection requirements.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272) directs us to use voluntary consensus standards in its regulatory activities unless doing so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies, such as the Society of Automotive Engineers (SAE). The NTTAA directs us to provide Congress,

through OMB, explanations when we decide not to use available and applicable voluntary consensus standards.

No voluntary consensus standards were used in developing the requirements because no voluntary standards exist that address the subject of this rulemaking. However, the SAE Recommended Practice J934, September 1998, *Vehicle Passenger Door Hinge Systems* and SAE Recommended Practice J839, September 1998, *Passenger Car Side Door Latch Systems* continue to be incorporated by reference in the regulatory text.

J. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal agencies to prepare a written assessment of the costs, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of more than \$100 million in any one year (adjusted for inflation with base year of 1995). Before promulgating a NHTSA rule for which a written statement is needed, section 205 of the UMRA generally requires us to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows us to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if we publish with the final rule an explanation why that alternative was not adopted.

The final rule will not impose any unfunded mandates under the Unfunded Mandates Reform Act of 1995. This rulemaking does not meet the definition of a Federal mandate because it would not result in costs of \$100 million (adjusted annually for inflation with a base year of 1995 or 116 million in 2003 dollars) or more to either State, local, or tribal governments, in the aggregate, or to the private sector. Thus, this rulemaking is not subject to the requirements of sections 202 and 205 of the UMRA.

K. Regulation Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified

Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

L. Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit <http://dms.dot.gov>.

List of Subjects in 49 CFR Part 571

Motor vehicle safety, Reporting and Recordkeeping requirements, and Tires.

In consideration of the foregoing, NHTSA amends 49 CFR 571.206 as follows:

PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

1. The authority citation for Part 571 continues to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30117 and 30166; delegation of authority at 49 CFR 1.50.

2. Section 571.206 is amended by:

(a) Revising S1; S2; the definitions of “auxiliary door latch,” “back door,” “fork-bolt,” “primary door latch,” “side front door,” “side rear door,” and “trunk lid” in S3; S4 through S4.1.1.3; S4.1.2; S4.2 through S4.2.1.2; S4.2.2; S4.3; S5.1 through S5.1.1.2; S5.1.2; S5.2; S5.2.1; S5.2.2; Figure 1; and

(b) Adding “auxiliary door latch system,” “body member,” “door closure warning system,” “door hinge system,” “door latch system,” “door member,” “door system,” “double door,” “folding door,” “fork-bolt opening direction,” “fully-latched position,” “hinge,” “hinge pin,” “latch,” “primary door latch system,” “secondary latched position,” “striker,” to the definitions in S3; S4.1.1.4; S4.1.2.1 through S4.1.2.3; S4.2.1.3; S4.2.2.1; S4.2.2.2; S4.3.1; S4.3.2; S5; S5.1.1.3; S5.1.1.4; S5.1.2.1 through S5.1.2.4; S5.2.1.1 through S5.2.1.4; S5.2.2.1 through S5.2.2.4; S5.3; Figures 2 through 4; Table 1; Figures 5 through 9; and

(c) Removing “cargo-type door” and “fork-bolt opening” from the definitions in S3, S4.1.3, S4.1.3.1, S4.4 through S4.5, and S5.4 through S5.5, to read as follows:

§ 571.206 Standard 206; Door locks and door retention components.

S1. *Scope and Purpose.* This standard specifies requirements for vehicle door locks and door retention components, including latches, hinges, and other supporting means, to minimize the likelihood of occupants being ejected from a vehicle as a result of impact.

S2. *Application.* This standard applies to passenger cars, multipurpose passenger vehicles, and trucks, and buses with a gross vehicle weight rating (GVWR) of 4,536 kg or less.

S3. Definitions.

Auxiliary Door Latch is a latch equipped with a fully latched position, with or without a secondary latched position, and fitted to a door or door system equipped with a primary door latch system.

Auxiliary Door Latch System consists of door latches and strikers other than those associated with the primary door latch system.

Back Door is a door or door system on the back end of a motor vehicle through which passengers can enter or depart the vehicle or cargo can be loaded or unloaded. It does not include:

(a) A trunk lid; or

(b) A door or window composed entirely of glazing material and whose latches and/or hinge systems are attached directly to the glazing material.

Body Member is that portion of the hinge normally affixed to the body structure.

Door Closure Warning System is a system that will activate a visual signal when a door latch system is not in its fully latched position and the vehicle ignition is activated.

Door Hinge System is one or more hinges used to support a door.

Door Latch System consists of latches and strikers installed on a door system.

Door Member is that portion of the hinge normally affixed to the door structure and constituting the swinging member.

Door System is the door, latch, striker, hinges, sliding track combinations and other door retention components on a door and its surrounding doorframe. The door system of a double door includes both doors.

Double Door is a system of two doors where the front door or wing door opens first and connects to the rear door or bolted door, which opens second.

Folding Door is a movable barrier, which will close off an entranceway to a bus, multipurpose passenger vehicle or truck, consisting of two or more hinge panels that swing, slide, or rotate; does not have a striker and latch assembly.

Fork-bolt is the part of the latch that engages and retains the striker when in a latched position.

Fork-bolt Opening Direction is the direction opposite to that in which the striker enters the latch to engage the fork-bolt.

Fully Latched Position is the coupling condition of the latch that retains the door in a completely closed position.

Hinge is a device system used to position the door relative to the body structure and control the path of the door swing for passenger ingress and egress.

Hinge Pin is that portion of the hinge normally interconnecting the body and door members and establishing the swing axis.

Latch is a device employed to maintain the door in a closed position relative to the vehicle body with provisions for deliberate release (or operation).

Primary Door Latch is a latch equipped with both a fully latched position and a secondary latched position and is designated as a “primary door latch” by the manufacturer.

Primary Door Latch System consists of a primary door latch(s) and a striker(s).

Secondary Latched Position refers to the coupling condition of the latch that retains the door in a partially closed position.

Side Front Door is a door that, in a side view, has 50 percent or more of its opening area forward of the rearmost point on the driver's seat back, when the seat back is adjusted to its most vertical and rearward position.

Side Rear Door is a door that, in a side view, has 50 percent or more of its opening area to the rear of the rearmost point on the driver's seat back, when the driver's seat is adjusted to its most vertical and rearward position.

Striker is a device with which the latch engages to maintain the door in the fully latched or secondary latched position.

Trunk Lid is a movable body panel that provides access from outside the vehicle to a space wholly partitioned from the occupant compartment by a permanently attached partition or fixed or fold-down seat back.

S4. *Requirements.* The requirements apply to all side and back doors, that lead directly into a compartment that contains one or more seating accommodations and the associated door components, except for those on folding doors, roll-up doors, detachable doors, and on bus doors used only for emergency egress purposes and labeled accordingly.

S4.1 Hinged Doors

S4.1.1 *Primary and Auxiliary Door Latch Systems.* Each hinged door system shall be equipped with at least one

primary door latch system. By the time a vehicle is certified a manufacturer shall designate the door latch system(s) that is the "primary door latch system(s)." Upon certification, a manufacturer may not thereafter alter the designation of a primary door latch system. Each manufacturer shall, upon request from the National Highway Traffic Safety Administration, provide information regarding such designation.

S4.1.1.1 *Load Test One.*

(a) Each primary door latch system and auxiliary door latch system, when in the fully latched position, shall not separate when a load of 11,000 N is applied in the direction perpendicular to the face of the latch such that the latch and the striker anchorage are not compressed against each other, when tested in accordance with S5.1.1.1.

(b) When in the secondary latched position, the primary door latch system shall not separate when a load of 4,500 N is applied in the same direction specified in paragraph (a) of this section when tested in accordance with S5.1.1.1.

S4.1.1.2 *Load Test Two.*

(a) Each primary door latch system and auxiliary door latch system, when in the fully latched position, shall not separate when a load of 9,000 N is applied in the fork-bolt opening direction and parallel to the face of the latch, when tested in accordance with S5.1.1.2.

(b) When in the secondary latched position, the primary door latch system shall not separate when a load of 4,500 N is applied in the same direction specified in paragraph (a) of this section when tested in accordance with S5.1.1.2.

S4.1.1.3 *Load Test Three.*

(Applicable only to back doors that open in a vertical direction). Each primary door latch system on back doors, when in the fully latched position, shall not separate when a load of 9,000 N is applied in a direction orthogonal to the directions specified in S4.1.1.1 and S4.1.1.2 when tested in accordance with S5.1.1.3.

S4.1.1.4 *Inertial Load.* Each primary door latch system and auxiliary door latch system shall meet either the dynamic requirements specified in paragraphs (a) and (b) of S4.1.1.4 or the calculation of inertial load resistance specified in paragraph (c) of S4.1.1.4.

(a) Each primary door latch and auxiliary door latch on each hinged door shall not disengage from the fully latched position when an inertia load is applied to the door latch system, including the latch and its activation device, in the directions parallel to the vehicle's longitudinal and transverse

axes with the locking device disengaged, when tested as specified in S5.1.1.4(b).

(b) Each primary door latch and auxiliary door latch on each hinged back door shall also not disengage from the fully latched position when an inertia load is applied to the door latch system, including the latch and its activation device, in the direction parallel to the vehicle's vertical axis with the locking device disengaged, when tested as specified in S5.1.1.4(b).

(c) Each component or subassembly is calculated for its minimum inertial load resistance in a particular direction. The combined resistance to the unlatching operation must assure that the door latch system, when properly assembled in the vehicle door, will remain latched when subjected to an inertial load of 30 g in the vehicle directions specified in paragraph (a) of this section or paragraph (b) of this section, as applicable, when calculated in accordance with S5.1.1.4 (a).

S4.1.2 *Door Hinges.*

S4.1.2.1 When tested in accordance with S5.1.2, each door hinge system shall:

(a) Support the door,

(b) Not separate when a longitudinal load of 11,000 N is applied,

(c) Not separate when a transverse load of 9,000 N is applied, and

(d) For back doors,

(1) Not separate when a load of 11,000 N is applied perpendicular to the hinge face plate (longitudinal load test) such that the hinge plates are not compressed against each other (Load Test One).

(2) Not separate when a load of 9,000 N is applied perpendicular to the axis of the hinge pin and parallel to the hinge face plate (transverse load test) such that the hinge plates are not compressed against each other (Load Test Two).

(3) Not separate when a load of 9,000 N is applied in the direction of the axis of the hinge pin (Load Test Three—only for back doors that open in a vertical direction).

S4.1.2.2 If a single hinge within the hinge system is tested instead of the entire hinge system, the hinge must bear a load proportional to the total number of hinges in the hinge system. (For example, an individual hinge in a two-hinge system must be capable of withstanding 50% of the load requirements of the total system.)

S4.1.2.3 On side doors with rear mounted hinges that can be operated independently of other doors,

(a) The interior door handle shall be inoperative when the speed of the vehicle is greater than or equal to 4 km/h, and

(b) A door closure warning system shall be provided for those doors. The door closure warning system shall be located where it can be clearly seen by the driver.

S4.2 *Sliding Side Doors.*

S4.2.1 *Latch System.* Each sliding door system shall be equipped with either:

(a) At least one primary door latch system, or

(b) A door latch system with a fully latched position and a door closure warning system. The door closure warning system shall be located where it can be clearly seen by the driver. Upon certification a manufacturer may not thereafter alter the designation of a primary latch. Each manufacturer shall, upon request from the National Highway Traffic Safety Administration, provide information regarding such designation.

S4.2.1.1 *Load Test One.*

(a) At least one door latch system, when in the fully latched position, shall not separate when a load of 11,000 N is applied in the direction perpendicular to the face of the latch such that the latch and the striker anchorage are not compressed against each other, when tested in accordance with S5.2.1.1.

(b) In the case of a primary door latch system, when in the secondary latched position, the door latch system shall not separate when a load of 4,500 N is applied in the same direction specified in paragraph (a) of this section when tested in accordance with S5.2.1.1.

S4.2.1.2 *Load Test Two.*

(a) At least one door latch system, when in the fully latched position, shall not separate when a load of 9,000 N is applied in the fork-bolt opening direction and parallel to the face of the latch when tested in accordance with S5.2.1.2.

(b) In the case of a primary door latch system, when in the secondary latched position, the door latch system shall not separate when a load of 4,500 N is applied in the same direction specified in paragraph (a) of this section when tested in accordance with S5.2.1.2.

S4.2.1.3 *Inertial Load.* Each door latch system certified as meeting the requirements of S4.2.1.1 and S4.2.1.2 shall meet either the dynamic requirements specified in paragraph (a) of this section or the calculation of inertial load resistance specified in paragraph (b) of this section.

(a) The door latch system shall not disengage from the fully latched position when an inertial load is applied to the door latch system, including the latch and its activation mechanism, in the directions parallel to the vehicle's longitudinal and

transversal axes with the locking mechanism disengaged, and when tested in accordance with S5.1.1.4(b).

(b) The minimum inertial load resistance can be calculated for each component or subassembly. Their combined resistance to the unlatching operation must assure that the door latch system, when properly assembled in the vehicle door, will remain latched when subjected to an inertia load of 30 g in the vehicle directions specified in paragraph (a) of this section, when calculated in accordance with S5.1.1.4(a).

S4.2.2 Door System.

S4.2.2.1 The track and slide combination or other supporting means for each sliding door, while in the closed fully latched position, shall not separate from the door frame when a total force of 18,000 N along the vehicle transverse axis is applied to the door as specified in S5.2.2.

S4.2.2.2 When a sliding door system is tested in accordance with S5.2.2, the following conditions shall not occur:

(a) A separation which permits a sphere with a diameter of 100 mm to pass unobstructed between the exterior of the vehicle to the interior of the vehicle, while the required force is maintained as shown in Figure 1.

(b) Either force application device reaches a total displacement of 300 mm.

S4.3 Door Locks. Each door shall be equipped with at least one locking device which, when engaged, shall prevent operation of the exterior door handle or other exterior latch release control and which has an operating means and a lock release/engagement device located within the interior of the vehicle.

S4.3.1 Rear side doors. Each rear side door shall be equipped with at least one locking device which has a lock release/engagement mechanism located within the interior of the vehicle and readily accessible to the driver of the vehicle or an occupant seated adjacent to the door, and which, when engaged, prevents operation of the interior door handle or other interior latch release control and requires separate actions to unlock the door and operate the interior door handle or other interior latch release control.

S4.3.2 Back doors. Each back door equipped with an interior door handle or other interior latch release control, shall be equipped with at least one locking device that meets the requirements of S4.3.1.

S5 Test Procedures.

S5.1 Hinged Doors.

S5.1.1 Primary and Auxiliary Door Latches.

S5.1.1.1 Load Test One Force Application. The test procedures for S4.1.1.1 and S4.2.1.1 are as follows:

(a) Fully latched position.

(1) Attach the test fixture shown in Figure 2 to the mounting provisions of the latch and striker. Align the direction of engagement parallel to the linkage of the fixture. Mount the fixture with latch and striker in the fully latched position in the test machine so as to apply a load perpendicular to the face of the latch.

(2) Locate weights so as to apply a 900 N load tending to separate the latch and striker in the direction of the latch opening.

(3) Apply the test load, in the direction specified in S4.1.1.1 and Figure 5, at a rate not to exceed 5 mm/min until the required load has been achieved. Record the maximum load achieved.

(b) Secondary Latched Position.

(1) Attach the test fixture shown in Figure 2 to the mounting provisions of the latch and striker. Align the direction of engagement parallel to the linkage of the fixture. Mount the fixture with latch and striker in the secondary position in the test machine so as to apply a load perpendicular to the face of the latch.

(2) Locate weights so as to apply a 900 N load tending to separate the latch and striker in the direction of the latch opening.

(3) Apply the test load, in the direction specified in S4.1.1.1 and Figure 5, at a rate not to exceed 5 mm/min until the required load has been achieved. Record maximum load achieved.

(4) The test plate to which the door latch is mounted will have a striker cut-out configuration similar to the environment in which the door latch will be mounted on normal vehicle doors.

S5.1.1.2 Load Test Two Force Application. The test procedures for S4.1.1.2 and S4.2.1.2 are as follows:

(a) Fully Latched Position.

(1) Adapt the test fixture shown in Figure 3 to the mounting provisions of the latch and striker. Mount the fixture with latch and striker in the fully latched position in the test machine so to apply a load in the direction of latch opening.

(2) Apply the test load, in the direction specified in S4.1.1.2 and Figure 5, at a rate not to exceed 5 mm/min until the required load has been achieved. Record the maximum load achieved.

(b) Secondary Latched Position.

(1) Adapt the test fixture shown in Figure 3 to the mounting provisions of the latch and striker. Mount the fixture with latch and striker in the secondary

latched position in the test machine so as to apply a load in the direction of latch opening.

(2) Apply the test load, in the direction specified in S4.1.1.2 and Figure 5, at a rate not to exceed 5 mm/min until the required load has been achieved. Record the maximum load achieved.

S5.1.1.3 Load Test Three Force Application. The test procedures for S4.1.1.3 are as follows:

(a) Adapt the test fixture shown in Figure 4 to the mounting provisions of the latch and striker. Mount the fixture with latch and striker in the fully latched position in the test machine so as to apply a load in the direction specified in S4.1.1.3 and Figure 5.

(b) Apply the test load, in the direction specified in S4.1.1.3 and Figure 5, at a rate not to exceed 5 mm/min until the required load has been achieved. Record the maximum load required.

S5.1.1.4 Inertial Force Application. The test procedures for S4.1.1.4 and S4.2.1.3 are as follows:

(a) Calculation. The calculation is performed in accordance with paragraph 6 of Society of Automotive Engineers Recommended Practice J839, *Passenger Car Side Door Latch Systems*, June 1991.

(b) Dynamic Test. The dynamic inertial force application is tested according to the setup specified in paragraph (1) or (2) of this section.

(1) Test Setup and Directions for Full Vehicle Test.

(i) Test Setup.

(A) Rigidly secure the full vehicle to an acceleration device that, when accelerated together, will assure that all points on the crash pulse curve are within the corridor defined in Table 1 and Figure 6.

(B) Install the equipment used to record door opening (doors may be tethered to avoid damaging the recording equipment).

(C) Close the door(s) to be tested and ensure that the door latch(es) is in the fully-latched position, that the door(s) is unlocked, and that all windows, if provided, on the door(s) are closed.

(ii) Test Directions. (See Figure 7)

(A) Longitudinal Setup 1. Orient the vehicle so that its longitudinal axis is aligned with the axis of the acceleration device, simulating a frontal impact.

(B) Longitudinal Setup 2. Orient the vehicle so that its longitudinal axis is aligned with the axis of the acceleration device, simulating a rear impact.

(C) Transverse Setup 1. Orient the vehicle so that its transverse axis is aligned with the axis of the acceleration device, simulating a driver-side impact.

(D) Transverse Setup 2. (Only for vehicles having different door arrangements on each side.) Orient the vehicle so that its transverse axis is aligned with the axis of the acceleration device, simulating a side impact in the direction opposite to that described in b(1)(ii)(C) of this paragraph.

(2) *Test Setup and Directions for Door Test.*

(i) Test Setup.

(A) Mount the door assemblies, consisting of at least the door latch(es), exterior door handle(s) with mechanical latch operation, interior door opening lever(s), and locking device(s), either separately or combined to a test fixture. Each door and striker is mounted to the test fixture to correspond to its orientation on the vehicle and to the directions specified in b(1)(ii) of this paragraph.

(B) Mount the test fixture to the acceleration device, and install the equipment used to record door opening.

(C) Ensure that the door latch is in the fully-latched position, that the door is tethered and unlocked, and that any windows are closed.

(ii) Test Directions. (See Figure 7)

(A) Longitudinal Setup 1. Orient the door subsystem(s) on the acceleration device in the direction of a frontal impact.

(B) Longitudinal Setup 2. Orient the door subsystem(s) on the acceleration device in the direction of a rear impact.

(C) Transverse Setup 1. Orient the door subsystem(s) on the acceleration device in the direction of a driver-side impact.

(D) Transverse Setup 2. Orient the door subsystem(s) on the acceleration device in the direction opposite to that described in (b)(2)(ii)(C) of this paragraph.

(E) Vertical Setup 1 (applicable only to back doors that open in a vertical direction). Orient the door subsystem(s) on the acceleration device so that its vertical axis (when mounted in the vehicle) is aligned with the axis of the acceleration device, simulating a rollover impact where the force is applied in the direction from the top to the bottom of the door (when mounted in a vehicle).

(F) Vertical Setup 2 (applicable only to back doors that open in a vertical direction). Orient the door subsystem(s) on the acceleration device so that its vertical axis (when mounted in the vehicle) is aligned with the axis of the acceleration device, simulating a rollover impact where the force is applied in the direction opposite to that described in (b)(2)(ii)(E) of this paragraph.

(3) *Test Operation.*

(i) The acceleration device platform shall be instrumented with an accelerometer and data processing system that conforms to the requirements specified in Society of Automotive Engineers (SAE) Recommended Practice J211 December 2003, "Instrumentation for Impact Test—Part 1—Electronic Instrumentation", Channel Class 60. The accelerometer sensitive axis is parallel to the direction of test platform travel.

(ii) Maintaining a minimum acceleration level of 30 g for a period of at least 30 ms, while keeping the recorded acceleration within the pulse corridor defined in Table 1 and Figure 6, accelerate the acceleration device in the following directions:

(A) For Full Vehicle Tests, in the directions specified in S5.1.1.4(b)(1)(ii)(A) through S5.1.1.4(b)(1)(ii)(D).

(B) For Door Tests, in the directions specified in S5.1.1.4(b)(2)(ii)(A) through S5.1.1.4(b)(2)(ii)(F).

(iii) Check recording device for door opening and/or closure during the test.

(iv) If at any point in time, the pulse exceeds 36 g and the test specifications are met, the test shall be considered valid.

S5.1.2 *Door Hinges.* The test procedures for S4.1.2 are as follows:

S5.1.2.1 Multiple Hinge Evaluation;

S5.1.2.1.1 *Longitudinal Load Test.*

(a) Attach the test fixture illustrated in Figure 8 to the mounting provisions of the hinge system. Hinge attitude is configured to simulate vehicle position (door fully closed) relative to the hinge centerline. For test purposes, the distance between the extreme end of one hinge in the system to the extreme end of another hinge in the system is to be set at $406 \text{ mm} \pm 4 \text{ mm}$. The load is to be applied equidistant between the linear center of the engaged portions of the hinge pins and through the centerline of the hinge pin in the longitudinal vehicle direction (see Figure 8).

(b) Apply the test load at a rate not to exceed 5 mm/min until the required load has been achieved. Record maximum load achieved.

S5.1.2.1.2 *Transverse Load Test*

(a) Attach the test fixture shown in Figure 8 to the mounting provisions of the hinge system. Hinge attitude is configured to simulate vehicle position (door fully closed) relative to the hinge centerline. For test purposes, the distance between the extreme end of one hinge in the system to the extreme opposite end of another hinge in the system is to be set at $406 \text{ mm} \pm 4 \text{ mm}$. The load is to be applied equidistant

between the linear center of the engaged portions of the hinge pins and through the centerline of the hinge pin in the transverse vehicle direction (see Figure 8).

(b) Apply the test load at a rate not to exceed 5 mm/min until the required load has been achieved. Record maximum load achieved.

S5.1.2.2 *Back Door Hinge Load Test*

(a) Load Test One

(1) Attach the test fixture illustrated in Figure 8 to the mounting provisions of the hinge system. Hinge attitude is configured to simulate vehicle position (door fully closed) relative to the hinge centerline. For test purposes, the distance between the extreme end of one hinge system in the system to the extreme opposite end of another hinge system is to be set at $406 \pm 4 \text{ mm}$. The load is to be applied equidistant between the linear center of the engaged portions of the hinge pins and through the centerline of the hinge pin, and as specified in S4.1.2.1(d)(1). (See Figure 9).

(2) Apply the test load at a rate not to exceed 5 mm/min until the required load has been achieved. Failure consists of a separation of either hinge. Record the maximum load achieved.

(b) Load Test Two

(1) Attach the test fixture illustrated in Figure 8 to the mounting provisions of the hinge system. Hinge attitude is configured to simulate vehicle position (door fully closed) relative to the hinge centerline. For test purposes, the distance between the extreme end of one hinge system in the system to the extreme opposite end of another hinge system is to be set at $406 \pm 4 \text{ mm}$. The load is to be applied equidistant between the linear center of the engaged portions of the hinge pins and through the centerline of the hinge pin, and as specified in S4.1.2.1(d)(2). (See Figure 9).

(2) Apply the test load at a rate not to exceed 5 mm/min until the required load has been achieved. Failure consists of a separation of either hinge. Record the maximum load achieved.

(c) Load Test Three

(1) Attach the test fixture illustrated in Figure 8 to the mounting provisions of the hinge system. Hinge attitude is configured to simulate vehicle position (door fully closed) relative to the hinge centerline. For test purposes, the distance between the extreme end of one hinge system in the system to the extreme opposite end of another hinge system is to be set at $406 \pm 4 \text{ mm}$. The load is to be applied through the centerline of the hinge pin, and as specified in S4.1.2.1(d)(3). (See Figure 9).

(2) Apply the test load at a rate not to exceed 5 mm/min until the required load has been achieved. Failure consists of a separation of either hinge. Record the maximum load achieved.

S5.1.2.3 *Single Hinge Evaluation.*

Individual hinges of a hinge system are tested in accordance with the procedures below:

(a) *Longitudinal Load.* Attach the test fixture illustrated in Figure 8 to the mounting provisions of the hinge. Hinge attitude is configured to simulate the vehicle position (door fully closed) relative to the hinge centerline. For test purposes, the load is to be applied equidistant between the linear center of the engaged portions of the hinge pin and through the centerline of the hinge pin in the longitudinal vehicle direction. Apply the test load at a rate not to exceed 5 mm/min until the required load has been achieved. Failure consists of a separation of either hinge. Record maximum load achieved.

(b) *Transverse Load.* Attach the test fixture illustrated in Figure 8 to the mounting provisions of the hinge. Hinge attitude is configured to simulate the vehicle position (door fully closed) relative to the hinge centerline. For test purposes, the load is to be applied equidistant between the linear center of the engaged portions of the hinge pin and through the centerline of the hinge pin in the transverse vehicle direction. Apply the test load at a rate not to exceed 5 mm/min until the required load has been achieved. Failure consists of a separation of either hinge. Record maximum load achieved.

(c) *Back Door Hinge Load Tests.*

(1) *Load Test One.* Attach the test fixture illustrated in Figure 8 to the mounting provisions of the hinge. Hinge attitude is configured to simulate the vehicle position (door fully closed) relative to the hinge centerline. For test purposes, the load is to be applied equidistant between the linear center of the engaged portions of the hinge pin and through the centerline of the hinge pin, and as specified in S4.1.2.1(d)(1). (See Figure 9). Apply the test load at a rate not to exceed 5 mm/min until the required load has been achieved. Failure consists of a separation of either hinge. Record maximum load achieved.

(2) *Load Test Two.* Attach the test fixture illustrated in Figure 8 to the mounting provisions of the hinge. Hinge attitude is configured to simulate the vehicle position (door fully closed) relative to the hinge centerline. For test purposes, the load is to be applied equidistant between the linear center of the engaged portions of the hinge pin and through the centerline of the hinge pin, and as specified in S4.1.2.1(d)(2).

(See Figure 9). Apply the test load at a rate not to exceed 5 mm/min until the required load has been achieved. Failure consists of a separation of either hinge. Record maximum load achieved.

(3) *Load Test Three.* Attach the test fixture illustrated in Figure 8 to the mounting provisions of the hinge. Hinge attitude is configured to simulate the vehicle position (door fully closed) relative to the hinge centerline. For test purposes, the load is to be applied through the centerline of the hinge pin, and as specified in S4.1.2.1(d)(3). (See Figure 9). Apply the test load at a rate not to exceed 5 mm/min until the required load has been achieved. Failure consists of a separation of either hinge. Record maximum load achieved.

S5.1.2.4 For piano-type hinges, the hinge spacing requirements are not applicable and arrangement of the test fixture is altered so that the test forces are applied to the complete hinge.

S5.2 *Sliding Side Doors.*

S5.2.1 *Door Latches.*

S5.2.1.1 *Load Test One Force Application.* The requirements of S4.2.1.1 are tested in accordance with the procedures specified in S5.1.1.1.

S5.2.1.2 *Load Test Two Force Application.* The requirements of S4.2.1.2 are tested in accordance with the procedures specified in S5.1.1.2.

S5.2.1.3 [Reserved.]

S5.2.1.4 [Reserved.]

S5.2.2 *Door System.* The test procedures for S4.2.2 are as follows:

S5.2.2.1 Tests are conducted using a full vehicle with the sliding door and its retention components.

S5.2.2.2 The test is conducted using two force application devices capable of applying the outward transverse forces specified in S5.2.2.4. The test setup is shown in Figure 10. The force application system shall include the following:

(a) Two force application plates, (b) Two force application devices capable of applying the outward transverse load requirements for a minimum displacement of 300 mm.

(c) Two load cells of sufficient capacity to measure the applied loads specified in S5.2.2.4.

(d) Two linear displacement measurement devices required for measuring force application device displacement during the test.

(e) Equipment to measure for a 100 mm separation as specified in S4.2.2.2(a), while respecting all relevant safety and health requirements.

S5.2.2.3 *Test Setup.*

(a) Remove all interior trim and decorative components from the sliding door assembly.

(b) Remove seats and any interior components that may interfere with the

mounting and operation of the test equipment and all pillar trim and any non-structural components that overlap the door and cause improper placement of the force application plates.

(c) Each force application device and associated support structure is rigidly fixed on a horizontal surface on the vehicle floor, while applying the loads.

(d) Determine the forward and aft edge of the sliding door, or its adjoining vehicle structure, that contains a latch/striker.

(e) Close the sliding door, ensuring that all door retention components are fully engaged.

(f) For any tested door edge that contains one latch/striker, the following set-up procedures are used:

(1)(i) The force application plate is 150 mm in length, 50 mm in width, and at least 15 mm in thickness. The plate edges are rounded to a radius of 6 mm $\pm$ 1 mm.

(ii) The plates are rigidly fixed perpendicular to the force application devices to maintain the displacement of the force application plate in the transverse direction. The plates allow for longitudinal rotation with respect to the vehicle's centerline axis. The plates do not allow for rotation in the vehicle's transverse direction.

(2) Place the force application device and force application plate against the door so that the applied force is perpendicular to the vertical longitudinal plane that passes through the vehicle's longitudinal centerline, and vertically centered on the door-mounted portion of the latch/striker.

(3) The force application plate is positioned such that the long edge of the plate is as close to the edge of the interior edge of the door as possible, but not such that the forward edge of plate is more than 12.5 mm from the interior edge.

(g) For any tested door edge that contains more than one latch/striker, the following setup procedures are used:

(1)(i) The force application plate is 300 mm in length, 50 mm in width, and at least 15 mm in thickness. The plate edges are rounded to a radius of 6 mm $\pm$ 1 mm.

(ii) The plates are rigidly fixed perpendicular to the force application devices to maintain the displacement of the force application plate in the transverse direction. The plates allow for longitudinal rotation with respect to the vehicle's centerline axis. The plates do not allow for rotation in the vehicle's transverse direction.

(2) Place the force application device and force application plate against the door so that the applied force is perpendicular to the vertical

longitudinal plane that passes through the vehicle's longitudinal centerline, and vertically centered on a point midway between the outermost edges of the latch/striker assemblies.

(3) The force application plate is positioned such that the long edge of the plate is as close to the edge of the interior edge of the door as possible, but not such that the forward edge of plate is more than 12.5 mm from the interior edge.

(h) For any tested door edge that does not contain at least one latch/striker, the following set-up procedures are used:

(1)(i) The force application plate is 300 mm in length, 50 mm in width, and at least 15 mm in thickness. The plate edges are rounded to a radius of 6 mm $\pm$ 1 mm.

(ii) The plates are rigidly fixed perpendicular to the force application devices to maintain the displacement of the force application plate in the transverse direction. The plates allow for longitudinal rotation with respect to the vehicle's centerline axis. The plates do not allow for rotation in the vehicle's transverse direction.

(2) Place the force application device and force application plate against the door so that the applied force is perpendicular to the vertical longitudinal plane that passes through the vehicle's longitudinal centerline, and vertically centered on a point midway along the length of the door edge ensuring that the loading device avoids contact with the window glazing.

(3) The force application plate is positioned such that the long edge of the plate is as close to the edge of the interior edge of the door as possible, but not such that the forward edge of plate is more than 12.5 mm from the interior edge.

(i) The door is unlocked. No extra fixtures or components may be welded or affixed to the sliding door or any of its components.

(j) Place the load application structure so that the force application plates are in contact with the interior of the sliding door.

(k) Apply a preload of 500 N to each actuator and "zero" the displacement measuring device.

S5.2.2.4 *Test Procedure.*

(a) Move each force application device at any rate up to 2000 N per minute until a force of 9,000 N is achieved on each force application device or until either force application device reaches a total displacement of 300 mm.

(b) If one of the force application devices reaches the target force of 9,000 N prior to the other, maintain the 9,000 N force with that force application device until the second force application device reaches the 9,000 N force.

(c) Once both force application devices have achieved 9,000 N each hold the resulting load.

(d) Maintain each force application device load as specified in paragraph (c) and within 30 seconds measure the separation between the exterior edge of the doorframe and the interior of the door along the perimeter of the door.

S5.3 [Reserved].

BILLING CODE 4910-59-P

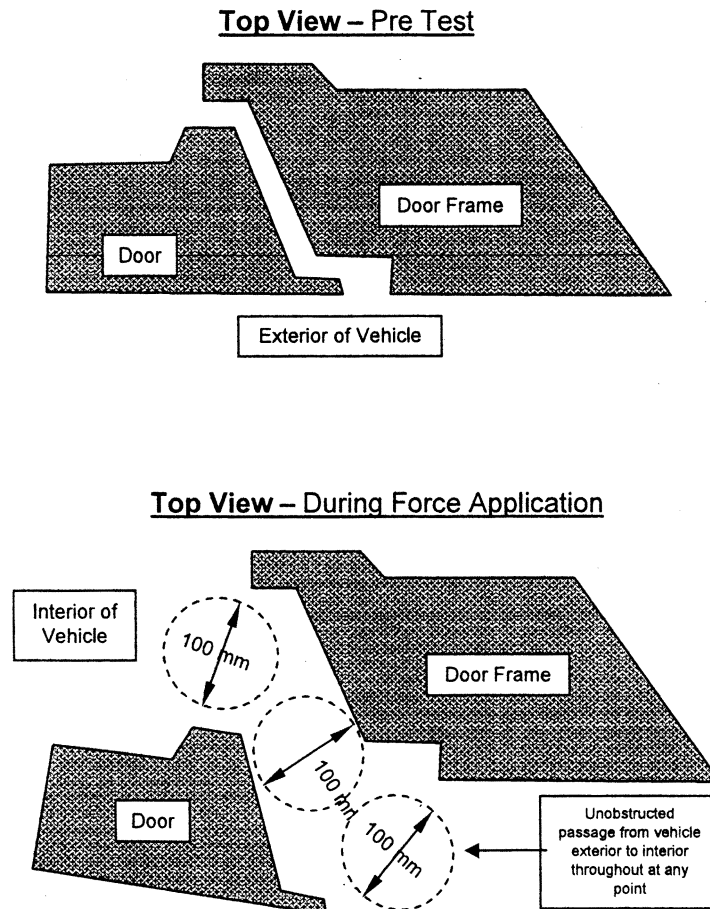
FIGURE 1. EVALUATION OF SLIDING DOOR GAP SEPARATION

FIGURE 2 - DOOR LATCH – TENSILE TESTING FIXTURE FOR LOAD TEST 1

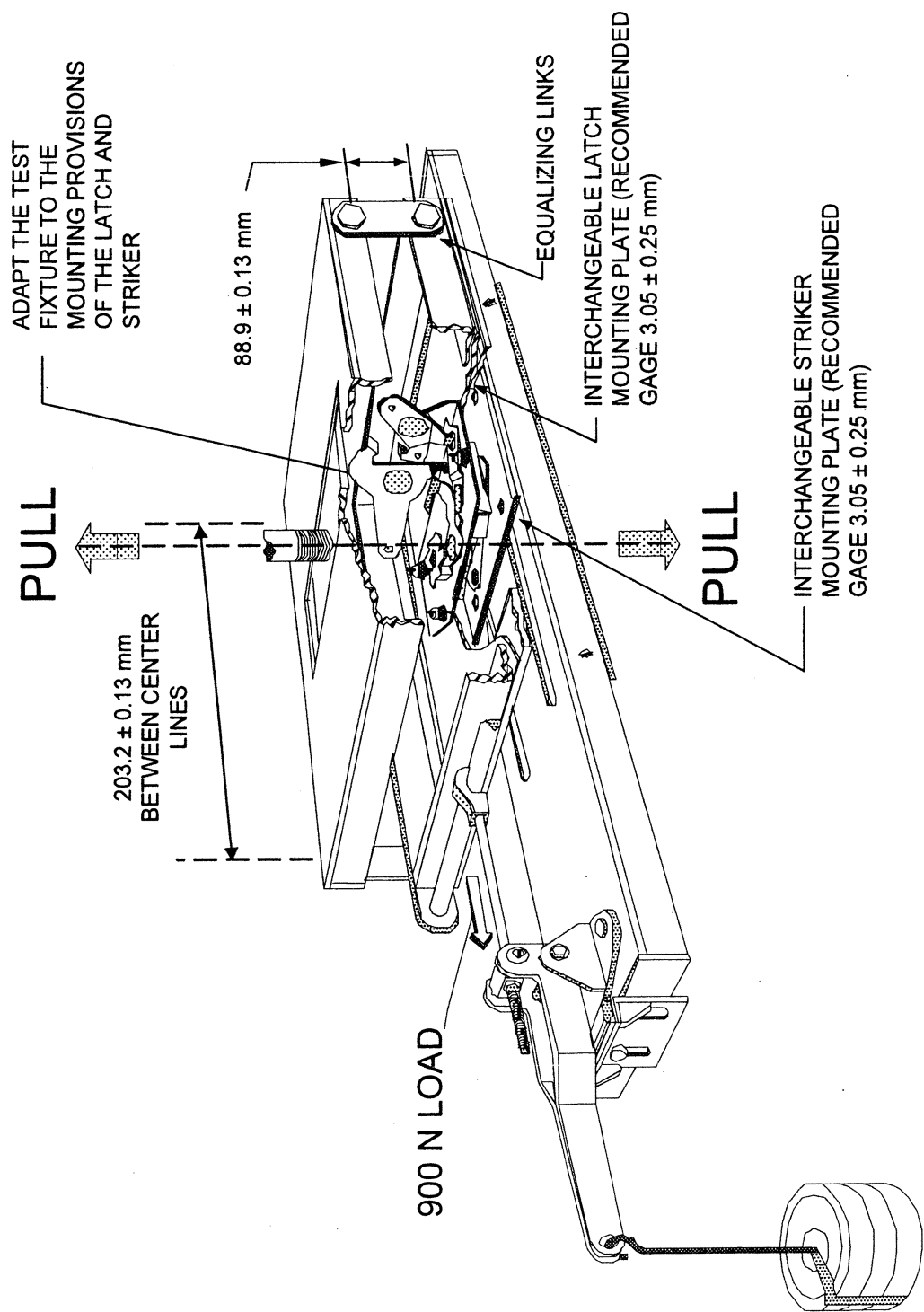


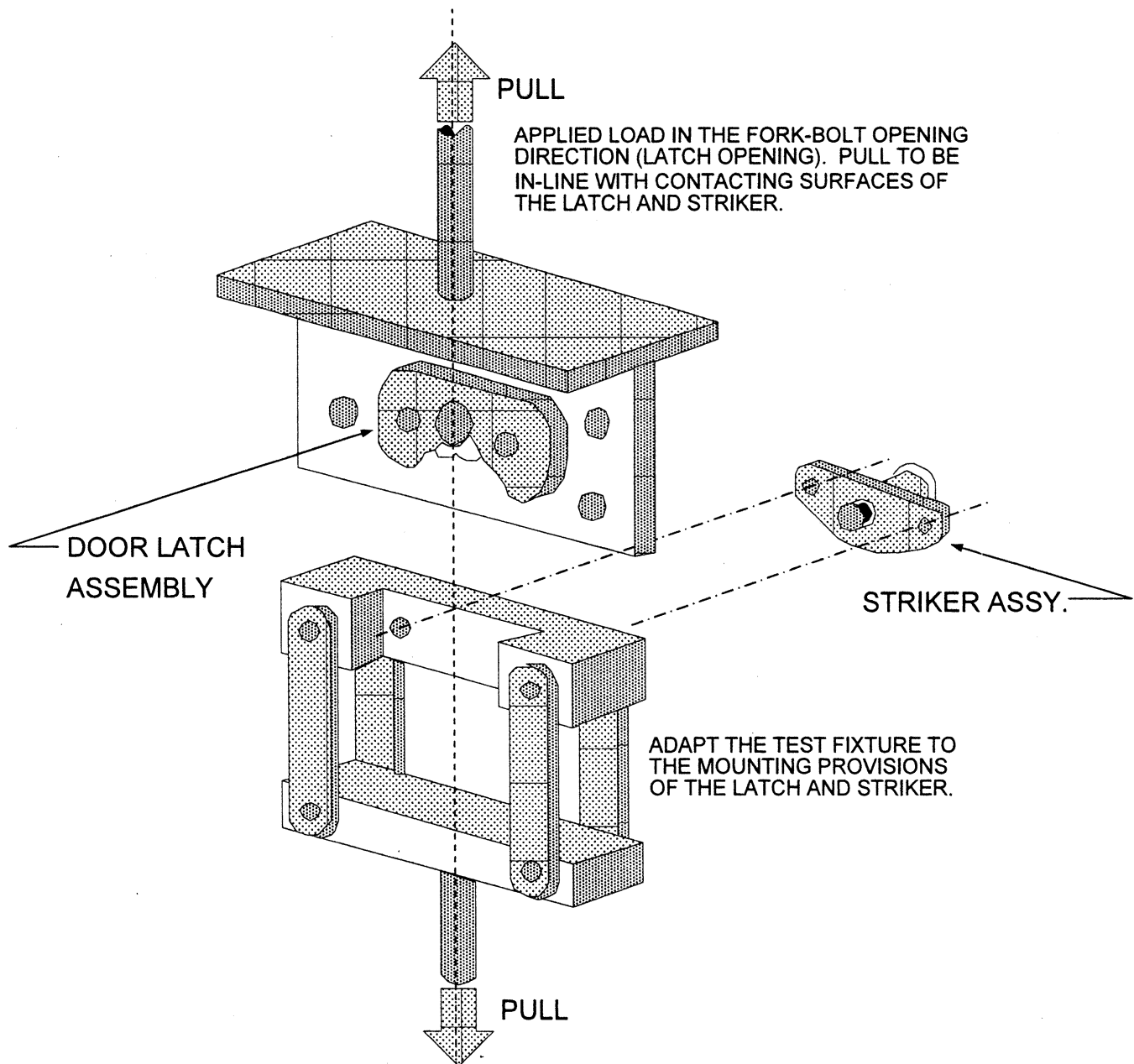
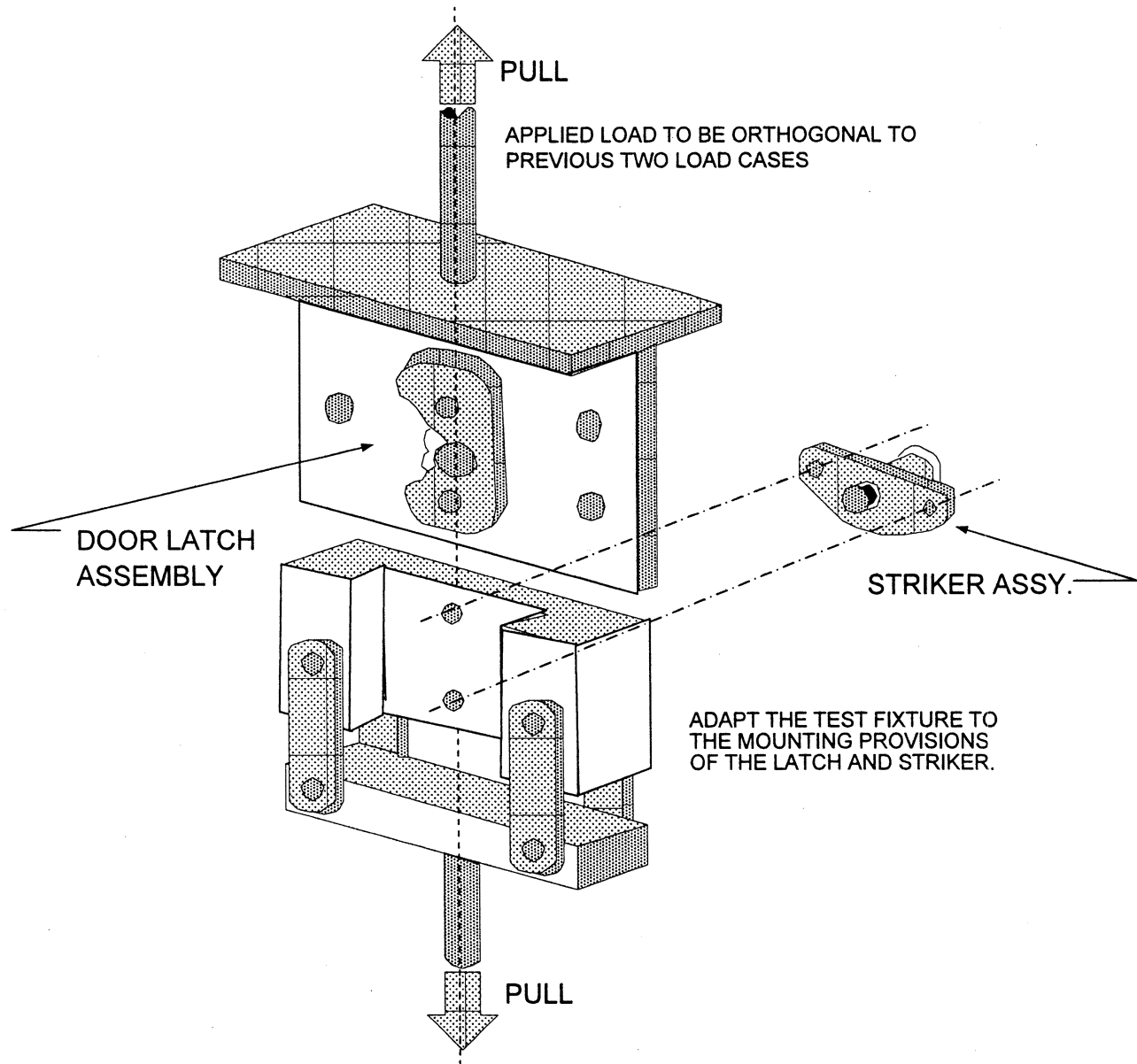
FIGURE 3 – DOOR LATCH – TENSILE TESTING FIXTURE FOR LOAD TEST 2

FIGURE 4 – DOOR LATCH – TENSILE TESTING FIXTURE FOR LOAD TEST 3 (BACK DOORS ONLY)

Upper Bound			Lower Bound		
Point	Time (ms)	Acceleration (g)	Point	Time (ms)	Acceleration (g)
A	0	6	E	5	0
B	20	36	F	25	30
C	60	36	G	55	30
D	100	0	H	70	0

ACCELERATION PULSE CORRIDOR TABLE 1

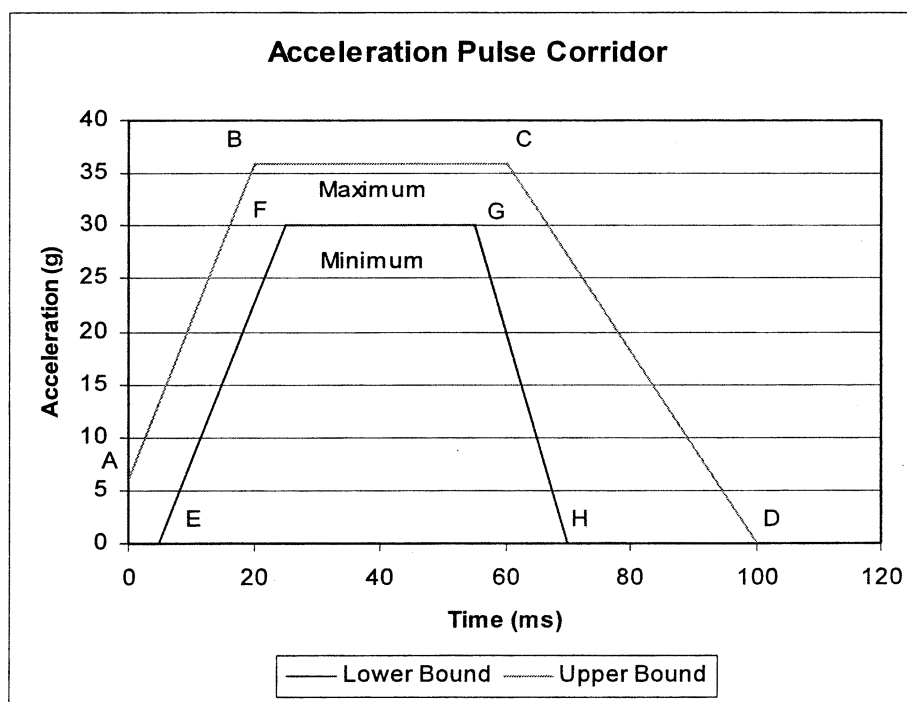
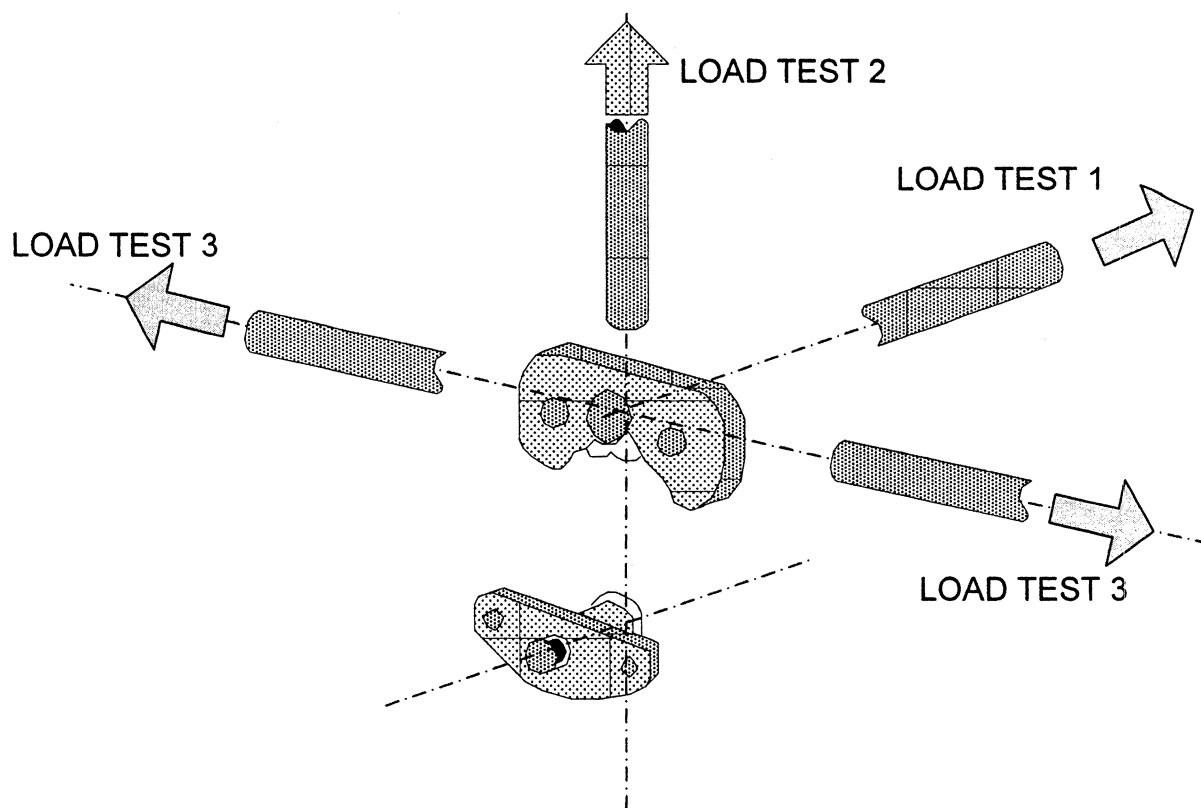
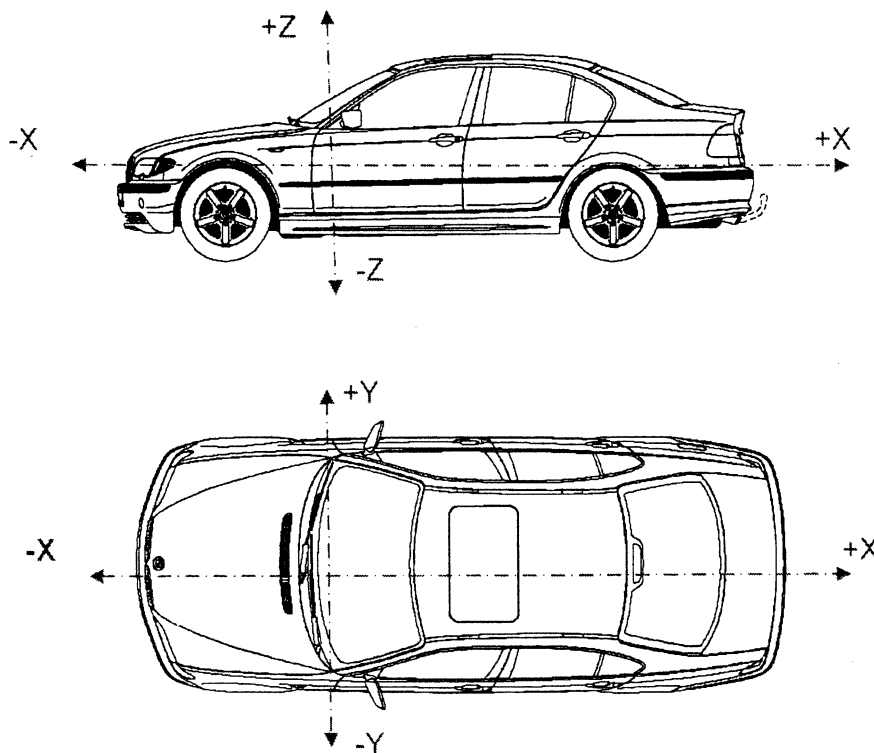
FIGURE 5 – DOOR LATCH STATIC LOAD TEST DIRECTIONS**FIGURE 6 – ACCELERATION PULSE**

FIGURE 7 - VEHICLE COORDINATE REFERENCE SYSTEM FOR INERTIAL TESTING

X = longitudinal direction
Y = transverse direction
Z = vertical direction

FIGURE 8 – HINGE STATIC TEST FIXTURES

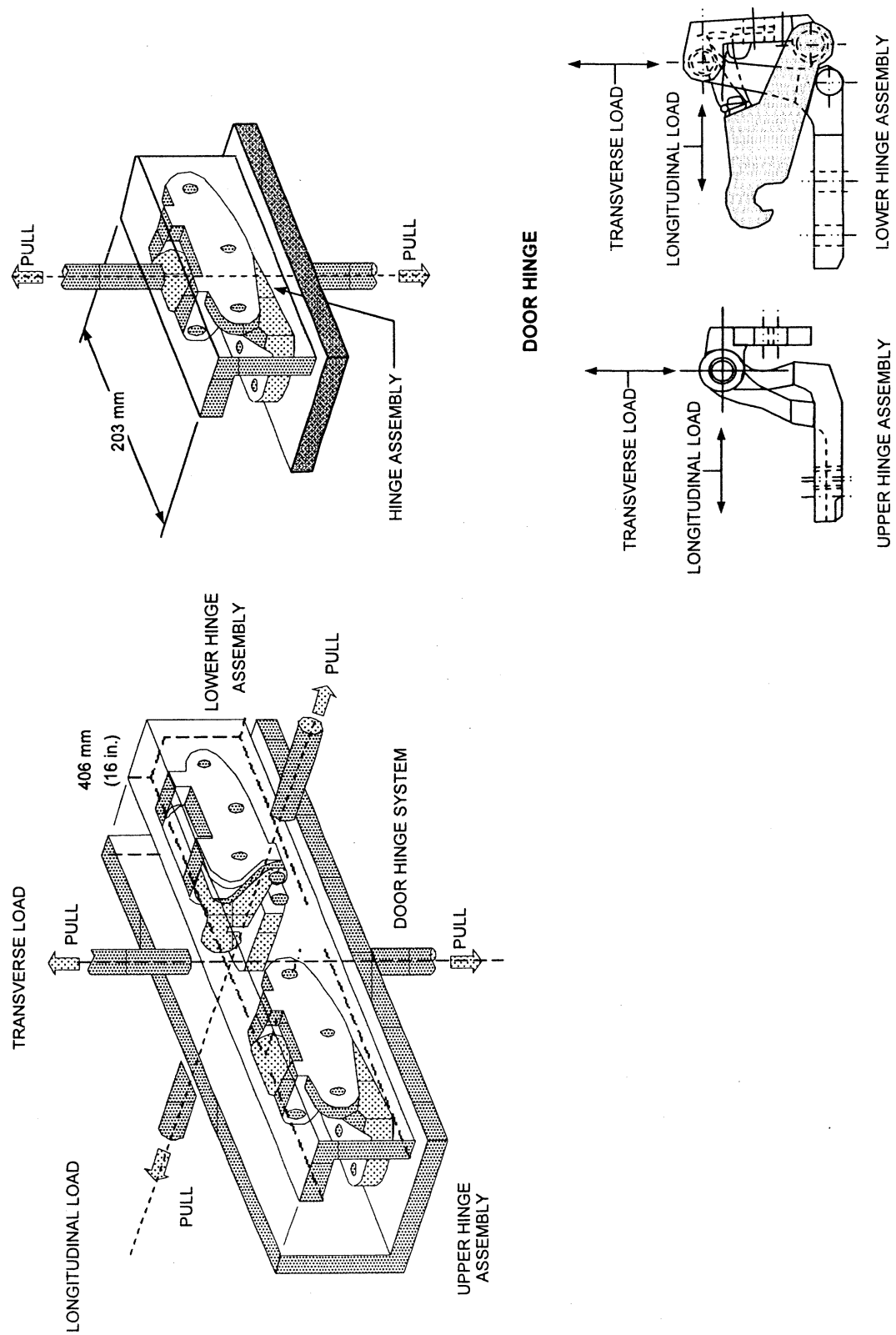
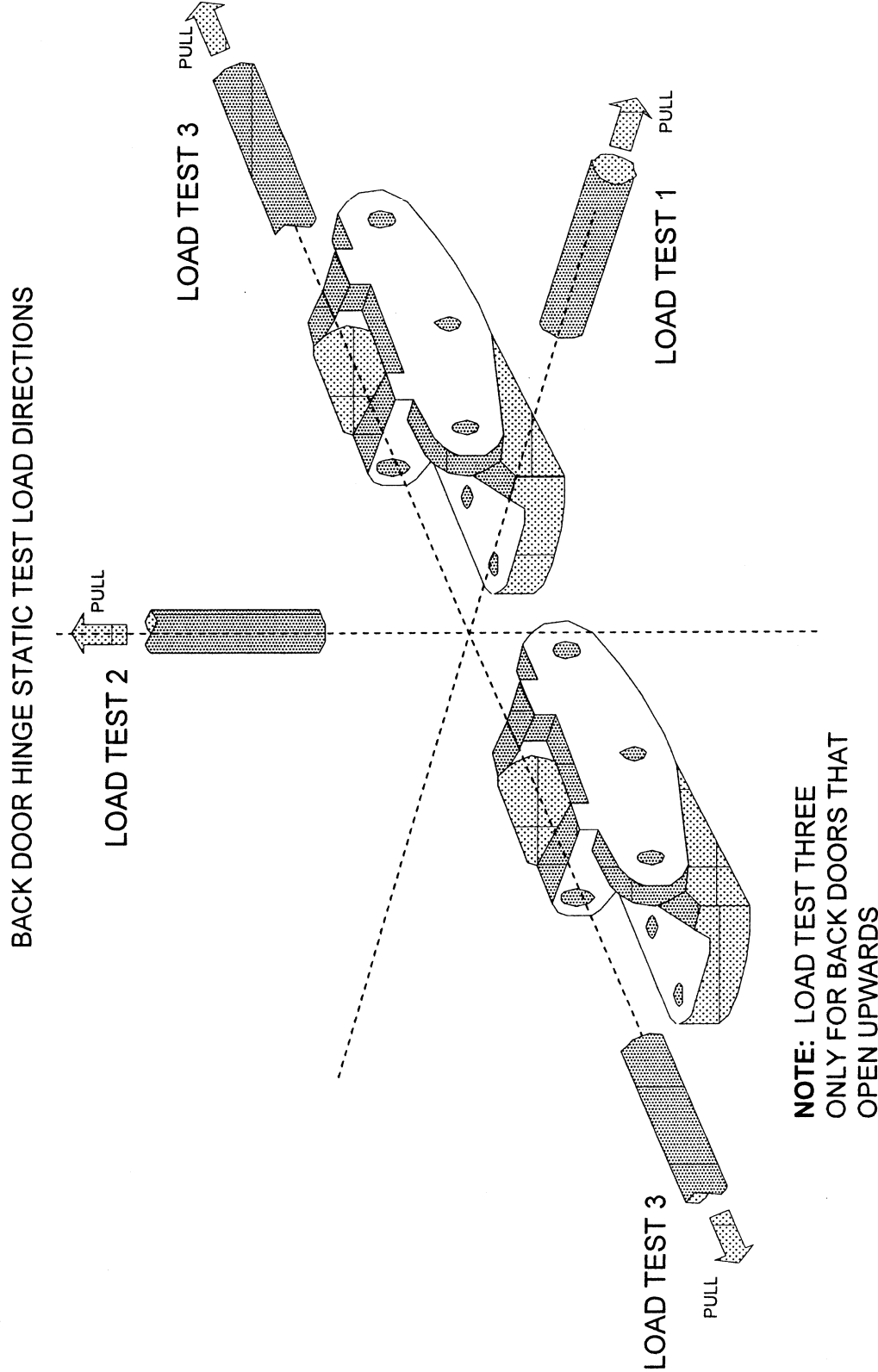


FIGURE 9 – HINGE STATIC TEST LOAD DIRECTIONS FOR BACK DOORS



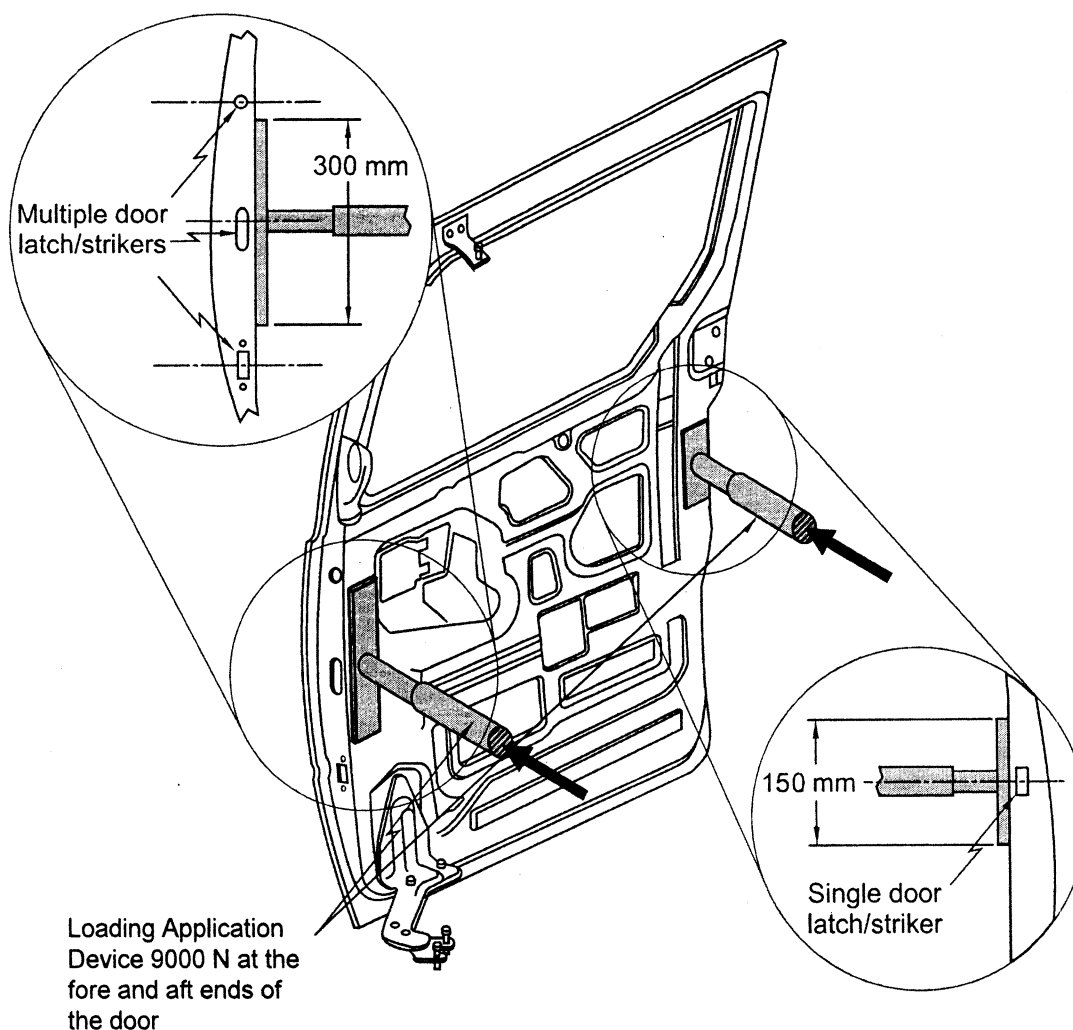


FIGURE 10 – Sliding Door Full Vehicle Test Procedure
(Note: Sliding door is shown separated from the vehicle)

Issued on: January 30, 2007.

Nicole R. Nason,
Administrator.

[FR Doc. 07-517 Filed 2-5-07; 8:45 am]

BILLING CODE 4910-59-C

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 COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: U.S. Census Bureau.

Title: Generic Clearance for MAF & TIGER Updating Activities.

Form Number(s): Will vary by activity.

Agency Approval Number: 0607–0809.

Type of Request: Revision of a currently approved collection.

Burden: 14,290 hours.

Number of Respondents: 849,750.

Average Hours Per Response: 1 minute.

Needs and Uses: The Census Bureau requests approval from the Office of Management and Budget (OMB) for an extension of the generic clearance for a number of activities it plans to conduct to update its Master Address File (MAF) and maintain the linkage between the MAF and the Topologically Integrated Geographic Encoding and Referencing (TIGER) database of address ranges and associated geographic information. The Census Bureau plans to use the MAF for post-Census 2000 evaluations, various pre-2010 census tests, and as a sampling frame for the American Community Survey and our other demographic current surveys. In the past, the Census Bureau has built a new address list for each decennial census. The MAF built during Census 2000 is meant to be kept current thereafter, eliminating the need to build a completely new address list for future censuses and surveys. The TIGER is a geographic system that maps the entire country in Census Blocks with applicable address range of living quarter location information. Linking

MAF and TIGER allows us to assign each address to the appropriate Census Block, produce maps as needed and publish results at the appropriate level of geographic detail.

The generic clearance for the past three years has proved to be very beneficial to the Census Bureau. The generic clearance allowed us to focus our limited resources on actual operational planning and development of procedures. This extension will be especially beneficial over the upcoming three years by allowing us to focus on the other work involved in improving new procedures for 2010, and keeping the MAF current.

We will follow the protocol of past generic clearances: we will send a letter to OMB at least two weeks before the planned start of each activity that gives more exact details, examples of forms, and final estimates of respondent burden. We also will file a year-end summary with OMB after the close of each fiscal year giving results of each activity conducted.

The following sections describe the categories of activities to be included under the clearance. The Census Bureau has conducted these activities (or similar ones) previously and the respondent burden remains relatively unchanged from one time to another.

Demographic Area Address Listing (DAAL)

The Demographic Area Address Listing (DAAL) program encompasses the geographic area updates for the Community Address Updating System (CAUS) and the area and group quarters frame listings for many ongoing demographic surveys (the Current Population Survey, the Consumer Expenditures Survey, etc.). The CAUS program was designed to address quality concerns relating to areas with high concentrations of noncity-style addresses, and to provide a rural counterpart to the update of city-style addresses the MAF will receive from the U.S. Postal Services's Delivery Sequence File. The ongoing demographic surveys, as part of the 2000 Sample Redesign Program, plan to use the MAF as one of several sources of addresses from which to select their samples. In addition to the area and group quarters frame listings, the demographic surveys will also list blocks via the DAAL program for their Frame Assessment for Current Household Surveys (FACHS)

evaluations. The DAAL program is a cooperative effort across many divisions at the Census Bureau; it includes automated listing software, systems, and procedures that will allow us to conduct listing operations in a dependent manner based on information contained in the MAF.

The DAAL operations will be conducted on an ongoing basis in potentially any county across the country. Field Representatives (FRs) will canvass selected Census tabulation blocks to improve the address list in areas where substantial address changes have occurred that have not been added to the MAF through regular update operations, and/or in blocks in the area or group quarters frame sample for the demographic surveys. FRs will update existing address information, and when necessary, contact individuals, to collect accurate location and mailing address information. In general, contact will occur only when the FR is adding to the address list, and the individual's address is not posted or visible to the FR. If the occupants of these households are not at home, the FR may attempt to contact a neighbor to determine the best time to find the occupants at home and/or to obtain the correct address information.

DAAL is an ongoing operation. Listing assignments are distributed quarterly with the work conducted throughout the time period. We expect that DAAL listings will be conducted throughout the entire time period of the extension.

Dress Rehearsal Address Canvassing

An Address Canvassing operation will take place as part of the 2008 Census Dress Rehearsal. The operation will take place between May 7, 2007 and June 26, 2007. The operation will be a standard address canvassing operation where census listers will canvass specified blocks and conduct brief interviews to verify or update address information against address information on the Census Bureau's address lists and maps. Listers will enter an address status for every address based on what they found out during the visit. Listers will also visit addresses not listed on our address lists and add them. They will record address information and address statuses on the address lists that reside on the hand held computer (HHC). Sites for the 2008 Census Dress Rehearsal will

be San Joaquin County, California and Fayetteville and Eastern North Carolina.

Decennial Address Canvassing

An Address Canvassing operation will take place as part of the 2010 Decennial Census. The operation will take place between April 13, 2009 and May 2009. The operation will be a standard address canvassing operation where census listers will canvass specified blocks and conduct brief interviews to verify or update address information against address information on the Census Bureau's address lists and maps. Listers will enter an address status for every address based on what they found out during the visit. Listers will also visit addresses not listed on our address lists and add them. They will record address information and address statuses on the address lists that reside on the hand held computer (HHC). Sites for the 2010 Decennial Census will be nation wide.

Dress Rehearsal Update/Leave

The U.S. Census Bureau will conduct the Update/Leave operation, March 3, 2008 through April 7, 2008 in the 2008 Census Dress Rehearsal sites of San Joaquin County, California and Fayetteville and Eastern North Carolina. Update/Leave is a field operation for the 2008 Census Dress Rehearsal. The results of this test will enable the Census Bureau to identify, refine, and improve our address collection procedures for a more cost-effective and accurate decennial census.

Update/Leave requires Listers to update the Census Bureau's address list and maps, and to leave a census questionnaire at each housing unit. Listers verify and update the addresses on the address list and their locations on census maps to ensure that they are as current, complete and accurate as possible. Listers will use Form DX-105A (U/L), Update/Leave Address Listing Pages to verify, and update addresses currently in the Census Bureau's Update/Leave universe. Listers will enter an action code for every address based on what they found out. Listers will visit addresses not already listed and add them to our address list. To add addresses, Listers will use Form DX-105B (U/L), Update/Leave Add Pages.

If the occupants of these living quarters are not at home the Listers will leave a questionnaire at the household in a plastic bag, then attempt to contact neighbors in order to obtain the correct address information. If the Lister is unable to contact anyone about an address, they will use their own judgment, and information from

surrounding addresses to enter the address information. Quality Control (QC) for Update/Leave consists of an initial observation, a dependent quality control check in the field and an office review of completed work.

Decennial Update/Leave

The U.S. Census Bureau will conduct the Update/Leave operation in the 2010 Decennial Census. Update/Leave requires Listers to update the Census Bureau's address list and maps, and to leave a census questionnaire at each housing unit. Listers verify and update the addresses on the address list and their locations on census maps to ensure that they are as current, complete and accurate as possible. Listers will use Form DX-105A (U/L), Update/Leave Address Listing Pages to verify, and update addresses currently in the Census Bureau's Update/Leave universe. Listers will enter an action code for every address based on what they found out. Listers will visit addresses not already listed and add them to our address list. To add addresses, Listers will use Form DX-105B (U/L), Update/Leave Add Pages.

If the occupants of these living quarters are not at home the Listers will leave a questionnaire at the household in a plastic bag, then attempt to contact neighbors in order to obtain the correct address information. If the Lister is unable to contact anyone about an address, they will use their own judgment, and information from surrounding addresses to enter the address information. Quality Control (QC) for Update/Leave consist of an initial observation, a dependent quality control check in the field and an office review of completed work.

Dress Rehearsal Group Quarters Validation (GQV)

The U.S. Census Bureau will conduct the Group Quarters Validation Operation from September 17—October 24, 2007 at the 2008 Census Dress Rehearsal sites of San Joaquin County, California and Fayetteville and Eastern North Carolina. The GQV operation, which supports the Census Bureau's strategic goal of developing methodologies for compiling a complete and accurate MAF for the 2010 Census, is designed to verify and classify addresses identified as other living quarters during the 2006 Address Canvassing operation. The addresses will be classified as Group Quarters (GQ), Housing Unit (HU), or "not a living quarters". If the address is a GQ, the lister will label it with the correct type code, (e.g. as a college residence hall or skilled nursing unit). Listers will

use the DX-351 GQV Questionnaire to list address information and type codes for each GQ in their workload. GQV creates the universe for a follow-up operation known as Group Quarters Enumeration (GQE), in which we count the residents of identified GQs.

Decennial Group Quarters Validation

The U.S. Census Bureau will conduct the Group Quarters Validation Operation as part of the 2010 Decennial Census. The operation will take place between Sept 11, 2009—October 22, 2009. The GQV operation verifies and classifies addresses identified as other living quarters during the Decennial Address Canvassing operation. The addresses will be classified as Group Quarters (GQ), Housing Unit (HU), or "not a living quarters". If the address is a GQ, the lister will label it with the correct type code, (e.g. as a college residence hall or skilled nursing unit). Listers will use the DX-351 GQV Questionnaire to list address information and type codes for each GQ in their workload. GQV creates the universe for a follow-up operation known as Group Quarters Enumeration (GQE), in which we count the residents of identified GQs.

The list above is not exhaustive of all activities, which may be performed under this generic clearance. We will follow the approved procedure when submitting any additional activities not specifically listed here.

Affected Public: Individuals or households.

Frequency: One-time.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13 U.S.C., Sections 141 and 193.

OMB Desk Officer: Brian Harris-Kojetin, (202) 395-7314.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482-0266, Department of Commerce, room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at dhynek@doc.gov).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Brian Harris-Kojetin, OMB Desk Officer either by fax (202-395-7245) or e-mail (bharrisk@omb.eop.gov).

Dated: January 31, 2007.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E7-1819 Filed 2-5-07; 8:45 am]

BILLING CODE 3510-07-P

DEPARTMENT OF COMMERCE**Submission for OMB Review;
Comment Request**

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: U.S. Census Bureau.

Title: 2007 Census Bilingual Form Study.

Form Number(s):

Advance Letter Package/Reminder Card

DE-5(L)—Advance Letter (English).

DE-5(L)(E/S)—Advance Letter Bilingual English/Spanish.

DE-5—Outgoing Envelope for Advance Letters.

DE-9—Reminder Postcard (English).

DE-9(L)(E/S)—Reminder Letter Bilingual English/Spanish.

Questionnaires

DE-1—Mailback INITIAL Mailing (Also used for Replacement).

DE-1(E/S)—Bilingual English/Spanish (Start Here Cover/7&8person panels).

DE-2(E/S)—Bilingual English/Spanish (Directors Letter Cover).

Letters

DE-16(L)—Cover Letter—INITIAL Mailing.

DE-16(L)(E/S)—Cover Letter Bilingual—INITIAL Mailing [DE-1(E/S)].

DE-17(L)—Cover Letter REPLACEMENT Mailing.

Envelopes

DE-6A—INITIAL Mailing Outgoing Envelope (English).

DE-8A—INITIAL Mailing Return Envelope.

DE-6C—REPLACEMENT Mailing Outgoing Envelope.

DE-6B—Bilingual/INITIAL Mailing Outgoing Envelope.

DE-8B—Bilingual Return Envelope.

Agency Approval Number: 0607-0915.

Type of Request: Regular submission.

Burden: 5,000 hours.

Number of Respondents: 30,000.

Average Hours Per Response: 10 minutes.

Needs and Uses: The Census Bureau tested a bilingual census form in the 2005 National Census Test (NCT). The bilingual questionnaire had a “swim lane” design that provided two response columns, one in English and one in Spanish, each containing the same questions and response categories. This form was mailed to a randomly selected

set of 10,000 housing units across the United States.

The results from the 2005 NCT show that the bilingual form significantly increased the self response rate nationally (by 2.2 percentage points for paper response, and 1.1 percentage points for total response), and more specifically, in areas where there is a high concentration of non-White and Hispanic populations (Bouffard and Tancreto, 2006). Moreover, the bilingual form resulted in a higher proportion of response from Hispanic persons than the English-only form. However, item nonresponse rates for the bilingual form were higher for all household level items and Hispanic origin compared to the English-only form (Bouffard et al., 2006). There are many potential reasons for these item nonresponse discrepancies, including forms design, question wording, translation, and differences in the responding population.

The purpose of a follow-up test of the bilingual form is to discern if the item nonresponse issues can be resolved by improved form design and utilization of the questions that will be on the form in the 2008 Census Dress Rehearsal. Moreover, this test provides the opportunity to study the impact of the bilingual form in areas that contain a heavy concentration of Spanish-speaking people with limited English proficiency. Furthermore, this test provides the opportunity to verify the 2005 NCT finding of increased response to the bilingual census form.

Affected Public: Individuals or households.

Frequency: One time.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13 U.S.C., Sections 141 and 193.

OMB Desk Officer: Brian Harris-Kojetin, (202) 395-7314.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482-0266, Department of Commerce, room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at dHynek@doc.gov).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Brian Harris-Kojetin, OMB Desk Officer either by fax (202-395-7245) or e-mail (bharrisk@omb.eop.gov).

Dated: January 31, 2007.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E7-1821 Filed 2-5-07; 8:45 am]

BILLING CODE 3510-07-P

DEPARTMENT OF COMMERCE**Submission for OMB Review;
Comment Request**

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: U.S. Census Bureau.

Title: Report of Privately-Owned Residential Building or Zoning Permits Issued.

Form Number(s): C-404.

Agency Approval Number: 0607-0094.

Type of Request: Extension of a currently approved collection.

Burden: 17,568 hours.

Number of Respondents: 19,450.

Average Hours Per Response: 9 minutes.

Needs and Uses: The U.S. Census Bureau is requesting an extension of a currently approved collection of the Form C-404, “Report of Privately-Owned Residential Building or Zoning Permits Issued” otherwise known as the Building Permits Survey (BPS).

The Census Bureau produces statistics used to monitor activity in the large and dynamic construction industry. Given the importance of this industry, several of the statistical series are key economic indicators. Two such series are (a) Housing Units Authorized by Building Permits and (b) Housing Starts. These statistics help state, local, and federal governments, as well as private industry, analyze this important sector of the economy. All of these series are available monthly based on a sample of building permit offices, and annually based on the entire universe of permit offices.

The Census Bureau collects these data primarily by mail using the Form C-404. Data are also collected via Internet Web pages and receipt of electronic files.

The Census Bureau uses the Form C-404 to collect data that will provide estimates of the number and valuation of new residential housing units authorized by building permits. About one-half of the permit offices are requested to report monthly. The remainder are only surveyed once per

year. We use the data, a component of the index of leading economic indicators, to estimate the number of housing units started, completed, and sold, if single-family. The Census Bureau also uses these data to select samples for its demographic surveys. Policymakers, planners, businessmen/women, and others use the detailed geographic data collected from state and local officials on new residential construction authorized by building permits to monitor growth and plan for local services, and to develop production and marketing plans. The BPS is the only source of statistics on residential construction for states and smaller geographic areas.

Affected Public: State, local or tribal government.

Frequency: Monthly and annually.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13, United States Code, Section 182.

OMB Desk Officer: Brian Harris-Kojetin, (202) 395-7314.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482-0266, Department of Commerce, room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at dhynek@doc.gov).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Brian Harris-Kojetin, OMB Desk Officer either by fax (202-395-7245) or e-mail (bharrisk@omb.eop.gov).

Dated: January 31, 2007.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E7-1823 Filed 2-5-07; 8:45 am]

BILLING CODE 3510-07-P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: U.S. Census Bureau.

Title: 2004 Panel of the Survey of Program Participation, Waves 10, 11, and 12.

Form Number(s): SIPP 241005(L) Director's Letter; SIPP/CAPI Automated Instrument; SIPP 24003 Reminder Card.

Agency Approval Number: 0607-0905.

Type of Request: Extension of a currently approved collection.

Burden: 44,799.

Number of Respondents: 44,713.

Average Hours Per Response: 30 minutes.

Needs and Uses: The U.S. Census Bureau requests authorization from the Office of Management and Budget (OMB) to extend the expiration date for the 2004 Panel of the Survey of Income and Program Participation (SIPP) to February 28, 2008.

This will provide the time necessary to conduct the Wave 10, 11, and 12 interviews for the 2004 Panel of the SIPP. The interviews will include the core SIPP, which has already been approved by OMB under Authorization No. 0607-0905. Due to budget constraints, there are no topical modules for the Wave 10, 11, and 12 interviews.

The SIPP represents a source of information for a wide variety of topics and allows information for separate topics to be integrated to form a single and unified database so that the interaction between tax, transfer, and other government and private policies can be examined. Government domestic policy formulators depend heavily upon the SIPP information concerning the distribution of income received directly as money or indirectly as in-kind benefits and the effect of tax and transfer programs on this distribution. They also need improved and expanded data on the income and general economic and financial situation of the U.S. population. The SIPP has provided these kinds of data on a continuing basis since 1983, permitting levels of economic well-being and changes in these levels to be measured over time.

The survey is molded around a central "core" of labor force and income questions that remain fixed throughout the life of a panel.

The SIPP is designed as a continuing series of national panels of interviewed households that are introduced every few years, with each panel having durations of 3 to 4 years. The 2004 Panel is scheduled for 4 years and will include 12 waves which began on February 1, 2004. All household members 15 years old or over are interviewed using regular proxy-respondent rules. They are interviewed a total of 12 times (12 waves), at 4-month intervals, making the SIPP a longitudinal survey. Sample people (all household members present at the time of the first interview) who move within the country and reasonably close to a SIPP primary sampling unit will be

followed and interviewed at their new address. Individuals 15 years old or over who enter the household after Wave 1 will be interviewed; however, if these people move, they are not followed unless they happen to move along with a Wave 1 sample individual.

Data provided by the SIPP are being used by economic policymakers, the Congress, state and local governments, and federal agencies that administer social welfare or transfer payment programs, such as the Department of Health and Human Services and the Department of Agriculture.

Affected Public: Individuals or households.

Frequency: Every 4 months.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13 U.S.C., Section 182.

OMB Desk Officer: Brian Harris-Kojetin, (202) 395-7314.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482-0266, Department of Commerce, room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at dhynek@doc.gov).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Brian Harris-Kojetin, OMB Desk Officer either by fax (202-395-7245) or e-mail (bharrisk@omb.eop.gov).

Dated: January 31, 2007.

Gwellnar Banks,

Office of the Chief Information Officer.

[FR Doc. E7-1836 Filed 2-5-07; 8:45 am]

BILLING CODE 3510-07-P

DEPARTMENT OF COMMERCE

International Trade Administration

Pure Magnesium in Granular Form from the People's Republic of China: Final Results of the Expedited Sunset Review of the Antidumping Duty Order

A-570-864

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On October 2, 2006, the Department of Commerce ("the Department") initiated a sunset review of the antidumping duty order on pure magnesium in granular form from the People's Republic of China ("PRC") pursuant to section 751(c) of the Tariff Act of 1930, as amended ("the Act"). On the basis of a notice of intent to participate and an adequate substantive

response filed on behalf of domestic interested parties and inadequate response from respondent interested parties, the Department conducted an expedited (120-day) sunset review. As a result of this sunset review, the Department finds that revocation of the antidumping duty order would be likely to lead to continuation or recurrence of dumping. The dumping margins are identified in the *Final Results of Review* section of this notice.

EFFECTIVE DATE: February 6, 2007.

FOR FURTHER INFORMATION CONTACT:

Hilary E. Sadler, Esq., or Juanita Chen, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482-4340, or (202) 482-1904, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 2, 2006, the Department published the notice of initiation of the second sunset review of the antidumping duty order on pure magnesium in granular form from the PRC pursuant to section 751(c) of the Act. *See Initiation of Five-year ("Sunset") Reviews*, 71 FR 57921 (October 2, 2006). The Department received the Notice of Intent to Participate from US Magnesium LLC¹ ("US Magnesium"), the domestic party, within the deadline specified in section 351.218(d)(1)(i) of the Department's regulations ("Sunset Regulations"). US Magnesium claimed interested party status under section 771(9)(C) of the Act, as a domestic producer of pure magnesium in granular form. The Department received a complete substantive response only from US Magnesium within the 30-day deadline specified in section 351.218(d)(3)(i) of the Department's regulations. The Department received no responses from the respondent interested parties. As a result, pursuant to section 751(c)(5)(A) of the Act and section 351.218(e)(1)(ii)(C)(2) of the Department's regulations, the Department conducted an expedited (120-day) sunset review of this order.

Scope of the Order

There is an existing antidumping duty order on pure magnesium from the People's Republic of China (PRC). *See Notice of Antidumping Duty Orders: Pure Magnesium From the People's*

Republic of China, the Russian Federation and Ukraine; Notice of Amended Final Determination of Sales at Less Than Fair Value: Antidumping Duty Investigation of Pure Magnesium From the Russian Federation, 60 FR 25691 (May 12, 1995). The scope of this order excludes pure magnesium that is already covered by the existing order on pure magnesium in ingot form and currently classifiable under item numbers 8104.11.00 and 8104.19.00 of the Harmonized Tariff Schedule of the United States (HTSUS). The scope of this order includes imports of pure magnesium products, regardless of chemistry, including, without limitation, raspings, granules, turnings, chips, powder, and briquettes, except as noted above. Pure magnesium includes: (1) Products that contain at least 99.95 percent primary magnesium, by weight (generally referred to as "ultra-pure" magnesium); (2) products that contain less than 99.95 percent but not less than 99.8 percent primary magnesium, by weight (generally referred to as "pure" magnesium); (3) chemical combinations of pure magnesium and other material(s) in which the pure magnesium content is 50 percent or greater, but less than 99.8 percent, by weight that do not conform to an "ASTM Specification for Magnesium Alloy"² (generally referred to as "off-specification pure" magnesium); and (4) physical mixtures of pure magnesium and other material(s) in which the pure magnesium content is 50 percent or greater, but less than 99.8 percent, by weight. Excluded from this order are mixtures containing 90 percent or less pure magnesium by weight and one or more of certain non-magnesium granular materials to make magnesium-based reagent mixtures. The non-magnesium granular materials of which the Department is aware used to make such excluded reagents are: Lime, calcium metal, calcium silicon, calcium carbide, calcium carbonate, carbon, slag coagulants, fluorspar, nepheline syenite, feldspar, aluminum, alumina (Al₂O₃), calcium aluminate, soda ash, hydrocarbons, graphite, coke, silicon, rare earth metals/mischmetal, cryolite, silica/fly ash, magnesium oxide, periclase, ferroalloys, dolomitic lime, and colemanite. A party importing a magnesium-based reagent which includes one or more materials not on this list is required to seek a scope clarification from the Department before

such a mixture may be imported free of antidumping duties.

The merchandise subject to this order is currently classifiable under item 8104.30.00 of the HTSUS. Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

Analysis of Comments Received

All issues raised in this review is addressed in the "Issues and Decision Memorandum" ("Decision Memo") from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, dated January 30, 2007, which is hereby adopted by this notice. The issues discussed in the Decision Memo include the likelihood of continuation or recurrence of dumping and the magnitude of the margins likely to prevail if the order were to be revoked. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum which is on file in room B-099 of the main Commerce Building.

In addition, a complete version of the Decision Memo can be accessed directly on the Web at <http://ia.ita.doc.gov/frn>, under the heading "February 2007." The paper copy and electronic versions of the Decision Memo are identical in content.

Final Results of Review

We determine that revocation of the antidumping duty order on pure magnesium in granular form from the PRC would be likely to lead to continuation or recurrence of dumping at the following weighted-average percentage margins:

Manufacturers/Exporters/Producers	Weighted-Average Margin (percent)
Minmetals	24.67
PRC-wide Rate	305.56

We are issuing and publishing the results and notice in accordance with sections 751(c), 752, and 777(i)(1) of the Act.

Dated: January 30, 2007.

David M. Spooner,

Assistant Secretary for Import Administration.
[FR Doc. E7-1894 Filed 2-5-07; 8:45 am]

BILLING CODE 3510-DS-S

¹ US Magnesium's predecessor is Magnesium Corporation of America, the original petitioner in this proceeding.

² The meaning of this term is the same as that used by the American Society for Testing and Materials in its Annual Book of ASTM Standards: Volume 01.02 Aluminum and Magnesium Alloys.

DEPARTMENT OF COMMERCE**International Trade Administration**

A-469-805

**Stainless Steel Bar from Spain:
Extension of Time Limit for Preliminary
Results of Antidumping Duty
Administrative Review**

AGENCY: Import Administration,
International Trade Administration,
Department of Commerce.

EFFECTIVE DATE: February 6, 2007.

FOR FURTHER INFORMATION CONTACT:
Dmitry Vladimirov or Minoo Hatten,
AD/CVD Operations, Office 5, Import
Administration, International Trade
Administration, U.S. Department of
Commerce, 14th Street and Constitution
Avenue, NW, Washington, DC 20230;
telephone: (202) 482-0665 and (202)
482-1690, respectively.

SUPPLEMENTARY INFORMATION:**Background**

At the request of an interested party, the Department of Commerce (the Department) initiated an administrative review of the antidumping duty order on stainless steel bar from Spain for the period March 1, 2005, through February 28, 2006. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 71 FR 25145 (April 28, 2006). On December 1, 2006, we published in the **Federal Register** a notice extending the due date for the completion of these preliminary results of review from December 1, 2006, to February 13, 2007. See *Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 69550 (December 1, 2006) (*Extension Notice*).¹

**Extension of Time Limit for Preliminary
Results of Antidumping Duty
Administrative Review.**

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), requires the Department to make a preliminary determination within 245 days after the last day of the anniversary month of an order for which a review is requested and a final determination within 120 days after the date on which the preliminary determination is published.

¹ In the *Extension Notice* we stated inadvertently that we are extending the time period for issuing the preliminary results of this review to February 13, 2006. On December 15, 2006, we published in the **Federal Register** a correction notice announcing the extension of the due date for the completion of these preliminary results of review to February 13, 2007. See *Correction to Notice of Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 75503 (December 15, 2006).

If it is not practicable to complete the review within these time periods, section 751(a)(3)(A) of the Act allows the Department to extend the time limit for the preliminary determination to a maximum of 365 days after the last day of the anniversary month.

We determine that it is not practicable to complete the preliminary results of this review by the current deadline of February 13, 2007. We require additional time to analyze supplemental questionnaire responses with respect to a number of cost issues in this administrative review. Therefore, in accordance with section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2), we are extending the time period for issuing the preliminary results of this review to March 22, 2007.

This notice is published in accordance with sections 751(a)(3)(A) and 777 (i)(1) of the Act.

Dated: January 31, 2007.

Stephen J. Claeys,

*Deputy Assistant Secretary for Import
Administration.*

[FR Doc. E7-1893 Filed 2-5-07; 8:45 am]

BILLING CODE 3510-DS-S

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric
Administration****Proposed Information Collection;
Comment Request; Natural Resource
Damage Assessment Restoration
Project Information Sheet**

AGENCY: National Oceanic and
Atmospheric Administration (NOAA),
Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, 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.

DATES: Written comments must be submitted on or before April 9, 2007.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at dHynek@doc.gov).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be

directed to John Rapp, (225) 578-7924 or john.rapp@noaa.gov.

SUPPLEMENTARY INFORMATION:**I. Abstract**

The Natural Resource Damage Assessment (NRDA) Restoration Project Information Sheet is designed to facilitate the collection of information on existing, planned, or proposed restoration projects. This information will be used by the Natural Resource Trustees to develop potential restoration alternatives for natural resource injuries and service losses requiring restoration during the restoration planning phase of the NRDA process.

II. Method of Collection

The Restoration Project Information Sheet can be submitted on paper through the mail or faxed, or can be submitted electronically via the Internet or e-mail.

III. Data

OMB Number: 0648-0497.

Form Number: None.

Type of Review: Regular submission.

Affected Public: State, local, or tribal governments; individuals or households; business or other for-profits organizations; not-for-profit institutions; farms; and the federal government.

Estimated Number of Respondents: 66.

Estimated Time Per Response: 20 minutes including the time for reviewing instructions, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Estimated Total Annual Burden

Hours: 55.

Estimated Total Annual Cost to Public: \$0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection;

they also will become a matter of public record.

Dated: January 31, 2007.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E7-1820 Filed 2-5-07; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Applications and Reporting Requirements for the Incidental Take of Marine Mammals by Specified Activities Under the Marine Mammal Protection Act

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, 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.

DATES: Written comments must be submitted on or before April 9, 2007.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at dHynek@doc.gov).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Kenneth R. Hollingshead, (301) 713-2055, ext. 128 or ken.hollingshead@noaa.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Marine Mammal Protection Act (MMPA) prohibits the taking by harassment, injury, or mortality of marine mammals unless exempted or authorized by permit. The incidental-take program authorizes the taking of marine mammal incidental to maritime activities (military, oil industry, oceanographic research). It is the responsibility of the activity to determine if it might have a "taking" and, if it does, to apply for an authorization. Applications are

necessary for NOAA to know that an authorization is needed and to determine whether authorization can be made under the MMPA. The reporting requirements are mandated by the MMPA and are necessary to ensure that determinations made concerning the impact on marine mammals are valid.

II. Method of Collection

Applications and reports are submitted by paper copy via overnight delivery and via e-mail to provide us with the .pdf and .doc copies that we use to work on the application and for posting for the public to download and review. While our application instructions are posted on the Web, we do not have the ability to accept applications via the Web. We are currently beta-testing the system for accepting applications for scientific research permits which we may be able to apply to this information collection also.

III. Data

OMB Number: 0648-0151.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations; not-for-profit institutions; and State, Local, or Tribal Government.

Estimated Number of Respondents: 72.

Estimated Time Per Response: 483 hours for a request for new or the renewal of regulations; 45 hours for an application for Letter of Authorization (response times vary significantly based on the complexity of the application); 200 hours for an application for an Incidental Harassment Authorization; and 93-120 hours for a 90-day, quarterly, or annual report under a Letter of Authorization or Incidental Harassment Authorization.

Estimated Total Annual Burden Hours: 12,376.

Estimated Total Annual Cost to Public: \$1,359.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques

or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: January 31, 2007.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E7-1822 Filed 2-5-07; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 020107B]

Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits (EFPs)

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

ACTION: Notification of a proposal for an EFP to conduct experimental fishing; request for comments.

SUMMARY: The Administrator, Northeast Region, NMFS (Regional Administrator) has made a preliminary determination that the subject EFP application from the University of New England (UNE) that would allow Northeast multispecies vessels to possess spiny dogfish for a spiny dogfish life history study contains all the required information and warrants further consideration. The Regional Administrator has also made a preliminary determination that the activities authorized under the EFP would be consistent with the goals and objectives of the Spiny Dogfish Fishery Management Plan (FMP). However, further review and consultation may be necessary before a final determination is made.

DATES: Comments on this document must be received on or before February 21, 2007.

ADDRESSES: Comments may be submitted by e-mail. The mailbox address for providing e-mail comments is DA7-25@noaa.gov. Include in the subject line of the e-mail comment the following document identifier: "Comments on UNE dogfish possession EFP proposal." Written comments should be sent to Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 1 Blackburn

Drive, Gloucester, MA 01930. Mark the outside of the envelope, "Comments on UNE dogfish possession EFP proposal" Comments may also be sent via facsimile (fax) to (978) 281-9135.

FOR FURTHER INFORMATION CONTACT:

Ryan Silva, Fishery Management Specialist, phone: 978-281-9326, fax: 978-281-9135.

SUPPLEMENTARY INFORMATION: The FMP implemented a semi-annual quota. When a semi-annual quota is projected to be harvested, NMFS closes the fishery until the next semi-annual quota opens. During a dogfish closure, no vessel may fish for or possess dogfish. The dogfish fishery was closed on December 19, 2006 (71 FR 76222), and will not re-open until May 1, 2007. As part of a continuing research project, UNE, in collaboration with the University of New Hampshire (UNH), is investigating Gulf of Maine dogfish age and growth, and size at sexual maturity characteristics. The applicant states that current dogfish life history data need updating, particularly in light of recent stock declines and potential regional variability in life history traits. The project investigators are attempting to develop a more accurate aging tool, which will improve age and size at sexual maturity determinations. The applicant notes that these data will provide critical life history information needed for effective dogfish management decisions, particularly for the Gulf of Maine.

The applicant would start collecting dogfish samples upon approval of the EFP and continue through June, 2007. The applicant would collect 15 dogfish per gender per 5-cm size class (<35 cm - >100 cm), for a total of 450 dogfish. Samples would be collected during commercial NE multispecies fishing trips in areas open to commercial NE multispecies regulations in statistical areas 125 and 132. Vessels would be fishing with otter trawl and gill net gear that is fully compliant with NE multispecies regulations. The applicant has indicated that up to 50 dead dogfish would be kept each trip, and that dogfish will not be targeted during the fishing trips. All live dogfish bycatch would be returned to the ocean as quickly as possible; only dead dogfish would be retained.

If approved, participating vessels would not be allowed to possess or retain more than 50 dogfish on any trip, and no dogfish may be sold.

Regulations under the Magnuson-Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on

applications for proposed EFPs. The applicant may place requests for minor modifications and extensions to the EFP throughout the year. EFP modifications and extensions may be granted without further notice if they are deemed essential to facilitate completion of the proposed research and minimal so as not to change the scope or impact of the initially approved EFP request.

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

Dated: February 1, 2007.

James P. Burgess,

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

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 011807A]

Taking of Marine Mammals Incidental to Specified Activities; An On-ice Marine Geophysical Research and Development Program in the Beaufort Sea

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

ACTION: Notice of receipt of application and proposed incidental take authorization; request for comments.

SUMMARY: NMFS has received an application from Shell Offshore, Inc. (SOI) for an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to conducting an on-ice marine geophysical research and development (R&D) program in the U.S. Beaufort Sea from March to May, 2007. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an authorization to SOI to incidentally take, by harassment, small numbers of three species of pinnipeds for a limited period of time this year.

DATES: Comments and information must be received no later than March 8, 2007.

ADDRESSES: Comments on the application should be addressed to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3225, or by telephoning one of the contacts listed here. The mailbox address for providing email comments is PR1.011807A@noaa.gov. Comments

sent via e-mail, including all attachments, must not exceed a 10-megabyte file size. A copy of the application and other supporting material related to this proposed action may be obtained by writing to this address or by telephoning the first contact person listed here and is also available at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>

FOR FURTHER INFORMATION CONTACT:

Shane Guan, Office of Protected Resources, NMFS, (301) 713-2289, ext 137 or Brad Smith, Alaska Region, NMFS, (907) 271-5006.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Permission shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and that the permissible methods of taking and requirements pertaining to the mitigation, monitoring, and reporting of such takings are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as "...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Except for certain categories of activities not pertinent here, the MMPA defines "harassment" as:

any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an

application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny issuance of the authorization.

Summary of Request

On January 17, 2007, NMFS received an application from SOI for the taking, by harassment, of three species of marine mammals incidental to conducting an on-ice marine geophysical R&D program. The proposed seismic survey would occur on U.S. Beaufort Sea. Sources and receivers would be placed above and below the ice in attempts to find pairings that provide the best mitigation of seismic noise in a shallow marine environment where conventional seismic vessels cannot operate. A variety of instruments will be used to create a complete catalogue of data for development of noise mitigation techniques. Sources include standard and lightweight vibrators, accelerated weight drop (impact) sources on the ice, and small volume airgun arrays deployed through holes augered in the ice. Receivers will be deployed both on the ice surface, as well as below the ice suspended in the water column and on the ocean floor. The program will also require a temporary camp facility geared to accommodate up to 100 people. The proposed program is expected to begin in March and last till May, 2007.

Description of the Activity

The proposed R&D program would occur on the U.S. Minerals Management Service (MMS) Outer Continental Shelf (OCS) lease blocks located offshore from Oliktok Point, Milne Point, West Dock, or Endeavor Islands, in the Alaskan Beaufort Sea. This on-ice R&D will consist of 35 linear miles (56 km) of surveying withing a 16 km² (6.2 mi²) area. The prospective locations have been selected on the basis of suitability for the scientific testing and proximity to facilities to help minimize impact on the region. The water depth at each location is less than 20 m (66 ft); deep enough that the ice is not grounded. Ice condition within the proposed survey area will determine the area selected, and SOI will consult with MMS and NMFS before the selection is made.

Surface sources will be a variety of industry-standard vehicles and weigh drops. On-ice vibroseis will be conducted using 2 vibrators: a 68,000 lb gross vehicle weight (GVW) wheeled vibrator capable of 49,440 foot-pounds (ft-lbs) of force and a 14,400 lb GVW

wheeled mini-vibrator capable of 12,000 ft-lbs of force. A minimum ice thickness of 4 ft (1.2 m) is required in order to support the vibrators and recording equipment. Impact sources to be used include 2 weigh drops: a Digipulse 1180 with peak force output of 1,200,000 ft-lbs at base plate, and a Polaris Explorer 860 with peak force output of 866,000 ft-lbs at base plate. Both weigh drop impact sources have dominant frequency ranges from 10 to 90 Hz. No measurements of acoustic energy source levels have been taken in industry using these equipments, however, in air and underwater sound levels resulted from weigh drops will be measured and monitored during the proposed survey.

An airgun array with 1 or 2 210 in³ Generator/Injector (GI) airguns would also be used and can produce between 345,000 and 560,000 ft-lbs of force at 2,000 and 3,000 pounds per square inch (PSI), respectively. The source level of the airgun, measured at 1 m from the source, ranges from 228 - 232 dB re: 1 microPa, when fired in open water without sea ice coverage. The dominant frequency of the airgun is below 188 Hz.

The recording unit is comprised of 13 tracked vehicles for crew transport and technical support, 2 tracked recording trailers, and 2 ice drilling units.

The program will also require a temporary camp facility geared to accommodate up to 200 people and will be composed of purpose-built accommodations which are largely self-sufficient for normal operations. Camp facilities may include as many as 35 sled trailers including medical facilities, crew quarters, offices, kitchen and dining facilities, laundry facilities, technical work spaces, generators, and fuel storage units. Two tracked vehicles will be available for camp site support and access trail maintenance.

Prospective camp locations will be chosen based on ice conditions and safety of access to ice. SOI will consult with MMS and NMFS before moving camp location within the proposed project area. Mobilization and demobilization will take place from West Dock, Oliktok Point, Milne Point, or Endeavor Island. Given the logistics, it is unlikely that the operations would utilize each of the 4 prospective camp locations. The camp will be stationed on grounded ice beside the access route. Kuukpik Veritas will begin conducting surveys and ice checks and move the camp 7 to 12 days ahead of the seismic survey along the route away from the mobilization point. Re-supply operations will periodically be required for fuel and provisions. These operations will be based out of West

Dock, Oliktok Point, Milne Point, or Endeavor Island.

Camp mobilization is expected to begin on March 10, 2007. By March 15, the camp would be established and seismic acquisition will begin on or about March 17. Data acquisition will continue until May 5 to 10, followed by camp demobilization to Oliktok Point, Milne Point, West Dock, or Endeavor Island. Operations are expected to be occurring 24 hours a day through the entire survey period. The program is projected to take 30 to 40 days to acquire the necessary data.

Description of Marine Mammals Affected by the Activity

Four marine mammal species are known to occur within the proposed survey area: ringed seal (*Phoca hispida*), bearded seal (*Erignathus barbatus*), spotted seal (*Phoca largha*), and polar bear (*Ursus maritimus*). None of these species are listed under the Endangered Species Act (ESA) as endangered or threatened species. Other marina mammal species that seasonally inhabit the Beaufort Sea, but are not anticipated to occur in the project area during the proposed R&D program, include the bowhead whales (*Balaena mysticetus*) and beluga whales (*Delphinapterus leucas*). SOI will seek a take Authorization from the U.S. Fish and Wildlife Service (USFWS) for the incidental taking of polar bears because USFWS has management authority for this species. A detailed description of these species can be found in Angliss and Outlaw (2005), which is available at the following URL: <http://www.nmfs.noaa.gov/pr/pdfs/sars/ak2005.pdf>. Additional information on the 3 pinniped species is presented below:

Ringed Seals

Ringed seals are widely distributed throughout the Arctic basin, Hudson Bay and Strait, and the Bering and Baltic seas. Ringed seals inhabiting northern Alaska belong to the subspecies *P. h. hispida*, and they are year-round residents in the Beaufort Sea.

During winter and spring, ringed seals inhabit landfast ice and offshore pack ice. Seal densities are highest on stable landfast ice but significant numbers of ringed seals also occur in pack ice (Wiig *et al.*, 1999). Seals congregate at holes and along cracks or deformations in the ice (Frost *et al.*, 1999). Breathing holes are established in landfast ice as the ice forms in autumn and are maintained by seals throughout winter. Adult ringed seals maintain an average of 3.4 holes per seal (Hammill and Smith, 1989).

Some holes may be abandoned as winter advances, probably in order for seals to conserve energy by maintaining fewer holes (Brueggeman and Grialou, 2001). As snow accumulates, ringed seals excavate lairs in snowdrifts surrounding their breathing holes, which they use for resting and for the birth and nursing of their single pups in late March to May (McLaren, 1958; Smith and Stirling, 1975; Kelly and Quakenbush, 1990). Pups have been observed to enter the water, dive to over 10 m (33 ft), and return to the lair as early as 10 days after birth (Brendan Kelly, pers comm to CPA, June 2002), suggesting pups can survive the cold water temperatures at a very early age. Mating occurs in late April and May. From mid-May through July, ringed seals haul out in the open air at holes and along cracks to bask in the sun and molt.

The seasonal distribution of ringed seals in the Beaufort Sea is affected by a number of factors but a consistent pattern of seal use has been documented since aerial survey monitoring began over 20 years ago. Recent studies indicated that ringed seals showed a strong seasonal and habitat component to structure use (Williams *et al.*, 2006), and habitat, temporal, and weather factors all had significant effects on seal densities (Moulton *et al.*, 2005). The studies also showed that effects of oil and gas development on local distribution of seals and seal lairs are no more than slight, and are small relative to the effects of natural environmental factors (Moulton *et al.*, 2005; Williams *et al.*, 2006).

A reliable estimate for the entire Alaska stock of ringed seals is currently not available (Angliss and Outlaw, 2005). A minimum estimate for the eastern Chukchi and Beaufort Sea is 249,000 seals, including 18,000 for the Beaufort Sea (Angliss and Outlaw, 2005). The actual numbers of ringed seals are substantially higher, since the estimate did not include much of the geographic range of the stock, and the estimate for the Alaska Beaufort Sea has not been corrected for animals missed during the surveys used to derive the abundance estimate (Angliss and Outlaw, 2005). Estimates could be as high or approach the past estimates of 1 - 3.6 million ringed seals in the Alaska stock (Frost, 1985; Frost *et al.*, 1988).

Frost and Lowry (1999) reported an observed density of 0.61 ringed seals/km² on the fast ice from aerial surveys conducted in spring 1997 of an area (Sector B2) overlapping the activity area, which is in the range of densities (0.28–0.66) reported for the Northstar development from 1997 to 2001 (Moulton *et al.*, 2001). This value (0.61)

was adjusted to account for seals hauled out but not sighted by observers ($\times 1.22$, based on Frost *et al.* (1988)) and seals not hauled out during the surveys ($\times 2.33$, based on Kelly and Quakenbush (1990)) to obtain the 1.73 seals/km². This estimate covered an area from the coast to about 2 - 20 miles beyond the activity area; and it assumed that habitat conditions were uniform.

Bearded Seals

The bearded seal has a circumpolar distribution in the Arctic, and it is found in the Bering, Chukchi, and Beaufort seas (Jefferson *et al.*, 1993). Bearded seals are predominately benthic feeders, and prefer waters less than 200 m (656 ft) in depth. Bearded seals are generally associated with pack ice and only rarely use shorefast ice (Jefferson *et al.*, 1993). Bearded seals occasionally have been observed maintaining breathing holes in annual ice and even hauling out from holes used by ringed seals (Mansfield, 1967; Stirling and Smith, 1977).

Seasonal movements of bearded seals are directly related to the advance and retreat of sea ice and to water depth (Kelly, 1988). During winter they are most common in broken pack ice and in some areas also inhabit shorefast ice (Smith and Hammill, 1981). In Alaska waters, bearded seals are distributed over the continental shelf of the Bering, Chukchi, and Beaufort seas, but are more concentrated in the northern part of the Bering Sea from January to April (Burns, 1981). Recent spring surveys along the Alaskan coast indicate that bearded seals tend to prefer areas of between 70 and 90 percent sea ice coverage, and are typically more abundant greater than 20 nm (37 km) off shore, with the exception of high concentrations nearshore to the south of Kivalina in the Chukchi Sea (Bengtson *et al.*, 2000; Simpkins *et al.*, 2003). Since bearded seals are normally found in broken ice that is unstable for on-ice seismic operation, bearded seals will be rarely encountered during seismic operations.

There are no reliable population estimates for bearded seals in the Beaufort Sea or in the proposed project area (Angliss and Outlaw, 2005). Aerial surveys conducted by MMS in fall 2000 and 2001 sighted a total of 46 bearded seals during survey flights conducted between September and October (Treacy, 2002a; 2002b). Bearded seal numbers are considerably higher in the Bering and Chukchi seas, particularly during winter and early spring. Early estimates of bearded seals in the Bering and Chukchi seas range from 250,000 to 300,000 (Popov, 1976; Burns, 1981).

Surveys flown from Shismaref to Barrow during May-June 1999 and 2000 resulted in an average density of 0.07 seals/km² and 0.14 seals/km², respectively, with consistently high densities along the coast of the south of Kivalina (Bengtson *et al.*, 2005). These densities cannot be used to develop an abundance estimate because no correction factor is available.

Spotted Seals

Spotted seals occur in the Beaufort, Chukchi, Bering, and Okhotsk seas, and south to the northern Yellow Sea and western Sea of Japan (Shaughnessy and Fay, 1977). Based on satellite tagging studies, spotted seals migrate south from the Chukchi Sea in October and pass through the Bering Strait in November and overwinter in the Bering Sea along the ice edge (Lowry *et al.*, 1998). In summer, the majority of spotted seals are found in the Bering and Chukchi seas, but do range into the Beaufort Sea (Rugh *et al.*, 1997; Lowry *et al.*, 1998) from July until September. The seals are most commonly seen in bays, lagoons, and estuaries and are typically not associated with pack ice at this time of the year.

A small number of spotted seal haul-outs are documented in the central Beaufort Sea near the deltas of the Colville and Sagavanirktok rivers (Johnson *et al.*, 1999). Previous studies from 1996 to 2001 indicate that few spotted seals (a few tens) utilize the central Alaska Beaufort Sea (Moulton and Lawson, 2002; Treacy, 2002a; 2002b). In total, there are probably no more than a few tens of spotted seals along the coast of central Alaska Beaufort Sea.

A reliable abundance estimate for spotted seal is not currently available (Angliss and Outlaw, 2005), however, early estimates of the size of the world population of spotted seals was 335,000 to 450,000 animals and the size of the Bering Sea population, including animals in Russian waters, was estimated to be 200,000 to 250,000 animals (Burns, 1973). The total number of spotted seals in Alaskan waters is not known (Angliss and Outlaw, 2005), but the estimate is most likely between several thousand and several tens of thousands (Rugh *et al.*, 1997). Using maximum counts at known haulouts from 1992 (4,135 seals), and a preliminary correction factor for missed seals developed by the Alaska Department of Fish and Game (Lowry *et al.*, 1998), an abundance estimate of 59,214 was calculated for the Alaska stock (Angliss and Outlaw, 2005).

Potential Effects on Marine Mammals and Their Habitat

Seismic surveys using acoustic energy, such as airguns and weigh drop impact sources, may have the potential to adversely impact marine mammals in the vicinity of the activities (Gordon *et al.*, 2004). The sound source level of the GL airgun to be used in the proposed project is 228 dB re: 1 microPa at 1 m, which is strong enough to cause hearing threshold shift (TS) in pinnipeds when exposed for an extended duration (Kastak *et al.*, 1999).

However, it is extremely unlikely that any animals would be exposed to a sound level of this magnitude since acoustic energy is attenuated as it propagates through the water column. Preliminary results of the acoustic modeling, which did not take the ice effects into consideration, shows that the received sound pressure levels (SPLs) dropped down to 190, 180, and 160 dB re: 1 microPa root mean square (RMS) at distances of 120 m (394 ft), 330 m (1,083 ft), and 2.22 km (1.38 mi), respectively. However, with the sea ice dampening effects, actually received SPLs at these distances are expected to be lower (Richardson *et al.*, 1995). In addition, most acoustic energy from an airgun is directed downward, and the short duration of each pulse limits the total energy (Richardson *et al.*, 1995).

Intense acoustic signals from seismic surveys are also known to cause behavioral alteration in marine mammals such as reduced vocalization rates (Goold, 1996), avoidance (Malme *et al.*, 1986, 1988; Richardson *et al.*, 1995; Harris *et al.*, 2001), and changes in blow rates (Richardson *et al.*, 1995) in several marine mammal species. One controlled exposure experiment using small airguns (source level: 215–224 dB re 1 microPa peak-to-peak (p-p)) was conducted on harbor seals (*Phoca vitulina*) and gray seals (*Halichoerus grypus*) that had been fitted with telemetry devices showed fright responses in two harbor seals when playback started (Thompson *et al.*, 1998). Their heart rate dropped dramatically from 35–45 beats/min to 5–10 beats/min. However, these responses were short-lived and following a typical surfacing tachycardia; there were no further dramatic drops in heart rate. Harbor seals showed strong avoidance behavior, swimming rapidly away from the source. Stomach temperature tags revealed that they ceased feeding during this time. Only one seal showed no detectable response to the airguns and approached to within 300 m (984 ft) of the sound source. The behavior of harbor seals seemed to return to normal

soon after the end of each trial. Similar avoidance responses were also documented in gray seals. By contrast, sighting rates of ringed seals from a seismic vessel in shallow Arctic waters showed no difference between periods with the full array, partial array, or no airguns firing (Harris *et al.*, 2001).

Incidental harassment to marine mammals could also result from physical activities associated with on-ice seismic operations, which have the potential to disturb and temporarily displace some seals. Pup mortality could occur if any of these animals were nursing and displacement were protracted. However, it is unlikely that a nursing female would abandon her pup given the normal levels of disturbance from the proposed activities, potential predators, and the typical movement patterns of ringed seal pups among different holes. Seals also use as many as four lairs spaced as far as 3,437 m (11,276 ft) apart. In addition, seals have multiple breathing holes. Pups may use more holes than adults, but the holes are generally closer together than those used by adults. This indicates that adult seals and pups can move away from seismic activities, particularly since the seismic equipment does not remain in any specific area for a prolonged time. Given those considerations, combined with the small proportion of the population potentially disturbed by the proposed activity, impacts are expected to be negligible for the ringed, bearded, and spotted seal populations.

The seismic surveys would only introduce acoustic energy into the water column and no objects would be released into the environment. In addition, the total footprint of the proposed seismic survey area covers approximately 16 km² (6.2 mi²), which represents only a small fraction of the Beaufort Sea pinniped habitat. Sea-ice surface rehabilitation is often immediate, occurring during the first episode of snow and wind that follows passage of the equipment over the ice.

There is a relative lack of knowledge about the potential impacts of seismic energy on marine fish and invertebrates. Available data suggest that there may be physical impacts on eggs and on larval, juvenile, and adult stages of fish at very close range (within meters) to seismic energy source. Considering typical source levels associated with seismic arrays, close proximity to the source would result in exposure to very high energy levels. Where eggs and larval stages are not able to escape such exposures, juvenile and adult fish most likely would avoid them. In the cases of eggs and larvae, it is likely that the

numbers adversely affected by such exposure would be very small in relation to natural mortality. Studies on fish confined in cages that were exposed under intense sound for extended period showed physical or physiological impacts (Scholik and Yan, 2001; 2002; McCauley *et al.*, 2003; Smith *et al.*, 2004). While limited data on seismic surveys regarding physiological effects on fish indicate that impacts are short-term and are most apparent after exposure at very close range (McCauley *et al.*, 2000a; 2000b; Dalen *et al.*, 1996), other studies have demonstrated that seismic guns had little effect on the day-to-day behavior of marine fish and invertebrates (Knudsen *et al.*, 1992; Wardle *et al.*, 2001). It is more likely that fish will swim away upon hearing the seismic impulses (Engas *et al.*, 1996).

Limited studies on physiological effects on marine invertebrates showed that no significant adverse effects from seismic energy were detected for Squid and cuttlefish (McCauley *et al.*, 2000) or in snow crabs (Christian *et al.*, 2003).

Based on the foregoing discussion, NMFS finds preliminarily that the proposed seismic surveys would not cause any permanent impact on the physical habitats and marine mammal prey species in the proposed project area.

Number of Marine Mammals Expected to Be Taken

NMFS estimates that up to 28 ringed seals and much fewer bearded and spotted seals could be taken by Level B harassment as a result of the proposed on-ice geophysical R&D program. The estimate take number is based on consideration of the number of ringed seals that might be disturbed within the 16 km² proposed project area, calculated from the adjusted ringed seal density of 1.73 seal per km² (Kelly and Quakenbush, 1990). This number represents less than 0.1 percent of the total ringed seal population (estimated at 18,000) for the Beaufort Sea (Angliss and Outlaw, 2005).

Due to the unavailability of reliable bearded and spotted seals densities within the proposed project area, NMFS is unable to estimate take numbers for these two species. However, it is expected much fewer bearded and spotted seals would subject to takes by Level B harassment since their occurrence is much lower within the proposed project area, especially during spring (Moulton and Lawson, 2002; Treacy, 2002a; 2002b; Bengtson *et al.*, 2005). Consequently, the levels of take of these 2 pinniped species by Level B harassment within the proposed project

area would represent only small fractions of the total population sizes of these species in Beaufort Sea.

In addition, NMFS expected that the actual take of Level B harassment by the proposed geophysical program would be much lower with the implementation of the proposed mitigation and monitoring measures discussed below. Therefore, NMFS believes that any potential impacts to ringed, bearded, and spotted seals to the proposed on-ice geophysical seismic program would be insignificant, and would be limited to distant and transient exposure.

Potential Effects on Subsistence

Residents of the village of Nuiqsut are the primary subsistence users in the activity area. The subsistence harvest during winter and spring is primarily ringed seals, but during the open-water period both ringed and bearded seals are taken. Nuiqsut hunters may hunt year round; however, most of the harvest has been in open water instead of the more difficult hunting of seals at holes and lairs (McLaren, 1958; Nelson, 1969). Subsistence patterns may be reflected through the harvest data collected in 1992, when Nuiqsut hunters harvested 22 of 24 ringed seals and all 16 bearded seals during the open water season from July to October (Fuller and George, 1997). Harvest data for 1994 and 1995 show 17 of 23 ringed seals were taken from June to August, while there was no record of bearded seals being harvested during these years (Brower and Opie, 1997). Only a small number of ringed seals was harvested during the winter to early spring period, which corresponds to the time of the proposed on-ice seismic operations.

Based on harvest patterns and other factors, on-ice seismic operations in the activity area are not expected to have an unmitigable adverse impact on subsistence uses of ringed and bearded seals because:

(1) Operations would end before the spring ice breakup, after which subsistence hunters harvest most of their seals.

(2) The area where seismic operations would be conducted is small compared to the large Beaufort Sea subsistence hunting area associated with the extremely wide distribution of ringed seals.

In order to ensure the least practicable adverse impact on the species and the subsistence use of ringed seals, SOI has notified and provided the affected subsistence community with a draft plan of cooperation. SOI held community meeting with the affected Beaufort Sea communities in mid-October 2006 and will hold meetings

again in early 2007 to discuss proposed activities and to resolve potential conflicts regarding any aspects of either the operation or the plan of cooperation.

Mitigation and Monitoring

The following mitigation and monitoring measures are proposed for the subject on-ice seismic surveys. All activities will be conducted as far as practicable from any observed ringed seal lair and no energy source will be placed over a seal lair.

SOI will employ trained seal lair sniffing dogs to locate seal structures under snow (subnivean) before the seismic program begins. The recommended prospective area for the proposed project will be surveys for the subnivean seal structures using 3 trained dogs running together. Transects will be spaced 250 m (820 ft) apart and oriented 90° to the prevailing wind direction. The search tracks of the dogs will be recorded by GPS units on the dogs and the tracks will be downloaded daily. Subnivean structures located will be probed by steel rod to check if each is open (active), or frozen (abandoned). Structures will be categorized by size, structure and odor to ascertain whether the structure is a birth lair, resting lair, resting lair of rutting male seals, or a breathing hole. Locations of seal structures will be marked and monitored and adjustment to the seismic operation will be made to avoid the lairs.

Seismic sources for the program will be recorded into 5 sensor groups: analog surface receivers, digital surface receivers, hydrophones in the water column, and 3 different types of 4-component ocean bottom sensors on the seafloor. Each source will be recorded into the 5 receiver groups. Water column monitoring of sound levels will be most directly accomplished by monitoring sound levels from the hydrophones. Density of receivers is very high, with spacing of 5 m (16.4 ft), so a detailed characterization of the sound levels can be accomplished. A range of receiver offsets will be available up to the maximum program offset of 4,000 m (13,123 ft). Additionally, the surface and ocean bottom sensors can be used as supplemental information in the determination of source levels and propagation distances for the experiment.

NMFS and SOI are proposing a 500 m (1,640 ft) exclusion zone around all located active subnivean seal structures, which no seismic or impact surveys will be conducted. During active seismic and impact source testing an on-ice 500 m (1,640 ft) safety zone will be established. The size of the safety zone shall then be

adjusted to match the 190 dB_{rms} re: 1 microPa isopleth based on seismic source monitoring. On ice monitoring must be conducted by a trained, NMFS-approved marine mammal observer (MMO) for entry by any marine mammal. No seismic or impact surveys will be conducted if a marine mammal is observed entering the monitored safety zone.

To further reduce the potential impacts to marine mammals, SOI will implement soft-start (ramp-up) procedure when starting operations of the airgun or impact sources. Airgun and impact sources will be initiated at 50 percent of its full level and slowly (not more than 6 dB per 5 minutes) increase their power to full capacity.

Reporting

An annual report must be submitted to NMFS within 90 days of completing the year's activities. The report must contain detail description of the any marine mammal, by species, number, age class, and sex if possible, that is sighted in the vicinity of the proposed project area; whether the animal is harassed; and the context of behavior change due to Level B harassment.

Endangered Species Act (ESA)

NMFS has determined that no species listed as threatened or endangered under the ESA will be affected by issuing an incidental harassment authorization under section 101(a)(5)(D) of the MMPA to SOI for the proposed on-ice seismic survey.

National Environmental Policy Act (NEPA)

The information provided in the Final Programmatic Environmental Assessment (EA) on the *Arctic Ocean Outer Continental Shelf Seismic Surveys – 2006* prepared by the Mineral Management Service (MMS) in June 2006 led NMFS to conclude that implementation of either the preferred alternative or other alternatives identified in the EA would not have a significant impact on the human environment. Therefore, an Environmental Impact Statement was not prepared. The proposed action discussed in this document is not substantially different from the 2006 actions, and a reference search has indicated that no significant new scientific information or analyses have been developed in the past several years that would warrant new NEPA documentation.

Preliminary Conclusions

The anticipated impact of the proposed on-ice seismic program on the

species or stock of ringed, bearded, and spotted seals is expected to be negligible for the following reasons:

(1) The proposed activity would only occur in a small area which supports a small proportion (<0.1 percent) of the ringed seal populations in the Beaufort Sea. The numbers of bearded and spotted seals within the proposed project area is expected to be even lower than that of ringed seals.

(2) The following mitigation and monitoring procedures will be implemented: (a) using trained seal lair sniffing dogs to conduct pre-operational survey and monitoring of ringed seal lairs and breathing holes within the proposed action area; (b) conducting activities as far away from any observed seal structures as possible; (c) establishing safety zone based on isopleth of 190 dB_{rms} re: 1 microPa and (d); monitoring safety zones during operations of airgun and impact sources by a trained MMO, and soft-start (ramp-up) procedure when initiating airgun.

As a result, NMFS believes the effects of on-ice geophysical R&D program are expected to be limited to short-term and localized behavioral changes involving relatively small numbers of ringed seals, and may also potentially affect any bearded and spotted seals in the vicinity. NMFS has preliminarily determined, based on information in the application and supporting documents, that these changes in behavior will have no more than a negligible impact on the affected pinniped species and populations within the proposed action area. Also, the potential effects of the proposed on-ice geophysical project during 2007 will not have an unmitigable adverse impact on subsistence uses of these species.

Proposed Authorization

NMFS proposes to issue an IHA to SOI for conducting on-ice geophysical R&D program in the U.S. Beaufort Sea, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. NMFS has preliminarily determined that the proposed activity would result in the harassment of small numbers of ringed seals, and potentially any bearded and spotted seals in the vicinity; would have no more than a negligible impact on the affected pinniped species and stocks; and would not have an unmitigable adverse impact on the availability of seals for subsistence uses.

Dated: January 31, 2007.

James H. Lecky,

*Director, Office of Protected Resources,
National Marine Fisheries Service.*

[FR Doc. E7-1875 Filed 2-5-07; 8:45 am]

BILLING CODE 3510-22-S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Draft Framework for Developing the National System of Marine Protected Areas

AGENCY: National Ocean Service, NOAA, Department of Commerce.

ACTION: Extension of Public Comment Period on the Draft Framework for Developing the National System of Marine Protected Areas.

SUMMARY: The Department of Commerce published a notice in the **Federal Register** on September 22, 2006 (71 FR 55432) announcing a 145-day public comment period on the Draft Framework for Developing the National System of Marine Protected Areas (Draft Framework). Copies of the Draft Framework can be requested via the contact information below or downloaded from <http://www.mpa.gov>. The deadline for public comment on the draft Framework is hereby extended.

DATES: The extended deadline for public comment on the draft Framework is 11:59 p.m. Eastern Time on February 28, 2007.

ADDRESSES: Comments should be sent to Joseph Uravitch, National Oceanic and Atmospheric Administration, National Marine Protected Areas Center, 1305 East West Highway, N/ORM, Silver Spring, MD 20910. Fax: (301) 713-3110. E-mail: mpa.comments@noaa.gov. Comments will be accepted in written form by mail, e-mail, or fax.

FOR FURTHER INFORMATION CONTACT: Refer to the **Federal Register** notice of September 22, 2006, or contact Jonathan Kelsey at (301) 563-1130, or via e-mail at mpa.comments@noaa.gov.

Dated: January 31, 2007.

David M. Kennedy,

Director, Office of Ocean and Coastal Resource Management.

[FR Doc. E7-1896 Filed 2-5-07; 8:45 am]

BILLING CODE 3510-08-P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Legal Processes

ACTION: Proposed collection; comment request.

SUMMARY: The United States Patent and Trademark Office (USPTO), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to

comment on the continuing information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before April 9, 2007.

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

- *E-mail:* Susan.Fawcett@uspto.gov. Include "0651-0046 comment" in the subject line of the message.

- *Fax:* 571-273-0112, marked to the attention of Susan Brown.

- *Mail:* Susan K. Brown, Records Officer, Office of the Chief Information Officer, Architecture, Engineering and Technical Services, Data Architecture and Services Division, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313-1450.

- *Federal e-Rulemaking Portal:* <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Shirley Hassan, Office of General Law, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313-1450; by telephone at 571-272-3000; or by e-mail at Shirley.Hassan@uspto.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

The purpose of this collection is to cover information requirements related to civil actions and claims involving current and former employees of the United States Patent and Trademark Office (USPTO). The rules for these legal processes may be found under 37 CFR Part 104, which outlines procedures for service of process, demands for employee testimony and production of documents in legal proceedings, reports of unauthorized testimony, employee indemnification, and filing claims against the USPTO under the Federal Tort Claims Act (28 U.S.C. 2672) and the corresponding Department of Justice regulations (28 CFR Part 14). The public may also petition the USPTO Office of General Counsel under 37 CFR 104.3 to waive or suspend these rules in extraordinary cases.

The procedures under 37 CFR Part 104 ensure that service of process intended for current and former employees of the USPTO is handled properly. The USPTO will only accept service of process for an employee acting in an official capacity. This

collection is necessary so that respondents or their representatives can serve a summons or complaint on the USPTO, demand employee testimony and documents related to a legal proceeding, or file a claim under the Federal Tort Claims Act. Respondents may also petition the USPTO to waive or suspend these rules for legal processes. This collection is also necessary so that current and former USPTO employees may properly forward service and demands to the Office of General Counsel, report unauthorized testimony, and request indemnification. The USPTO covers current employees as respondents under this information collection even though their responses do not require approval under the Paperwork Reduction Act. In those instances where both current and former employees may respond to the USPTO, the agency estimates that the number of respondents will be small.

There are no forms provided by the USPTO for this collection. For filing claims under the Federal Tort Claims Act, the public may use Standard Form

95 "Claim for Damage, Injury, or Death," which is provided by the Department of Justice and approved by the Office of Management and Budget (OMB) under OMB Control Number 1105-0008.

II. Method of Collection

By mail or hand delivery to the USPTO.

III. Data

OMB Number: 0651-0046.

Form Number(s): None.

Type of Review: Revision of a currently approved collection.

Affected Public: Individuals or households; businesses or other for-profits; not-for-profit institutions; and the Federal Government.

Estimated Number of Respondents: 176 responses per year.

Estimated Time Per Response: The USPTO estimates that it will take the public from 5 minutes (0.08 hours) to 1 hour to gather the necessary information, prepare the appropriate documents, and submit the information required for this collection.

Estimated Total Annual Respondent Burden Hours: 31 hours per year.

Estimated Total Annual Respondent Cost Burden: \$9,189 per year. The USPTO expects that the information in this collection will be prepared by attorneys and former employees, except for the requests for employee indemnification, which generally come from professional and supervisory staff. Since many of the former employees affected by this collection are attorneys, the attorney rate will be used for former employees as well. Using the professional rate of \$304 per hour for associate attorneys in private firms, the USPTO estimates that the respondent cost burden for attorneys and former employees submitting the information in this collection will be \$9,120 per year. Using the estimate of \$69 per hour for professional and supervisory staff, the USPTO expects that the respondent cost burden for submitting requests for employee indemnification will be \$69 per year. Therefore, the respondent cost burden for this collection will be \$9,189 per year.

Item	Estimated time for response	Estimated annual responses	Estimated annual burden hours
Petition to Waive Rules	30 minutes	7	4
Service of Process	5 minutes	130	10
Forwarding Service	10 minutes	7	1
Employee Testimony and Production of Documents in Legal Proceedings.	30 minutes	18	9
Forwarding Demands	10 minutes	7	1
Report of Unauthorized Testimony	30 minutes	1	1
Report of Possible Indemnification Cases	30 minutes	3	2
Employee Indemnification	30 minutes	1	1
Tort Claims	1 hour	2	2
Total .....	.....	76	31

Estimated Total Annual Non-hour Respondent Cost Burden: \$2,013 per year. There are no capital start-up, maintenance, or recordkeeping costs associated with this information collection. However, this collection does have annual (non-hour) costs in the form of filing fees and postage costs.

This collection has filing fees associated with the petition to waive or suspend the legal process rules under 37 CFR 104.3. The filing fee for this petition is \$130, and the USPTO estimates that approximately seven petitions will be filed per year for a total filing cost of \$910. There are no other filing fees associated with this information collection.

Customers may incur postage costs when submitting the information in this collection to the USPTO by mail. The USPTO estimates that the average first-

class postage for a mailed submission, other than a Service of Process, will be 52 cents and that up to 46 of these submissions will be mailed to the USPTO per year, for a postage cost of \$24. The USPTO estimates that the average postage for a Service of Process will be \$8.30 and that up to 130 of these submissions will be mailed to the USPTO per year, for a postage cost of \$1,079. The total estimated postage cost for this collection is \$1,103 per year.

The total non-hour respondent cost burden for this collection in the form of filing fees and postage costs is \$2,013 per year.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including

whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, e.g., the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: January 30, 2007.

Susan K. Brown,

Records Officer, USPTO, Office of the Chief Information Officer, Architecture, Engineering and Technical Services, Data Architecture and Services Division.

[FR Doc. E7-1871 Filed 2-5-07; 8:45 am]

BILLING CODE 3510-16-P

DEPARTMENT OF DEFENSE

Office of the Secretary

Notice of Open Meeting

AGENCY: Office of the Assistant Secretary of Defense (Health Affairs); DoD.

SUMMARY: In accordance with section 10(a)(2) of Public Law 92-463, The Federal Advisory Committee Act, announcement is made of the following meeting:

Name of Committee: DoD Task Force on Mental Health, a Subcommittee of the Defense Health Board.

Dates: February 26, 2007 (Morning—Open Session), February 27, 2007 (Afternoon—Open Session).

Times: 0800–1215 hours (26 February) 1530–1730 hours (27 February).

Location: DoubleTree Hotel, 300 Army Navy Drive, Arlington, VA 22202.

Agenda: The purpose of the meeting is to obtain, review, and evaluate information related to the Mental Health Task Force's congressionally-directed task of assessing the efficacy of mental health services provided to members of the Armed Forces by the Department of Defense. The Task Force members will receive briefings on topics related to mental health concerns among military service members and mental health care delivery. The Task Force will hold a "Town Hall Meeting" session to hear

concerns from the Washington, DC Metro Area Active Duty Military, National Guard and Reserve, and Veterans communities. The Task Force will also meet in administrative session to consider administrative matters.

FOR FURTHER INFORMATION CONTACT:

Colonel Roger Gibson, Executive Secretary, Defense Health Board, Skyline One, 5205 Leesburg Pike, Suite 810, Falls Church, VA 22041, (703) 681-3279, ext. 123.

SUPPLEMENTARY INFORMATION: The morning session on February 26, and the afternoon session on February 27, 2007 will be open to the public in accordance with Section 552b(b) of Title 5, U.S.C., specifically subparagraph (1) thereof and Title 5, U.S.C., appendix 1, subsection 10(d). Open sessions of the meeting will be limited by space accommodations. Any interested person may attend, and submit matters to the Board's point of contact for consideration by the Board. All comments must be received no later than 5 business days prior to the Board meeting.

Dated: January 30, 2007.

C.R. Choate,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 07-500 Filed 2-5-07; 8:45 am]

BILLING CODE 5001-06-M

DEPARTMENT OF DEFENSE

Office of the Secretary

Revised Non-Foreign Overseas Per Diem Rates

AGENCY: DoD, Per Diem, Travel and Transportation Allowance Committee.

ACTION: Republication of Revised Non-Foreign Overseas Per Diem Rates to Civilian Bulletin 251.

SUMMARY: The Per Diem, Travel and Transportation Allowance Committee is re-publishing Civilian Personnel Per Diem Bulletin Number 251 to correct an error in the Per Diem rate published on January 26, 2007 (72 FR 3799). This bulletin lists revisions in the per diem rates prescribed for U.S. Government employees for official travel in Alaska, Hawaii, Puerto Rico, the Northern Mariana Islands and Possessions of the United States. AEA changes announced in Bulletin Number 194 remain in effect. Bulletin Number 251 is being published in the **Federal Register** to assure that travelers are paid per diem at the most current rates.

EFFECTIVE DATE: February 1, 2007.

SUPPLEMENTARY INFORMATION: This document gives notice of revisions in per diem rates prescribed by the Per Diem Travel and Transportation Allowance Committee for non-foreign areas outside the continental United States. It supersedes Civilian Personnel Per Diem Bulletin Number 250. Distribution of Civilian Personnel Per Diem Bulletins by mail was discontinued. Per Diem Bulletins published periodically in the **Federal Register** now constitute the only notification of revisions in per diem rates to agencies and establishments outside the Department of Defense. For more information or questions about per diem rates, please contact your local travel office. The text of the Bulletin follows:

Dated: January 30, 2006.

C.R. Choate,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001-06-M

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Mariana Islands and Possessions of the United States by Federal Government civilian employees.

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	M&IE RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
ALASKA						
ADAK	120		79		199	07/01/2003
ANCHORAGE [INCL NAV RES]						
05/01 - 09/15	170		93		263	05/01/2006
09/16 - 04/30	95		85		180	05/01/2006
BARROW	159		95		254	05/01/2002
BETHEL	125		78		203	05/01/2006
BETTLES	135		62		197	10/01/2004
CLEAR AB	90		82		172	10/01/2006
COLD BAY	90		73		163	05/01/2002
COLDFOOT	165		70		235	10/01/2006
COPPER CENTER						
05/01 - 09/30	129		75		204	04/01/2006
10/01 - 04/30	89		71		160	04/01/2006
CORDOVA						
05/01 - 09/30	95		74		169	05/01/2006
10/01 - 04/30	85		72		157	04/01/2005
CRAIG						
04/15 - 09/14	125		67		192	04/01/2006
09/15 - 04/14	95		64		159	04/01/2006
DEADHORSE	95		67		162	05/01/2002
DELTA JUNCTION	90		77		167	02/01/2007
DENALI NATIONAL PARK						
06/01 - 08/31	122		66		188	04/01/2006
09/01 - 05/31	70		61		131	04/01/2006
DILLINGHAM	114		69		183	06/01/2004
DUTCH HARBOR-UNALASKA	121		84		205	04/01/2006
EARECKSON AIR STATION	90		82		172	10/01/2006
EIELSON AFB						
05/01 - 09/15	169		95		264	02/01/2007
09/16 - 04/30	75		86		161	02/01/2007
ELMENDORF AFB						
05/01 - 09/15	170		93		263	05/01/2006
09/16 - 04/30	95		85		180	05/01/2006
FAIRBANKS						
05/01 - 09/15	169		95		264	02/01/2007
09/16 - 04/30	75		86		161	02/01/2007
FOOTLOOSE	175		18		193	06/01/2002
FT. GREELY	90		77		167	02/01/2007
FT. RICHARDSON						
05/01 - 09/15	170		93		263	05/01/2006
09/16 - 04/30	95		85		180	05/01/2006
FT. WAINWRIGHT						
05/01 - 09/15	169		95		264	02/01/2007
09/16 - 04/30	75		86		161	02/01/2007

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Mariana Islands and Possessions of the United States by Federal Government civilian employees.

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	M&IE RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
GLENNALLEN						
05/01 - 09/30	129		75		204	04/01/2006
10/01 - 04/30	89		71		160	04/01/2006
HAINES	90		69		159	04/01/2006
HEALY						
06/01 - 08/31	122		66		188	04/01/2006
09/01 - 05/31	70		61		131	04/01/2006
HOMER						
05/15 - 09/15	139		80		219	05/01/2006
09/16 - 05/14	79		74		153	05/01/2006
JUNEAU						
05/01 - 09/30	129		89		218	04/01/2006
10/01 - 04/30	79		84		163	04/01/2006
KAKTOVIK	165		86		251	05/01/2002
KAVIK CAMP	150		69		219	05/01/2002
KENAI-SOLDOTNA						
05/01 - 08/31	129		92		221	04/01/2006
09/01 - 04/30	79		87		166	04/01/2006
KENNICOTT	189		85		274	04/01/2005
KETCHIKAN						
05/01 - 09/30	135		82		217	04/01/2005
10/01 - 04/30	98		78		176	04/01/2005
KING SALMON						
05/01 - 10/01	225		91		316	05/01/2002
10/02 - 04/30	125		81		206	05/01/2002
KLAWOCK						
04/15 - 09/14	125		67		192	04/01/2006
09/15 - 04/14	95		64		159	04/01/2006
KODIAK						
05/01 - 09/30	123		91		214	04/01/2006
10/01 - 04/30	99		88		187	04/01/2006
KOTZEBUE						
05/15 - 09/30	151		90		241	05/01/2006
10/01 - 05/14	135		89		224	05/01/2006
KULIS AGS						
05/01 - 09/15	170		93		263	05/01/2006
09/16 - 04/30	95		85		180	05/01/2006
MCCARTHY	189		85		274	04/01/2005
MCGRATH	165		69		234	10/01/2006
MURPHY DOME						
05/01 - 09/15	169		95		264	02/01/2007
09/16 - 04/30	75		86		161	02/01/2007
NOME	125		86		211	05/01/2006
NUIQSUT	180		53		233	05/01/2002
PETERSBURG	80		62		142	06/01/2005
POINT HOPE	130		70		200	03/01/1999
POINT LAY	105		67		172	03/01/1999
PORT ALSWORTH	135		88		223	05/01/2002
PRUDHOE BAY	95		67		162	05/01/2002
SEWARD						

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Mariana Islands and Possessions of the United States by Federal Government civilian employees.

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	M&IE RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
05/01 - 09/30	171		79		250	04/01/2006
10/01 - 04/30	69		69		138	04/01/2006
SITKA-MT. EDGE CUMBE						
05/01 - 09/30	119		83		202	02/01/2007
10/01 - 04/30	99		81		180	02/01/2007
SKAGWAY						
05/01 - 09/30	135		82		217	04/01/2005
10/01 - 04/30	98		78		176	04/01/2005
SLANA						
05/01 - 09/30	139		55		194	02/01/2005
10/01 - 04/30	99		55		154	02/01/2005
SPRUCE CAPE						
05/01 - 09/30	123		91		214	04/01/2006
10/01 - 04/30	99		88		187	04/01/2006
ST. GEORGE	129		55		184	06/01/2004
TALKEETNA	100		89		189	07/01/2002
TANANA	125		86		211	05/01/2006
TOGIAK	100		39		139	07/01/2002
TOK						
05/01 - 09/30	109		69		178	02/01/2007
10/01 - 04/30	90		67		157	02/01/2007
UMIAT	350		35		385	10/01/2006
VALDEZ						
05/01 - 10/01	129		80		209	04/01/2006
10/02 - 04/30	79		75		154	04/01/2006
WASILLA						
05/01 - 09/30	134		84		218	04/01/2006
10/01 - 04/30	80		79		159	04/01/2006
WRANGELL						
05/01 - 09/30	135		82		217	04/01/2005
10/01 - 04/30	98		78		176	04/01/2005
YAKUTAT	110		68		178	03/01/1999
[OTHER]	90		77		167	02/01/2007
AMERICAN SAMOA						
AMERICAN SAMOA	122		73		195	12/01/2005
GUAM						
GUAM (INCL ALL MIL INSTAL)	135		90		225	06/01/2005
HAWAII						
CAMP H M SMITH	149		100		249	05/01/2006
EASTPAC NAVAL COMP TELE AREA	149		100		249	05/01/2006
FT. DERUSSEY	149		100		249	05/01/2006
FT. SHAFTER	149		100		249	05/01/2006
HICKAM AFB	149		100		249	05/01/2006
HONOLULU (INCL NAV & MC RES CTR)	149		100		249	05/01/2006
ISLE OF HAWAII: HILO	112		93		205	05/01/2006
ISLE OF HAWAII: OTHER	150		95		245	05/01/2006
ISLE OF KAUAI	188		102		290	05/01/2006
ISLE OF MAUI	159		95		254	05/01/2006
ISLE OF OAHU	149		100		249	05/01/2006
KEKAHA PACIFIC MISSILE RANGE FAC	188		102		290	05/01/2006

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Mariana Islands and Possessions of the United States by Federal Government civilian employees.

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	M&IE RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
KILAUEA MILITARY CAMP	112		93		205	05/01/2006
LANAI	175		130		305	05/01/2006
LUALUALEI NAVAL MAGAZINE	149		100		249	05/01/2006
MCB HAWAII	149		100		249	05/01/2006
MOLOKAI	153		95		248	05/01/2006
NAS BARBERS POINT	149		100		249	05/01/2006
PEARL HARBOR [INCL ALL MILITARY]	149		100		249	05/01/2006
SCHOFIELD BARRACKS	149		100		249	05/01/2006
WHEELER ARMY AIRFIELD	149		100		249	05/01/2006
[OTHER]	112		93		205	12/01/2006
MIDWAY ISLANDS						
MIDWAY ISLANDS						
INCL ALL MILITARY	100		45		145	06/01/2006
NORTHERN MARIANA ISLANDS						
ROTA	129		91		220	05/01/2006
SAIPAN	121		94		215	05/01/2006
TINIAN	85		80		165	06/01/2005
[OTHER]	55		72		127	04/01/2000
PUERTO RICO						
AGUADILLA	87		70		157	07/01/2006
BAYAMON	195		77		272	08/01/2006
CAROLINA	195		77		272	08/01/2006
CEIBA						
05/01 - 11/30	155		57		212	08/01/2006
12/01 - 04/30	185		57		242	08/01/2006
FAJARDO [INCL ROOSEVELT RDS NAVS						
05/01 - 11/30	155		57		212	08/01/2006
12/01 - 04/30	185		57		242	08/01/2006
FT. BUCHANAN [INCL GSA SVC CTR,	195		77		272	08/01/2006
HUMACAO						
05/01 - 11/30	155		57		212	08/01/2006
12/01 - 04/30	185		57		242	08/01/2006
LUIS MUNOZ MARIN IAP AGS	195		77		272	08/01/2006
LUQUILLO						
05/01 - 11/30	155		57		212	08/01/2006
12/01 - 04/30	185		57		242	08/01/2006
MAYAGUEZ	109		73		182	07/01/2006
PONCE						
01/01 - 05/31	139		73		212	07/01/2006
06/01 - 07/31	230		82		312	07/01/2006
08/01 - 11/30	139		73		212	07/01/2006
12/01 - 12/31	230		82		312	07/01/2006
SABANA SECA [INCL ALL MILITARY]	195		77		272	08/01/2006
SAN JUAN & NAV RES STA	195		77		272	08/01/2006
[OTHER]	62		57		119	01/01/2000
VIRGIN ISLANDS (U.S.)						
ST. CROIX						
04/15 - 12/14	135		92		227	05/01/2006
12/15 - 04/14	187		97		284	05/01/2006

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Mariana Islands and Possessions of the United States by Federal Government civilian employees.

LOCALITY	MAXIMUM LODGING AMOUNT		M&IE RATE (B)	=	MAXIMUM PER DIEM RATE (C)		EFFECTIVE DATE
	(A)	+			(C)		
ST. JOHN							
04/15 - 12/14	163		98		261		05/01/2006
12/15 - 04/14	220		104		324		05/01/2006
ST. THOMAS							
04/15 - 12/14	240		105		345		05/01/2006
12/15 - 04/14	299		111		410		05/01/2006
WAKE ISLAND							
WAKE ISLAND	152		15		167		06/01/2006

[FR Doc. 07-498 Filed 2-5-07; 8:45 am]

BILLING CODE 5001-06-C

DEPARTMENT OF DEFENSE

Department of the Navy

Meeting of the Ocean Research and Resources Advisory Panel

AGENCY: Department of the Navy, DoD.

ACTION: Notice of Open Meeting.

SUMMARY: The Ocean Research and Resources Advisory Panel (ORRAP) will meet to discuss National Ocean Research Leadership Council (NORLC) and Interagency Committee on Ocean Science and Resource Management Integration (ICOSRMI) activities. All sessions of the meeting will remain open to the public.

DATES: The meeting will be held on Wednesday, February 21, 2007, from 8 a.m. to 5:30 p.m. and Thursday, February 22, 2007, from 7:30 a.m. to 1 p.m. In order to maintain the meeting time schedule, members of the public will be limited in their time to speak to the Panel. Members of the public should submit their comments one week in advance of the meeting to the meeting Point of Contact.

ADDRESSES: The meeting will be held at the Southern California Coastal Water Research Project Authority, 3535 Harbor Blvd., Costa Mesa, CA 92626.

FOR FURTHER INFORMATION CONTACT: Dr. Melbourne G. Briscoe, Office of Naval Research, 875 North Randolph Street, Suite 1425, Arlington, VA 22203-1995, telephone 703-696-4120.

SUPPLEMENTARY INFORMATION: This notice of open meeting is provided in

accordance with the Federal Advisory Committee Act (5 U.S.C. App. 2). The meeting will include discussions on initiatives in ocean management, research, and education, and other current issues in the ocean science and resource management communities.

Dated: January 31, 2007.

M. A. Harvison,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E7-1870 Filed 2-5-07; 8:45 am]

BILLING CODE 3810-FF-P

ELECTION ASSISTANCE COMMISSION

Sunshine Act Notice

AGENCY: United States Election Assistance Commission.

ACTION: Notice of Public Meeting for EAC Standards Board.

DATE AND TIME: Tuesday, February 20, 2007, 6:30 p.m.-9 p.m. Wednesday, 21, 2007, 8:30 a.m.-6 p.m. Thursday, 22, 2007, 9 a.m.-5 p.m. Friday, 23, 2007, 8:30 a.m.-11 a.m.

PLACE: Ritz-Carlton Atlanta, 191 Peachtree Street, NE., Atlanta, GA 30303, (404) 659-0400.

PURPOSE: The U.S. Election Assistance Commission (EAC) Standards Board, as required by the Help America Vote Act of 2002 (HAVA), will meet and receive updates on EAC projects and activities and discuss other relevant matters pertaining to the administration of federal elections. The Board will receive updates on the following subject: EAC's voting system certification and laboratory accreditation program and

activities of the Technical Guidelines Development Committee (TGDC) regarding the voluntary voting system guidelines. The business portion of the meeting will include an election for three vacancies on the Executive Board and the presentation of redrafted bylaws.

This meeting will be open to the public.

PERSON TO CONTACT FOR INFORMATION:

Bryan Whitener, Telephone: (202) 566-3100.

Thomas R. Wilkey,

Executive Director, U.S. Election Assistance Commission.

[FR Doc. 07-547 Filed 2-2-07; 3:32 pm]

BILLING CODE 6820-KF-M

DEPARTMENT OF ENERGY

Office of Science; Fusion Energy Sciences Advisory Committee

AGENCY: Department of Energy.

ACTION: Notice of Open Meeting.

SUMMARY: This notice announces a meeting of the Fusion Energy Sciences Advisory Committee. The Federal Advisory Committee Act (Public Law 92-463, 86Stat.770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, March 1, 2007, 8:30 a.m. to 6 p.m. and Friday, March 2, 2007, 8:30 a.m. to noon.

ADDRESSES: The Marriott Gaithersburg Washingtonian Center, 9751 Washingtonian Boulevard, Gaithersburg, Maryland 20878, USA.

FOR FURTHER INFORMATION CONTACT:

Albert L. Opdenaker, Office of Fusion

Energy Sciences; U.S. Department of Energy; 1000 Independence Avenue, SW.; Washington, DC 20585-1290; Telephone: 301-903-4927.

SUPPLEMENTARY INFORMATION: *Purpose of the Meeting:* The major purposes of the meeting are for the Fusion Energy Sciences Advisory Committee (FESAC) to (1) hear from DOE about the FY 2008 Budget, (2) complete the charge on the evaluation of the program's progress toward meeting the PART performance measures, and (3) a presentation and discussion of a new charge and how FESAC plans to approach this new charge. The charge will be related to the evolution of the program during the years of ITER construction and operation including what issues need to be dealt with and what general class(es) of facility(ies) may be needed in addition to ITER.

Tentative Agenda

Thursday, March 1, 2007

- Complete the charge on assessing the program's progress toward achieving long-range PART measures.
- Discussion of the new charge.
- Public Comments.

Friday, March 2, 2007

- U.S. Burning Plasma Office: Status Report.
- High Energy Density Physics: What is happening at DOE.
- Fusion Simulation Project Status and Plans.

Public Participation: The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Albert L. Opdenaker at 301-903-8584 (fax) or albert.opdenaker@science.doe.gov (e-mail). You must make your request for an oral statement at least 5 business days before the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: We will make the minutes of this meeting available for public review and copying within 30 days at the Freedom of Information Public Reading Room; IE-190; Forrestal Building; 1000 Independence Avenue, SW.; Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC, on February 1, 2007.

Rachel M. Samuel,
Deputy Advisory Committee Management Officer.

[FR Doc. E7-1855 Filed 2-5-07; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy; State Energy Advisory Board

AGENCY: Department of Energy.

ACTION: Notice of Open Teleconference.

SUMMARY: This notice announces a teleconference of the State Energy Advisory Board (STEAB). The Federal Advisory Committee Act (Pub. L. 92-463; 86 Stat. 770) requires that public notice of these teleconferences be announced in the **Federal Register**.

DATES: February 15, 2007, from 2 p.m. to 3 p.m. EST.

FOR FURTHER INFORMATION CONTACT: Gary Burch, STEAB Designated Federal Officer, Assistant Manager, Intergovernmental Projects & Outreach, Golden Field Office, U.S. Department of Energy, 1617 Cole Boulevard, Golden, CO 80401, Telephone 303/275-4801.

SUPPLEMENTARY INFORMATION: *Purpose of the Board:* To make recommendations to the Assistant Secretary for Energy Efficiency and Renewable Energy regarding goals and objectives, programmatic and administrative policies, and to otherwise carry out the Board's responsibilities as designated in the State Energy Efficiency Programs Improvement Act of 1990 (Pub. L. 101-440).

Tentative Agenda: Update members on routine business matters.

Public Participation: The teleconference is open to the public. Written statements may be filed with the Board either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Gary Burch at the address or telephone number listed above. Requests to make oral comments must be received five days prior to the conference call; reasonable provision will be made to include requested topic(s) on the agenda. The Chair of the Board is empowered to conduct the call in a fashion that will facilitate the orderly conduct of business. This notice is being published less than 15 days before the date of the meeting due to programmatic issues.

Notes: The notes of the teleconference will be available for public review and copying

within 60 days at the Freedom of Information Public Reading Room, 1E-190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. The notes will also be available for downloading on the STEAB Web site, www.steab.org, within 60 days.

Issued at Washington, DC, on January 31, 2007.

Rachel Samuel,
Deputy Advisory Committee Management Officer.

[FR Doc. E7-1856 Filed 2-5-07; 8:45 am]

BILLING CODE 6450-01-P

EXPORT-IMPORT BANK OF THE UNITED STATES

Sunshine Act Meeting

ACTION: Notice of a Partially Open Meeting of the Board of Directors of the Export-Import Bank of the United States.

TIME AND PLACE: Thursday, February 8, 2007 at 9:30 a.m. The meeting will be held at Ex-Im Bank in Room 1143, 811 Vermont Avenue, NW., Washington, DC 20571.

OPEN AGENDA ITEM: Ex-Im Bank Advisory Committee (15th Member) for 2007.

PUBLIC PARTICIPATION: The meeting will be open to public participation for Item No. 1 only.

FURTHER INFORMATION: For further information, contact: Office of the Secretary, 811 Vermont Avenue, NW., Washington, DC 20571 (Telephone 202-565-3957).

Howard A. Schweitzer,
General Counsel.

[FR Doc. 07-540 Filed 2-2-07; 1:15 pm]

BILLING CODE 6690-01-M

FARM CREDIT ADMINISTRATION

Farm Credit Administration Board; Regular Meeting

AGENCY: Farm Credit Administration.

SUMMARY: Notice is hereby given, pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)), of the regular meeting of the Farm Credit Administration Board (Board).

DATE AND TIME: The regular meeting of the Board will be held at the offices of the Farm Credit Administration in McLean, Virginia, on February 8, 2007, from 9 a.m. until such time as the Board concludes its business.

FOR FURTHER INFORMATION CONTACT: Roland E. Smith, Secretary to the Farm Credit Administration Board, (703) 883-4009, TTY (703) 883-4056.

ADDRESSES: Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102-5090.

SUPPLEMENTARY INFORMATION: This meeting of the Board will be open to the public (limited space available). In order to increase the accessibility to Board meetings, persons requiring assistance should make arrangements in advance. The matters to be considered at the meeting are:

Open Session

A. Approval of Minutes

- January 11, 2007 (Open and Closed).

B. New Business—Regulations

- Joint and Several Liability—Priority of Claims (Proposed Rule).

C. Reports

- Office of Management Services Quarterly Report.

Dated: February 2, 2007.

Roland E. Smith,

Secretary, Farm Credit Administration Board.
[FR Doc. 07-528 Filed 2-1-07; 4:44 pm]

BILLING CODE 6705-01-P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Additional information on all bank holding companies may be obtained from the National Information Center 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 March 5, 2007.

A. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480-0291:

1. *Hayward Bancshares, Inc., Eau Claire, Wisconsin* to acquire 100 percent of the voting shares of Summit Community Bank, Maplewood, Minnesota.

B. Federal Reserve Bank of Kansas City (Donna J. Ward, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198-0001:

1. *Kaw Valley Bancshares, Inc.*, to acquire 100 percent of the voting shares of Kaw Valley State Bank & Trust Company, both of Wamego, Kansas.

Board of Governors of the Federal Reserve System, February 1, 2007.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E7-1887 Filed 2-5-07; 8:45 am]

BILLING CODE 6210-01-S

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Reinstatement of Existing Collection; Comment Request

AGENCY: Federal Trade Commission.

ACTION: Notice and request for comment.

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") intends to conduct a pilot study in connection with Section 319 of the Fair and Accurate Credit Transactions Act of 2003. This study is a follow-up to the Commission's previous pilot study conducted from October 2005 through June 2006. Before gathering this information, the FTC is seeking public comment on its proposed consumer pilot study. The information collection requirements described below will be submitted to the Office of Management and Budget ("OMB") for review, as required by the Paperwork Reduction Act.

DATES: Public comments must be received on or before March 8, 2007.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to "Accuracy Pilot Study: Paperwork Comment (FTC file no. P044804)" to facilitate the

organization of the 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, with two complete copies, to the following address: Federal Trade Commission/Office of the Secretary, Room H-135 (Annex J), 600 Pennsylvania Avenue, NW., Washington, DC 20580. Because paper mail in the Washington area and at the Commission is subject to delay, please consider submitting your comments in electronic form, as prescribed below. However, if the comment contains any material for which confidential treatment is requested, it must be filed in paper form, and the first page of the document must be clearly labeled "Confidential."¹ The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible.

Comments filed in electronic form should be submitted by using the following Web link: <https://secure.commentworks.com/ftc-accuracy-expand> (and following the instructions on the Web-based form). To ensure that the Commission considers an electronic comment, you must file it on the Web-based form at the Web link <https://secure.commentworks.com/ftc-accuracy-expand>. If this notice appears at www.regulations.gov, you may also file an electronic comment through that Web site. The Commission will consider all comments that regulations.gov forwards to it.

Comments should also be submitted to: Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission. Comments should be submitted via facsimile to (202) 395-6974 because U.S. Postal Mail is subject to lengthy delays due to heightened security precautions.

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

¹ Commission Rule 4.2(d), 16 CFR 4.2(d). 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).

individuals from public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at <http://www.ftc.gov/ftc/privacy.htm>.

FOR FURTHER INFORMATION CONTACT: Peter Vander Nat, Economist, (202) 326-3518, Federal Trade Commission, Bureau of Economics, 600 Pennsylvania Ave., NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Section 319 of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"), Pub. L. 108-159 (2003), requires the FTC to study the accuracy and completeness of information in consumers' credit reports and to consider methods for improving the accuracy and completeness of such information. Section 319 of the FACT Act requires the Commission to issue a series of biennial reports to Congress over a period of eleven years, and the FTC has submitted two reports thus far: one in December 2004 ("December 2004 Report") and another in December 2006 ("December 2006 Report").²

In July 2005, OMB approved the FTC's plan to conduct a consumer pilot study to evaluate the feasibility of directly involving consumers in a review of the information in their credit reports (OMB Control No. 3084-0133).³ As discussed below, FTC staff believes it is necessary to conduct a follow-up pilot study to evaluate additional design elements prior to carrying out a nationwide survey on the accuracy and completeness of consumer credit reports. The additional design elements would permit the FTC to further assess whether certain data pertinent to credit report accuracy can be obtained in a way that is not unduly resource-intensive or otherwise cost-prohibitive if extended to a nationwide survey. As was true of the initial study, the follow-up pilot study will not rely on the selection of a nationally representative sample of consumers and statistical conclusions will not be drawn.

Under the Paperwork Reduction Act ("PRA"), 44 U.S.C. 3501-3520, federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. On October 19,

2006, the FTC sought comment on the information collection requirements associated with the proposed follow-up pilot study.⁴ As discussed below, three comments were received. Pursuant to the OMB regulations that implement the PRA (5 CFR Part 1320), the FTC is providing this second opportunity for public comment while seeking OMB approval to reinstate the clearance for the pilot study, which expired in September 2006.⁵ All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before March 8, 2007.

1. Description of the Collection of Information and Proposed Use

A. Initial Pilot Study

The goal of the initial pilot study was to assess the feasibility of directly engaging consumers in an in-depth review of their credit reports for the purpose of identifying alleged material errors and attempting to resolve such disputed items through the Fair Credit Report Act ("FCRA") dispute resolution process (see below). The FTC's contractor for the initial pilot study engaged 30 randomly selected participants in an in-depth review of their credit reports. By using the Web site "myfico.com," study participants obtained their credit reports and credit scores from each of the three nationwide consumer reporting agencies (Equifax, Experian, and TransUnion—hereinafter, the "CRAs"). After the research team evaluated consumer alleged errors for materiality, consumers were asked to channel disputed items through the FCRA dispute resolution process.⁶

⁴ 71 FR 61776.

⁵ The clearance was originally set to expire in December 2006. However, rather than seek a straight extension of the existing clearance in order to conduct the proposed follow-up pilot study, FTC staff asked OMB to discontinue the clearance in September 2006. This procedural approach ensured that the FTC's December 2006 Report to Congress, which includes the contractor's report on initial pilot study, would be publicly available before the expiration of the comment period regarding the October 19, 2006 Notice. See 71 FR 61776.

⁶ Section 611 of the FCRA (15 U.S.C. § 1681i) sets forth the process by which a consumer may dispute data in his or her credit files with a CRA, and the CRA's duty to investigate the dispute. Section 623(b) (15 U.S.C. § 1681s-2(b)) spells out the duties of persons that have furnished disputed items of information to a CRA, after receiving notice of a dispute from the CRA. The FCRA dispute resolution process thus involves the review of disputed items by data furnishers and CRAs, and the process renders a specific outcome for each alleged error. By direct instruction of the data furnisher, the following outcomes may occur: delete the item, change or modify the item (specifying the change), or maintain the item as originally reported. Also, a CRA may delete a disputed item due to expiration of statutory time frame (the FCRA limits the process to 30 days, but the time may be extended to 45 days if the consumer submits relevant information

Some of the contractor's key findings concerning the methodology of the initial pilot study include: (i) Participants were successfully engaged in conducting a thorough and effective review of their credit report information over the telephone; (ii) effective mechanisms to protect consumers, personal information can be employed,⁷ and (iii) sufficient information was provided for a subsequent analysis of the accuracy of items placed in CRA files and presented in credit reports.⁸

The contractor identified two matters that would need to be addressed further: additional procedures to help consumers follow through with the entirety of the study, and additional ways of identifying and recruiting consumers to become participants in the study. The majority of participants who alleged errors on their credit reports and indicated that they would file a formal dispute did not follow through with their intention to file. Considering that this was also true for those who alleged material errors in the expert opinion of the research team, the need to explore how to best follow-up with consumers who indicate they will file a dispute is clear. Further, the outcome of the study suggests that people who did not have Internet access or experience may have been less willing to participate. Although the contractor would have offered to provide Internet access to otherwise qualified participants, all the consumers who ultimately became participants in the study had Internet access.⁹ In consideration of these and

during the 30-day period). The CRAs track these possible actions by using a form called "Online Solution for Complete and Accurate Reporting" (e-OSCAR). See, Federal Trade Commission and Board of Governors of the Federal Reserve System, Report to Congress on the Fair Credit Reporting Act Dispute Process, August 2006. The report is available at <http://www.ftc.gov/reports/index.htm#2006>.

⁷ In the protocols of the pilot study, participants were not required to reveal their social security numbers ("SSNs") to University members of the research team, who conducted all interviews. Using normal Web site procedures, only Fair Isaac received SSNs upon an initial request for credit reports at "myfico.com." All financial account numbers were truncated to 3 or 4 digits in any information available to University researchers. More generally, the contractor used procedures that avoided identification of study participants to CRAs and data furnishers.

⁸ See December 2006 Report and its appendix, which includes the contractor's report on the initial pilot study (available at <http://www.ftc.gov/reports/index.htm#2006>).

⁹ A broad spectrum of credit scores was attained in the study group, but the distribution tended toward relatively higher credit scores. The contractor compared participants' credit scores to the national distribution, and the study data revealed that low scores were underrepresented in the sample, while high scores were over-represented.

² Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003, Federal Trade Commission, December 2004, and Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003, Federal Trade Commission, December 2006. The respective reports are available on the FTC's Web site at <http://www.ftc.gov/reports/index.htm#2004> and <http://www.ftc.gov/reports/index.htm#2006>.

³ See 70 FR 24583 (May 10, 2005) (design of initial pilot study and related public comments).

other matters, the FTC plans to conduct a follow-up pilot study.

B. Follow-Up Pilot Study

In many respects, the design of the follow-up study will be similar to the initial pilot study. The elements of the proposed follow-up study are as follows:

(i) A study group of 120 consumers will be drawn by a randomized procedure that is screened to consist of adult members of households to whom credit has been extended in the form of credit cards, automobile loans, home mortgages, or other forms of installment credit. The FTC will send a letter to potential study participants describing the nature and purpose of the pilot study. The contractor will screen consumers by conducting telephone interviews. Consumers who qualify and agree to participate will sign a prepared consent form giving the contractor permission to review the consumer's credit reports.

(ii) In selecting the study group, the contractor will use, and may also experiment with, a variety of methods for recruiting participants. In addition to the randomized selection procedure used in the initial pilot study (which made use of telephone directories), the contractor may engage consumers through referrals from financial institutions as they apply for credit, *e.g.*, mortgages, automobile loans, or other forms of credit. (Lenders will know—and have a permissible purpose for knowing—the consumer's credit score and certain other characteristics; consumers can then be informed of the FTC study and invited to participate.) The contractor may employ additional methods for securing participation, provided that no method would violate the permissible purposes for obtaining a consumer's credit report (FCRA sec. 604).

(iii) The selected study group will consist of consumers having a diversity of credit scores over three broad categories: poor, fair, and good. The contractor will monitor the respective processes of recruitment so as to attain approximately equal representations of credit scores across the designated categories.

(iv) The contractor will help participants obtain their credit reports from the CRAs. Each participant will request his or her three credit reports on the same day, although different participants will generally request their reports on different days.

(v) The contractor will help the participants review their credit reports by resolving common misunderstandings that they may have

about the information in their reports; this will involve educating the consumers wherever appropriate (thereby helping them to distinguish between accurate and inaccurate information).

(vi) The contractor will help participants locate any material differences or discrepancies among their three reports and check whether these differences indicate inaccuracies.

(vii) The contractor will facilitate a participant's contact with CRAs and data furnishers as necessary to help resolve credit report items that the participant views as inaccurate. To the extent necessary, the contractor will guide participants through the dispute process established by the FCRA. The contractor will not directly contact CRAs or data furnishers during the course of the study, as the outcome of a dispute may still be pending. The contractor will determine whether any changes in the participant's credit score result from changes in credit report information.¹⁰

(viii) For study participants who have alleged material errors and expressed an intention to file a dispute but do not file within 6 weeks, the contractor will prepare draft dispute letters on their behalf (together with stamped envelopes, pre-addressed to relevant CRAs). The contractor will ascertain from the consumer whether the letter correctly describes the consumer's allegation and, upon confirmation, the participant will be asked to sign and send the letter.

As was true of the initial study, the proposed follow-up pilot study is not intended to replicate normal circumstances under which consumers generally review their credit reports; nor is it intended to evaluate the adequacy or complexity of the dispute process. The scrutiny applied to the reports of study participants, with the help of expert advice, would not at all be indicative of a consumer's normal experience in reviewing a credit report. The FTC recognizes that consumers often are not familiar with credit reporting procedures and may have difficulties in understanding a credit report (which may be partly due to a consumer's own misconceptions). Also,

¹⁰In making this comparison, the contractor will not just obtain a new credit report and score from the relevant CRAs after items have been corrected (although such reports will be obtained). The contractor is required to have the expertise to re-score the original credit report in the context of those changes directly related to the contractor's review, thereby re-scoring the consumer's "frozen file." This method addresses the concern that changes in credit scores retrieved from CRAs could be the result of the addition of new items rather than corrected items.

as noted above, some consumers may need extra guidance and help in completing the process of filing disputes for alleged errors. In all of the proposed activities, the contractor will again use procedures that avoid identification of study participants to CRAs and data furnishers.

As was further true of the initial study, the proposed follow-up pilot study will not employ a specific definition of accuracy and completeness and no decision has been made on the definition of these terms for a nationwide survey.¹¹ Instead, both the initial and follow-up pilot studies seek to assess a methodology that involves consumer review of credit reports and both seek to ascertain the variety of information pertinent to accuracy and completeness that can be garnered. Finally, the follow-up pilot study will list an array of possible outcomes for items reviewed on the participants' credit reports. FTC staff anticipates this list will include the following categories (the contractor may supply additional categories as warranted by matters encountered in the study):

"disputed by consumer and deleted due to expiration of statutory [FCRA] time frame;"

"disputed by consumer and data furnisher agrees to delete the item;"

"disputed by consumer and data furnisher agrees to change or modify the item;"

"disputed by consumer and data furnisher disagrees, maintaining the item to be correct;"

"item not disputed by consumer;" or
"item not present on the report."¹²

As discussed in the December 2006 Report (at 7), which recognizes that the results of the dispute process do not establish the "accuracy" of credit reports in an absolute sense, it is still

¹¹ See also December 2004 Report at 5 n.10, which discusses different definitions of completeness, and at 16–18, which discusses FCRA accuracy and completeness requirements.

¹² The FTC staff recognizes the different reporting cycles of data furnishers and the voluntary basis on which information is reported to a CRA. There may be different explanations why an anticipated item is not on a particular credit report. The item may be missing because a data furnisher did not provide the information to a certain CRA, or—due to the specific reporting cycle of the data furnisher—because it was provided at a time after the credit report was viewed by the consumer. Alternatively, the item may have been submitted to a CRA but placed in the wrong consumer's file. The contractor will seek to determine, to the extent practicable, which of these explanations may apply. For example, at the end of the study the contractor may contact XYZ Mortgage, give a brief explanation of the FTC's pilot study, and inquire whether this furnisher normally reports information to Credit Bureau A; if so, then inquire about the timing of the reporting cycle. When making such inquiries, the contractor will not disclose the identities of study participants.

anticipated that these categories will be useful in designing a nationwide survey regardless of how "accuracy" and "completeness" may be delineated for such a survey.

C. Summary of Public Comments

The FTC received three comments on the proposed follow-up pilot study; one from ACA International ("ACA"), another from the Consumer Data Industry Association ("CDIA"), and a third from TransUnion, LLC ("TransUnion").¹³ The comments from each of these organizations are addressed below.

1. ACA Comment¹⁴

ACA supports the goal of both the initial and proposed follow-up pilot study (ACA at 5), while it also expresses concerns. ACA (at 5–7) views it as a shortcoming that the pilot study design does not include definitions of the terms "accuracy," "completeness," or "dispute," and does not categorize the types of data furnishers who may be addressed by a dispute.

The terms "accuracy" and "completeness" do not require specific definition at this time for the following reason: the pilot studies are not used to draw any conclusions, statistical or otherwise, about accuracy or completeness but are formulated solely as vehicles for assessing the feasibility of a certain study methodology (i.e., an assessment of a consumer survey approach that directly involves consumers in a review of information in their credit reports for the purpose of identifying alleged materials errors and attempting to resolve disputed items through the FCRA dispute resolution process). As discussed above, it is anticipated that the related categories outlined in this notice will be useful in designing a nationwide survey regardless of how the terms accuracy and completeness may be delineated for such a survey.

Regarding ACA's question about the term "dispute" and a classification for "data furnisher," staff uses these terms—expressly for the purpose of the pilot studies—in the following way: in regard to items on a credit report, a "disputed item" is a consumer alleged error that is communicated by the consumer, either in writing or electronically, to a CRA or to a data furnisher; a "data furnisher" is simply

a party who provides to a CRA any of the items that appear on a credit report.¹⁵ In giving this description, staff sees no need to classify, at this stage, the types of data furnishers who may be involved with consumer disputed items.¹⁶

2. CDIA Comment

The CDIA expresses support for FTC's plan to continue testing a methodology for a prospective nationwide study (CDIA at 1), and it also gives comment on a number of related matters. For purposes of staff's response, we summarize CDIA's concerns as follows: (1) specific concerns and advice pertaining to the design of a nationwide survey, (2) concerns with the contractor's report on the completed pilot study in relation to the proposed follow-up pilot study, and (3) concerns that some of the activities of the study may fall outside the scope of the mandate given to the FTC by Section 319 of the FACT Act. FTC staff addresses each of these areas in turn.

Regarding the design of a nationwide survey, CDIA (at 2–4) raises many matters, including the selection of sample participants and institutions that may be involved in helping to identify potential participants, appropriate sample size for a national survey, potential sample bias, and the need to ensure that the sample of credit reports utilized in a national survey have a distribution of credit scores representative of the national distribution. In connection with all of these matters, CDIA's overriding request appears to be (CDIA at 2) that the FTC present a national survey design for public comment. FTC staff has no disagreement with CDIA regarding these stated concerns but believes that a staff response would presently be premature. The design for a nationwide study depends in part on what the proposed follow-up pilot study reveals. More generally, staff affirms that a proposed design for a nationwide survey will be made publicly available.¹⁷

¹⁵ In offering this description, staff is not proposing any legal determination of duties or actions that may be required of a CRA or a data furnisher under the FCRA.

¹⁶ In preparation for the Commission's stated goal of classifying credit report errors by type and seriousness in terms of potential consumer harm (see, December 2006 Report at 2), it is expected that the studies will rank categories of credit report information according to the frequency of consumer disputes and determined errors. This type of ranking may be expected to render, concurrently, some categorization of corresponding data furnishers.

¹⁷ Staff anticipates that upon completion of the follow-up pilot study, a subsequent design for a nationwide survey will be submitted for OMB clearance. As is also true of the present matter, the

Regarding the work-product contained in the contractor's report, CDIA objects to some of the ways in which data were presented, and it disagrees with certain views and recommendations of the contractor (CDIA at 4–6). Before responding to these matters, staff notes that in order to have a transparent study process in connection with Section 319 of the FACT Act, the FTC made public the entirety of the contractor's report on the initial pilot study (appendix to the FTC's December 2006 Report to Congress). In the same report to Congress (at 2–4), the FTC brought forward those salient features in the contractor's report that were used in proposing a follow-up pilot study. Overall, staff believes that CDIA raises two or three matters that relate to both the work-product of the contractor and the FTC's formulation of a follow-up pilot study; these are discussed below.¹⁸

As described in section B(vi) above, when conducting the proposed follow-up pilot study, the FTC anticipates that the contractor will help participants to locate any material differences or discrepancies among their three credit reports and to check whether these differences indicate inaccuracies. In regard to this proposed study design element, CDIA (at 6–7) strongly objects to using a "cross-file analysis * * * publishing score range differences * * *" for the initial study or for the proposed follow-up pilot study. Staff agrees with CDIA that differences in credit scores across a consumer's credit reports (including very substantial differences) need not indicate errors. Given the voluntary basis on which information is reported to a CRA, (see note 12 above), there may be various explanations for differences in credit report information. Nonetheless, a score difference is relevant to the study if this score difference should be based on informational differences or discrepancies arising from some error in a consumer's credit files. (Staff anticipates that certain credit score ranges will be used to categorize the impact of determined errors; see discussion below.)

A second matter raised by CDIA that pertains to both the work-product of the contractor and the formulation of a

clearance process involves two **Federal Register** Notices which set forth the design elements of the study. Each notice provides opportunity for public scrutiny and comment.

¹⁸ The December 2006 Report (at 1) noted that the work-product and opinions of the contractor are not necessarily findings or opinions of the FTC. Staff sees no fruitful purpose to respond to matters in the contractor's report that were not used to formulate the follow-up study.

¹³ The comments are available on the FTC's Web site at <http://www.ftc.gov/os/comments/FACTA-accuracy-study-2/index.htm>.

¹⁴ ACA (at 1) describes itself as an international trade organization of credit and collection companies that provide a variety of accounts receivable management services.

follow-up pilot study involves the meaning of the term material and score ranges used for assessing materiality. CDIA (at 5) notes that certain credit score ranges were used by the contractor in assessing potential materiality.¹⁹ For the follow-up pilot study, FTC staff anticipates that disputed information will likely be categorized incrementally in terms of 10 point movements in score changes derived from a re-scoring of frozen files.²⁰

CDIA (at 5) also inquires how the study will address items that remain unresolved after the dispute process is complete; i.e., items for which a data furnisher maintains the information to be accurate but the consumer maintains it is not. Staff does not intend that the study would resolve such items and anticipates that the study will identify certain items (in terms of the categories of credit report information and their frequency) that remain unresolved. As noted in the FTC's December 2006 Report (at 7), knowing the results of the dispute process does not establish the accuracy of credit reports in an absolute sense. Yet, a study using the dispute process appears to be the only feasible way of performing a study of credit report accuracy, in view of the enormous difficulty and cost of attempting to ascertain the ultimate accuracy regarding alleged errors.

CDIA also comments on the mandate given by Section 319 of the FACT Act and maintains that such matters as comparing scores across credit bureaus

(as discussed above), attempting to ascertain why consumers do not dispute alleged inaccuracies, and engaging non-English speaking consumers in a review of their credit reports, all fall outside the scope of the Act (CDIA at 7). FTC staff disagrees. Staff believes that all of the design elements set forth regarding the follow-up pilot study (section B above) fall within the two-prong scope of the mandate: to study the accuracy and completeness of credit report information and to study methods for improving the accuracy and completeness of such information.

3. TransUnion Comment

Beyond the support expressed for CDIA's comments, TransUnion's comment letter conveys critical concern and advice in four main areas: (1) Disappointment that the FTC has not defined the terms accuracy and completeness in the context of the present studies, (2) concern that the FTC's scope in executing the mandate of Section 319 of the FACT Act appears to be limited to the three nationwide credit bureaus (Equifax, Experian, and TransUnion), (3) advice that, since Fair Isaac has recently developed a subsidiary that acts as a consumer reporting agency, Fair Isaac should not play a part in any follow-up study, and (4) a request that any person who has disputed credit report information in the past be excluded from the follow-up study.

In the above discussion of ACA's concerns, staff has explained why the terms "accuracy" and "completeness" do not require definitions in the context of these pilot studies; the same response serves as a reply to TransUnion's comment on this matter.

Regarding TransUnion's question (at 2) about the scope of the study on the variety of consumer reporting agencies encompassed under section 319 of the FACT Act, staff notes that the proposed pilot study does indeed involve credit reports and scores from Equifax, Experian, and TransUnion. We recognize there are many consumer reporting agencies, but credit reports from the three nationwide CRAs are the most widely used in making credit, insurance, and employment decisions. Staff has not foreclosed the possibility of recommending that additional consumer reporting agencies may be included in a broader survey. As noted above, any design for a nationwide study will, in due course, be made available for public comment.

TransUnion also requests (at 2) that Fair Isaac not be part of the contracting team for any follow-up study. The background for TransUnion's request

appears to be that Fair Isaac has recently developed a new credit score (an "Expansion Score") in regard to which a subsidiary of Fair Isaac acts as a consumer reporting agency. As described by the company,²¹ this score has been developed for credit grantors in connection with consumers who have insufficient credit histories to render the traditional FICO-based scores that are used by the nationwide CRAs.

Staff has considered this matter and does not think TransUnion's stated concern would justify excluding Fair Isaac from the bidding process for a follow-up pilot study.²² In the initial study, all participants had credit histories that were evaluated by traditional FICO-based scores, and Fair Isaac's role was limited to using its expert knowledge of these scores in connection with a re-scoring of participants' frozen files for consumer alleged errors.²³ In evaluating the proposals for the extended pilot from various contractors, staff will consider how susceptible a proposal may be to possible bias in the data collection process.

Finally, TransUnion (at 2) requests that anyone who has disputed credit report information in the past be excluded from the follow-up study, further adding that individuals who have already alleged an error at an earlier time should not be allowed to use the study as a means to recast their issues or complaints. Staff has several observations here. If it should be that some items may be "re-disputed" (as TransUnion suggests), the outcome for such disputes would follow from whatever normal procedures may be employed. For example, if a CRA has a reasonable basis for deeming a dispute frivolous, it can advise the consumer so and decline to act further. Or, if a CRA can identify the dispute as being a "re-dispute" of an already considered matter, it can again advise the consumer accordingly. Such responses would be part of the outcome of the study. On the other hand, should a CRA not have a

¹⁹ Based upon staff discussion with the contractor, the contractor viewed an alleged error as material if a re-scoring of the frozen file in regard to the challenged item yielded a change of approximately 30 points (deeming the later score range to be a commonly accepted estimate of normal variation in credit scores across a consumer's three credit reports). However, any consumer who wanted to dispute an item, regardless of anticipated impact, could do so and would be instructed on how to file. The contractor would summarize the results for all disputed items, as categorized by a re-scoring of frozen files to obtain the materiality of alleged errors. But the paucity of filed disputes that occurred in the initial pilot study rendered the procedures for assessing and reporting the materiality of disputed items as largely moot.

²⁰ We distinguish between disputed items and determined errors. The categorization of disputed items would start with items having an expected impact of 10 points or more, then 20 points, 30 points, and so forth. The various outcomes of the dispute process would also be summarized in terms of these same categories, including any actual changes in credit scores that arise from determined errors (those alleged inaccuracies that the dispute process confirms as being errors). As noted above in connection with design element B(vii), actual changes in scores retrieved from CRAs could be the result of the addition of new items rather than corrected items, so that these actual score changes need not correctly convey the impact of an error in a credit report. Hence, we categorize outcomes by using credit score ranges that refer to a re-scoring of frozen files.

²¹ Description obtained from Fair Isaac's Web site at www.fairisaac.com.

²² Presently, no determination has been made about a contract award. FTC staff anticipates that a contract will be let out for competitive bidding during the spring of 2007.

²³ See, 70 FR 24583 (May 10, 2005) on the design of the initial pilot study on this matter. The follow-up pilot study has the same design element (i.e., element B(vii), note 10.) Staff further notes that prospective participants are screened to consist of adult members of households to whom credit has been extended in the form of credit cards, automobile loans, home mortgages, or other forms of installment credit (design element B(i)). Typically, such consumers have credit histories capable of evaluation by traditional credit bureau scores.

readily available way of identifying "re-disputed" items, then neither would the contractor.

More generally, staff sees no basis for restricting the study to the reports of consumers who have never disputed any item prior to the study. It is possible that the accuracy of credit reports may differ based on items that have, or have not been, disputed. In light of this, staff plans to include a question in the study about whether consumers have disputed any item in one of their credit reports at an earlier time, and if so, to briefly indicate when and what. But a currently alleged error need not be related to a prior dispute, and we do not see any justification for excluding all consumers who have disputed some item(s) in the past. Staff adds that an important element of both the initial and proposed pilot study is that any contractor must have the expertise to evaluate alleged errors and to assess whether a dispute would be material to creditworthiness. In this context, it is very unlikely that frivolous or immaterial disputes would go forward.

2. Estimated Hours Burden

Consumer participation in the follow-up pilot study would involve an initial screening and any subsequent time spent by participants to understand, review, and if deemed necessary, to dispute information in their credit reports. The FTC staff estimates that up to 800 consumers may need to be screened through telephone interviews to obtain 120 participants, and that a screening interview may last up to 10 minutes, yielding a total of approximately 133 hours (800 screening interviews $\times$ 1/6 hour per contact).

With respect to the hours spent by study participants, in some cases the relative simplicity of a credit report may render little need for review and the consumer's participation may only be an hour. For reports that involve difficulties, it may require a number of hours for the participant to be educated about the report and to resolve any disputed items. For items that are disputed, the participant must submit a dispute form, identify the nature of the problem, present verification from the consumer's own records to the extent possible, and perhaps submit further information. As was true of the initial study, FTC staff again estimates the participants' time for reviewing their credit reports at an average of 5 hours per participant, resulting in a total of 600 hours (5 hours $\times$ 120 participants).²⁴

²⁴ This estimate is given for the purpose of calculating burden under the PRA. Information contained in the contractor's report regarding the

Total consumer burden hours are thus approximately 750 hours (derived as 133 screening hours plus 600 participant hours, further rounding upwards to the nearest 50 hours).

3. Estimated Cost Burden

The cost per participant should be negligible. Participation is voluntary, and will not require any start-up, capital, or labor expenditures by study participants. As with the initial study, participants will not pay for their credit reports or credit scores.

William Blumenthal,
General Counsel.

[FR Doc. E7-1837 Filed 2-5-07; 8:45 am]

BILLING CODE 6750-01-P

GENERAL SERVICES ADMINISTRATION

[Docket 2007-0006, Sequence 1]

Privacy Act of 1974; Notice of Updated System of Records

AGENCY: General Services Administration

ACTION: Updated Notice.

SUMMARY: The General Services Administration (GSA) is providing notice of an update to the record system Personnel Security Files (GSA/HRO-37). The system provides control over personnel security. The update ensures that the system of records meets the requirements of Homeland Security Presidential Directive 12 (HSPD-12) and that individuals be fully informed about collection of their personal information.

EFFECTIVE DATE: The system of records will become effective without further notice on March 8, 2007 unless comments received on or before that date result in a contrary determination.

FOR FURTHER INFORMATION CONTACT: Call or e-mail the GSA Privacy Act Officer: telephone 202-208-1317; e-mail gsa.privacyact@gsa.gov.

ADDRESSES: GSA Privacy Act Officer (CIB), General Services Administration, 1800 F Street NW, Washington, DC 20405.

SUPPLEMENTARY INFORMATION: To comply with new requirements of Homeland Security Presidential Directive 12 (HSPD-12), GSA updated its personnel security system. This notice explains

initial study may indicate a somewhat lower estimate of the average time spent by the 30 participants, but it would not render a noticeably different result for the overall consumer burden. In an effort not to underestimate the time spent by additional study participants, FTC staff has retained the estimate used for the initial study.

the new categories of records in the system and the authorities for maintaining the system.

Dated: January 29, 2007.

Cheryl Paige,
Acting Director, Office of Information Management.

GSA/HRO-37

SYSTEM NAME:

Personnel Security files.

SECURITY CLASSIFICATION:

Some records in the system are classified under Executive Order 12958 as amended.

SYSTEM LOCATION:

Personnel security files are maintained with other appropriate records in the Personnel Security Requirements Division (CPR), GSA Building, 1800 F Street NW, Washington, DC 20405.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Employees, applicants for employment, former employees of GSA and of commissions, committees, small agencies serviced by GSA, contractors, students, interns, volunteers, individuals authorized to perform or use services provided in GSA facilities (e.g., Credit Union or Fitness Center) and individuals formerly in any of these positions that require regular, ongoing access to federal facilities, information technology systems or information classified in the interest of national security. Included are historical researchers, experts or consultants, and employees of contractors performing services for GSA.

CATEGORIES OF RECORDS IN THE SYSTEM:

Personnel security files contain information such as name, former names, date and place of birth, home address, phone numbers, height, weight, hair color, eye color, sex, passport information, military information, civil court information, employment history, residential history, Social Security Number, occupation, experience, and investigative material, education and degrees earned, names of associates and references and their contact information, citizenship, names of relatives, citizenship of relatives, names of relatives who work for the federal government, criminal history, mental health history, drug use, financial information, fingerprints, summary report of investigation, results of suitability decisions, level of security clearance, date of issuance of security clearance, requests for appeals, witness statements, investigator's notes, tax

return information, credit reports, security violations, circumstances of violation, and agency action taken.

FORMS:

SF-85, SF-85P, SF-86, SF-87, GSA Form 3665, OF306, FD258.

AUTHORITY FOR MAINTAINING THE SYSTEM:

Depending upon the type of investigation, GSA is authorized to ask for this information under Executive Orders 10450 as amended, 10865 as amended, 12968 as amended, and 12958 as amended; sections 3301 and 9101 of title 5, U.S. Code; sections 2165 and 2201 of title 42, U.S. Code; parts 5, 731, 732, and 736 of title 5, Code of Federal Regulations; and Homeland Security Presidential Directive 12.

PURPOSE:

To assemble in one system information pertaining to issuing security clearances and public trust certifications, suitability decisions, fitness for service of applicants for federal employment and contract positions, and administrative actions. Information security files also are used for recommending administrative action against employees found to be violating GSA classified national security information regulations.

ROUTINE USES OF RECORDS IN THE SYSTEM, INCLUDING THE TYPES OF USERS AND THE PURPOSES OF SUCH USES:

- a. In any legal proceeding, where pertinent, to which GSA is a party before a court or administrative body.
- b. To the Department of Justice when: (a) the agency or any component thereof; or (b) any employee of the agency in his or her official capacity; (c) any employee of the agency in his or her individual capacity where agency or the Department of Justice has agreed to represent the employee; or (d) the United States Government, is a party to litigation or has an interest in such litigation, and by careful review, the agency determines that the records are both relevant and necessary to the litigation and the use of such records by DOJ is therefore deemed by the agency to be for a purpose compatible with the purpose for which the agency collected the records.
- c. To authorized officials engaged in investigating or settling a grievance, complaint, or appeal filed by an individual who is the subject of the record.
- d. Except as noted on Forms SF-85, 85-P, and 86, when a records on its face, or in conjunction with other records, indicates a violation or potential violation of law, whether civil, criminal, or regulatory in nature, and

whether arising by general statute or particular program statute, or by regulation, rule, or order issued pursuant thereto, disclosure may be made to the appropriate public authority, whether Federal, foreign, State, local or tribal, or otherwise, responsible for enforcing, investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation, or order issued pursuant thereto, if the information disclosed is relevant to any enforcement, regulatory, investigative or prosecutorial responsibility of the receiving entity.

e. To a Federal agency in connection with the hiring or retention of an employee; the issuance of a security clearance; the reporting of an investigation; the letting of a contract; or the issuance of a grant, license, or other benefit to the extent that the information is relevant and necessary to a decision.

f. To agency contractors or volunteers who have been engaged to assist the agency in the performance of a contract service, cooperative agreement, or other activity related to this system of records and who need to have access to the records in order to perform their activity. Recipients shall be required to comply with the requirements of the Privacy Act of 1974, as amended, 5 U.S.C. 552a.

g. To the Office of Personnel Management (OPM), the Office of Management and Budget (OMB), or the Government Accountability Office (GAO) when the information is required for program evaluation purposes.

h. To a Member of Congress or staff on behalf of and at the request of the individual who is the subject of the record.

i. To an expert, consultant, or contractor of GSA in the performance of a Federal duty to which the information is relevant.

j. To the National Archives and Records Administration (NARA) for records management purposes.

k. To a federal, state, or local agency, or other appropriate entities or individuals, or through established liaison channels to selected foreign governments, in order to enable an intelligence agency to carry out its responsibilities under the National Security Act of 1947 as amended, the CIA Act of 1949 as amended, Executive Order 12333 or any successor order, applicable national security directives, or classified implementing procedures approved by the Attorney General and promulgated pursuant to such statutes, orders, or directives.

l. To the Office of Management and Budget when necessary to the review of

private relief legislation pursuant to OMB Circular No. A-19.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained on paper and electronically in secure locations. Records are maintained in the system of records Comprehensive Human Resources Integrated System (GSA/PPFM-8) in the personnel security module and associated equipment.

RETRIEVABILITY:

Records are retrieved by name and Social Security Number.

SAFEGUARDS:

Personnel security file records are stored in a secured office in cabinets with access limited to authorized employees. A password system protects access to computer records. Access to the records is limited to those employees who have a need for them in the performance of their official duties.

RETENTION AND DISPOSAL:

These records are retained and disposed of in accordance with General Records Schedule 18, item 22, approved by the National Archives and Records Administration (NARA). Records are destroyed by burning, pulping, or shredding, as scheduled in the HB GSA Records Maintenance and Disposition System (OAD P 1820.2A).

SYSTEM MANAGER AND ADDRESS:

The official responsible for personnel security files in the system is the Director, Personnel Security Requirements Division (CPR), 1800 F Street NW, Washington, DC 20405.

NOTIFICATION PROCEDURE:

Inquiries by individuals as to whether the system contains a record pertaining to themselves should be addressed to the system manager.

RECORD ACCESS PROCEDURES:

Requests from individuals for access to records should be addressed to the system manager and should include full name (maiden name where appropriate), address, and date and place of birth. General inquiries may be made by telephone.

PROCEDURES FOR CONTESTING RECORDS:

GSA rules for accessing records, contesting their content, and appealing initial decisions appear in 41 CFR part 105-64.

RECORD SOURCES:

Individuals, employees, informants, law enforcement agencies, other

Government agencies, employees' references, co-workers, neighbors, educational institutions, and intelligence sources. Security violation information is obtained from a variety of sources, such as security guard's reports, security inspections, witnesses, supervisor's reports, and audit reports.

FILES EXEMPTED FROM PARTS OF THE ACT:

Under 5 U.S.C. 552a(k)(5), the personnel security case files in the system of records are exempt from subsections (c)(3); (d); (e)(1); (e)(4)(G), (H), and (I); and (f) of the act. Information will be withheld to the extent it identifies witnesses promised confidentiality as a condition of providing information during the course of the background investigation.

[FR Doc. E7-1866 Filed 2-5-07; 8:45 am]

BILLING CODE 6820-34-S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Food Defense Workshop; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

SUMMARY: The Food and Drug Administration (FDA), Office of Regulatory Affairs (ORA), Southwest Regional Office (SWRO), in co-sponsorship with the University of Arkansas (UA) Institute of Food Science and Engineering (IFSE), is announcing a public workshop entitled "Food Defense Workshop." This public workshop is intended to provide information about food defense, the regulations authorized by the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (the Bioterrorism Act), and other related subjects to FDA-regulated food facilities (farms, manufacturers, processors, distributors, retailers, and restaurants).

Date and Time: This public workshop will be held on May 23 through 24, 2007, from 8 a.m. to 5 p.m.

Location: The public workshop will be held at the Continuing Education Center, 2 East Center St., Fayetteville, AR (located downtown).

Contact: David Arvelo, Food and Drug Administration, Southwest Regional Office, 4040 North Central Expressway, suite 900, Dallas, TX 75204, 214-253-4952, FAX: 214-253-4970, or e-mail: david.arvelo@fda.hhs.gov.

For information on accommodation options, contact Steven C. Seideman, 2650 North Young Ave., Institute of Food Science and Engineering,

University of Arkansas, Fayetteville, AR 72704, 479-575-4221, FAX: 479-575-2165, or email: seideman@uark.edu.

Registration: You are encouraged to register by May 9, 2007. The University of Arkansas has a \$150 registration fee to cover the cost of facilities, materials, speakers, and breaks. Seats are limited; please submit your registration as soon as possible. Course space will be filled in order of receipt of registration. Those accepted into the course will receive confirmation. Registration will close after the course is filled. Registration at the site is not guaranteed but may be possible on a space available basis on the day of the public workshop beginning at 8 a.m. The cost of registration at the site is \$200 payable to: "The University of Arkansas." If you need special accommodations due to a disability, please contact Steven C. Seideman (see *Contact* section of this document) at least 7 days in advance.

Registration Form Instructions: To register, please complete the following form and submit along with a check or money order for \$150 payable to the "The University of Arkansas." Mail to: Institute of Food Science and Engineering, University of Arkansas, 2650 North Young Ave., Fayetteville, AR 72704.

FOOD DEFENSE WORKSHOP REGISTRATION FORM

Name: _____

Affiliation: _____

Mailing Address: _____

City: _____

State: _____

Zip Code: _____

Phone: () _____

FAX: () _____

E-mail: _____

Special Accommodations Required: _____

Transcripts: Transcripts of the public workshop will not be available due to the format of this workshop. Workshop handouts may be requested at cost through the Freedom of Information Office (HFI-35), Food and Drug Administration, 5600 Fishers Lane, rm. 6-30, Rockville, MD 20857, approximately 15 working days after the public workshop at a cost of 10 cents per page.

SUPPLEMENTARY INFORMATION: This public workshop is being held in response to the large volume of food

defense concerns from FDA-regulated food facilities (farms, manufacturers, processors, distributors, retailers, and restaurants) originating from the area covered by the FDA Dallas District Office. The Southwest Regional Office presents this workshop to help achieve objectives set forth in section 406 of the Food and Drug Administration Modernization Act of 1997 (21 U.S.C. 393), which include working closely with stakeholders and maximizing the availability and clarity of information to stakeholders and the public. This is

consistent with the purposes of the Small Business Representative Program, which are in part to respond to industry inquiries, develop educational materials, sponsor workshops and conferences to provide firms, particularly small businesses, with firsthand working knowledge of FDA's guidance, requirements, and compliance policies. This workshop is also consistent with the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), as outreach

activities by Government agencies to small businesses.

The goal of this public workshop is to present information that will enable FDA-regulated food facilities (farms, manufacturers, processors, distributors, retailers, and restaurants) to better comply with the regulations authorized by the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (the Bioterrorism Act), and with food defense guidance, especially in light of growing concerns about food defense. Information presented will be based on agency position as articulated through regulation, guidance, and information previously made available to the public. Topics to be discussed at the workshop include: (1) Food defense awareness, (2) ALERT: The basics, (3) FDA actions on bioterrorism legislation (food supply), (4) food recalls, (5) crisis management, (6) food defense technologies and methodologies, and other related topics. FDA expects that participation in this public workshop will provide regulated industry with greater understanding of the regulatory and policy perspectives on food defense and increase voluntary compliance and food defense awareness.

Dated: January 31, 2007.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. E7-1865 Filed 2-5-07; 8:45 am]

BILLING CODE 4160-01-S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2007D-0031]

Global Harmonization Task Force, Study Groups 1, 2, and 4; New Proposed and Final Documents; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of proposed and final documents that have been prepared by Study Groups 1, 2, and 4 of the Global Harmonization Task Force (GHTF). These documents represent a harmonized proposal and recommendation from the GHTF Study Groups that may be used by governments developing and updating their regulatory requirements for medical devices. These documents are intended to provide information only

and do not describe current regulatory requirements; elements of these documents may not be consistent with current U.S. regulatory requirements. FDA is requesting comments on these documents.

DATES: Submit written or electronic comments on any of the proposed documents by May 7, 2007. After May 7, 2007, written comments or electronic comments may be submitted at any time to the contact persons listed in this document.

ADDRESSES: Submit written requests for single copies of the documents to the Division of Small Manufacturers, International, and Consumer Assistance (HFZ-220), Center for Devices and Radiological Health, Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301-443-8818. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit written comments concerning this guidance to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to <http://www.fda.gov/dockets/ecomments>. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT:

For Study Group 1: Ginette Y.

Michaud, Chairperson, GHTF, Study Group 1, Office of Device Evaluation, Center for Devices and Radiological Health (HFZ-480), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 240-276-3700.

For Study Group 2: Mary Brady, GHTF, Study Group 2, Office of Surveillance and Biometrics, Center for Devices and Radiological Health (HFZ-530), Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850, 240-276-3458.

For Study Group 4: Jacqueline Welch, GHTF, Study Group 4, Office of Compliance, Center for Devices and Radiological Health (HFZ-320), Food and Drug Administration, 2094 Gaither Rd., Rockville, MD 20850, 240-276-0115.

SUPPLEMENTARY INFORMATION:

I. Background

FDA has participated in a number of activities to promote the international harmonization of regulatory requirements. In September 1992, a

meeting was held in Nice, France by senior regulatory officials to evaluate international harmonization. This meeting led to the development of the organization now known as the GHTF to facilitate harmonization. Subsequent meetings have been held on a yearly basis in various locations throughout the world.

The GHTF is a voluntary group of representatives from national medical device regulatory authorities and the regulated industry. Since its inception, the GHTF has been comprised of representatives from five founding members grouped into three geographical areas: Europe, Asia-Pacific, and North America, each of which actively regulates medical devices using its own unique regulatory framework.

The objective of the GHTF is to encourage convergence at the global level of regulatory systems of medical devices to facilitate trade while preserving the right of participating members to address the protection of public health by regulatory means considered most suitable. One of the ways this objective is achieved is by identifying and developing areas of international cooperation to facilitate progressive reduction of technical and regulatory differences in systems established to regulate medical devices. In an effort to accomplish these objectives, the GHTF formed five study groups to draft documents and carry on other activities designed to facilitate global harmonization. This notice is a result of documents that have been developed by three of the Study Groups (1, 2, and 4).

Study Group 1 was initially tasked with the responsibility of identifying differences between various regulatory systems. In 1995, the group was asked to propose areas of potential harmonization for premarket device regulations and possible guidance that could help lead to harmonization. As a result of its efforts, this group has developed proposed document SG1(PD)N044:2006. SG1(PD)N044:2006 (proposed document), entitled "Role of Standards," provides guidance on the use of standards by a manufacturer when designing a medical device and, subsequently, when demonstrating the device conforms to relevant essential safety and performance criteria. FDA seeks comment on the document and particularly "Section 5.2 Revision or Replacement of Recognised Standards." This section addresses the use of a recognized standard during the transitional period when it is being replaced by a revised version.

Study Group 4 was initially tasked with the responsibility of developing

guidance documents on quality systems auditing practices. As a result of its efforts, this group has developed document SG4(PD)N33R13:2006. SG4(PD)N33R13:2006 (proposed document), entitled "Guidelines for Regulatory Auditing of Quality Management Systems of Medical Device Manufacturers—Part 3: Regulatory Audit Reports," suggests a structure for audit reports used in multiple jurisdictions, promoting consistency and uniformity and should assist the auditor in preparing a report for use by multiple regulators and/or auditing organizations. Having reports that are consistent in content should facilitate the review and exchange of audit reports. Acceptance of audit reports by multiple regulators should eventually reduce the number of audits for manufacturers.

Study Group 2 was initially tasked with the responsibility of developing guidance documents that will be used for the exchange of adverse event reports. As a result of its efforts, this group developed SG2N54R8:2006. SG2N54R8:2006 (final document), entitled "Medical Devices Post Market Surveillance: Global Guidance for Adverse Event Reporting for Medical Devices," provides guidance on the type of adverse events associated with medical devices that should be reported by manufacturers to a National Competent Authority. It elaborates on the regulatory requirements existing in the participating member countries.

II. Significance of Guidance

These documents represent recommendations from the GHTF study groups and do not describe regulatory requirements. FDA is making these documents available so that industry and other members of the public may express their views and opinions.

III. Electronic Access

Persons interested in obtaining a copy of the documents may also do so by using the Internet. The Center for Devices and Radiological Health (CDRH) maintains an entry on the Internet for easy access to information including text, graphics, and files that may be downloaded to a personal computer with Internet access. Updated on a regular basis, the CDRH home page includes device safety alerts, **Federal Register** reprints, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturer's assistance, information on video conferencing and electronic

submissions, Mammography Matters, and other device-oriented information. Information on the GHTF may be accessed at <http://www.ghtf.org>. The CDRH web site may be accessed at <http://www.fda.gov/cdrh>.

IV. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**), written or electronic comments regarding these documents. 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. Comments received may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: January 30, 2007.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. E7-1864 Filed 2-5-07; 8:45 am]

BILLING CODE 4160-01-S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Public Law 104-13), the Health Resources and Services Administration (HRSA) will publish periodic summaries of proposed projects being developed for submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans, call the HRSA Reports Clearance Officer on (301) 443-1129.

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.

Proposed Project: Reporting Form for the MCHB National Hemophilia Program Grantees and Hemophilia Treatment Center (HTC) Affiliates Having Factor Replacement Product (FRP) Programs—NEW

The Maternal and Child Health Bureau (MCHB) of the Health Resources and Services Administration (HRSA) is planning to implement an annual reporting form required of grantees of the MCHB National Hemophilia Program and their HTC affiliates having a factor replacement product (FRP) program. The purpose of the form is to provide systematic information and data comprising a financial overview of the FRP programs of the HTCs receiving funding through grantees of the MCHB National Hemophilia Program. The proposed form will constitute a reporting requirement for the MCHB National Hemophilia Program grantees and their affiliate HTCs having FRP programs.

Data from the form will provide quantitative information on the financial and services provision aspects of each of the HTC FRP programs under each of the MCHB National Hemophilia Program grantees, specifically: (a) Patient FRP program participation, (b) FRP program revenue, (c) FRP program costs, (d) FRP program net income, and (e) use of FRP program net income. This form will provide data useful to grantees and their affiliate HTCs having FRP programs. Useful data will also be provided to the MCHB National Hemophilia Program in order to assess FRP program performance including FRP program operational costs appropriateness, FRP program cost efficiency, and FRP program services benefits-information that is essential to evaluating HTCs having FRP programs, grantees, and the MCHB National Hemophilia Program.

Each HTC having an FRP program is to submit its report to the grantee and each grantee is to submit the individual reports of each of their affiliate HTCs having an FRP program to the MCHB National Hemophilia Program as a part of their annual grant application.

The burden estimate for this project is as follows:

Form	Number of respondents	Average number of responses per respondent	Total responses	Hours per response	Total burden hours
Factor Replacement Product (FRP) Data Sheet	68	1	68	30	2040

Send comments to Susan G. Queen, Ph.D., HRSA Reports Clearance Officer, Room 10-33 Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857. Written comments should be received within 60 days of this notice.

Dated: January 29, 2007.

Caroline Lewis,

Acting Associate Administrator for Administration and Financial Management.
[FR Doc. E7-1824 Filed 2-5-07; 8:45 am]

BILLING CODE 4165-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Public Law 104-13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to the Office of

Management and Budget (OMB) under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, call the HRSA Reports Clearance Officer on (301) 443-1129.

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.

Proposed Project: "Health Care and Other Facilities" Construction Program: Web-Based Status Reporting Form: NEW

The Health Resources and Services Administration's Health Care and Other Facilities (HCOF) construction program provides earmarked funds to health-related facilities for construction-related activities and/or capital equipment purchases. Awarded facilities are

required to provide a periodic (quarterly for construction-related projects, annually for equipment only projects) update of the status of the funded project until it is completed. The monitoring period averages about 3 years, although some projects take up to 5 years to complete. The information collected from these updates is vital to program management staff to determine whether projects are progressing according to the established timeframes, meeting deadlines established in the Notice of Grant Award (NGA), and funds are drawn down appropriately. The data collected from the updates is also shared with both the Division of Grants Management Operations (DGMO) and the Division of Engineering Services (DES), so that they can assist in the overall evaluation of each project's progress.

A Web-based form has been developed for progress reporting for the HCOF program. This form will provide awardees access to directly input the required status update information in a timely, consistent, and uniform manner. The Web-based form will minimize burden to respondents and will inform respondents when there are missing data elements prior to submission.

The estimate of burden for the forms is as follows:

Project type (current)	Number of respondents	Responses per respondent	Total responses	Hours per response	Total burden hours
Construction-Related	325	4	1,300	.5	650
Equipment Only	357	1	357	.5	178.5
Total	682	.....	1,657	.....	828.5

Project type (FY 07-09 projection)	Number of respondents	Responses per respondent	Total responses	Hours per response	Total burden hours
Construction-Related*	498	4	1,992	.5	996
Equipment Only**	925	1	925	.5	462.5
Total	1,423	.....	2,917	.....	1,458

Send comments to Susan G. Queen, Ph.D., HRSA Reports Clearance Officer, Room 10–33, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: January 29, 2007.

Caroline Lewis,

Acting Associate Administrator for Administration and Financial Management.
[FR Doc. E7–1825 Filed 2–5–07; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506 (c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Pub. L. 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, call the

HRSA Reports Clearance Officer at 301–443–1129.

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.

Proposed Project: Women's Physical Activity and Healthy Eating Tools Assessment: NEW

The HRSA Office of Women's Health (OWH) developed the *Bright Futures for Women's Health and Wellness (BFWHW)* Initiative to help expand the scope of women's preventive health activities, particularly related to nutrition and physical activity. An intermediate assessment of the *BFWHW* health promotion consumer materials related to physical activity and healthy eating will be conducted in order to assess how the *BFWHW* materials can stimulate a conversation on physical activity and healthy eating during a clinical encounter; inform future *BFWHW* programming, and add to the peer-reviewed literature regarding

women's health and wellness initiatives.

Towards this end, anonymous assessment forms will be used to collect data from young and adult women clients, health care providers, and administrators of health centers. Data collected will include process and outcome measures. Data domains include: The distribution and use of the materials in the health care setting during wellness and health maintenance/check-up visits; client and provider awareness of physical activity and nutrition behaviors; attitudes about the importance of physical activity and nutrition; self-efficacy; and increase in knowledge and intent to change physical activity and nutrition behaviors.

A total of six organizations, which may include Federally Qualified Health Centers/Community Health Centers, faith-based organizations that offer health care services, worksite health centers, and school-based health clinics, will be selected for the study. Young women will complete anonymous assessment forms at school-based health centers; adult women will be assessed at other health care organizations. The providers at these sites will also be asked to complete a brief one-time anonymous assessment form. Telephone interviews will be conducted with an administrator of each of these sites as well. The data collection period at each site is estimated to last four months. The estimated response burden is as follows:

ESTIMATED DATA COLLECTION BURDEN HOURS

Data collection activity	Number of respondents	Hours per response	Responses per respondent	Total burden hours	Hourly wage rate	Total cost
Clients	3,000	1.00	1	3,000	\$5.15	\$15,450.00
Administrators	6	4.25	1	25.50	37.09	945.80
Support Staff	6	64.00	1	384	13.65	5,241.60
Providers	60	6.00	1	360	59.15	21,294.00
Total	3,072			3,769.5		\$42,931.40

Send comments to Susan G. Queen, Ph.D., HRSA Reports Clearance Officer, Room 10–33, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: January 29, 2007.

Caroline Lewis,

Acting Associate Administrator for Administration and Financial Management.
[FR Doc. E7–1841 Filed 2–5–07; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Privacy Act of 1974; Report of Modified or Altered System—Indian Health Service Scholarship and Loan Repayment Programs

AGENCY: Indian Health Service (IHS).

ACTION: Notice of Proposed Modification or Alteration to a System of Records (SOR).

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, the Indian Health Service (IHS) is proposing to modify or alter a SOR, "Indian Health Service Scholarship and Loan Repayment Programs," System No. 09–17–0002. We propose to modify the SOR to reflect current program changes, technology changes, statutory and implementation changes. Under the system name, we propose no change to the title but the office acronyms have been changed as a result of an organizational change. We are proposing to change the system location to reflect

the current organizational and office location changes. We are proposing to update the categories of individuals covered by the system with minor edits to include Tribal medical/health care and Title V Urban healthcare entity; and to update the categories of records in the system with edits to include additional program requirements “(e.g. from W-4, direct deposit form for scholarship recipients and loan repayment participants).” We are proposing to update the Authority for maintenance of the system to correct statutory authorities and to include additional statutory authorities (e.g., Privacy Act, Federal Records Act, and Department Regulations). We are proposing to update the Purposes by categorizing the two programs and modifying/altering by listing the applicable purposes into each of the two programs (Scholarship and Loan Repayment). We are proposing to modify/alter/delete several published routine uses, as explained, to accommodate program and statutory changes as indicated: Numbers 1 through 3 remain unchanged; number 4 is modified/alter to reflect program language revisions and is renumbered as 5; number 5 is modified to include legal proceedings related to administrative claims and the inclusive provision of the Department of Health and Human Services (DHHS)/Office of General Counsel (OGC) representation in litigation matters and is renumbered as 4; number 6 is deleted as no longer applicable; number 7 is renumbered as 6 with no changes in the wording; number 8 is renumbered as 7 with no changes in the wording; number 9 is renumbered as 8 with no changes in the wording; number 10 is renumbered as 9 with minor editorial changes; number 11 is renumbered as 10 with minor editorial changes to include the IHCIA acronym citation (i.e., Indian Health Care Improvement Act, as amended); number 12 is renumbered as 11 with no changes in the wording with the exception of the removal of the statement on “Disclosure to Consumer Reporting Agencies.”

We are proposing to add 7 new routine uses to provide disclosures of records when all requirements are met: number 12, to provide disclosure to consumer reporting agency for commercial credit report and to National Student Clearinghouse using the Loan Location Internet System for verification of applicant's loan data. The statement on “Disclosure to Consumer Reporting Agencies” is now incorporated in this new routine use; number 13, to provide disclosure to any Federal agency on delinquent debtors or

defaulting participants to effect salary offset, court-ordered administrative offset, and to the Treasury Department, Internal Revenue Service (IRS) for verification of current mailing address for collection purposes; number 14, to allow disclosure to debt collection agents and those authorized federal or non-federal entities to collect a Federal debt from delinquent debtors or defaulting participants; number 15, to provide disclosure of applicant's information to IRS for verification of any delinquent tax account and to determine credit worthiness; number 16, to provide disclosure of applicant's information to IRS any debt that becomes partly or wholly uncollectible as taxable income; number 17, to allow disclosure to IRS of any IHS debtors or defaulting participants' information for IRS offset on tax refund; number 18, to allow the disclosure of lenders or educational institutions' information to Federal or non-Federal entities authorized to collect Federal debt and for identification of an individual and the nature of the debt.

We are proposing to modify/alter the section on storage by including computerized and electronic formats; the section on safeguards for authorized users by redefining the staff functions; the section on physical safeguards to identify specific safeguards for electronic records; and the section on retention and disposal to reflect separate program changes to the IHS Records Schedule for the scholarship program records and to the loan repayment program records. We are proposing to modify/alter the section on the system managers and addresses to reflect the organization and function changes. Under the notification procedures, we are proposing to modify/alter the sections on requests in person and requests by mail to reflect minor edits and a policy change on Social Security numbers; and the section on requests by telephone by revising the wording in a clear and concise program change. In addition, we are proposing two new notification procedures that address requests by facsimile and requests by electronic mail by including a confidentiality statement on facsimile requests and clarification for electronic requests and its security safeguard risks. Under the records source categories section, we are proposing to modify/alter by including the Indian health program human resources department. This system exemption previously listed as “None” will remain.

DATES: *Effective Dates:* The Report of Intent to Amend a System of Records Notice and an advance copy of the

system notice have been sent to the Chair of the House Committee on Government Reform and Oversight, the Chair of the Senate Committee on Governmental Affairs, and the Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB). To ensure that all parties have adequate time in which to comment, the modified system of records, including routine uses, will become effective 40 days from the publication of the notice, or from the date it was submitted to OMB and the Congress, whichever is later, unless IHS receives comments that require alterations to this notice.

ADDRESSES: The public should address comments to: Mr. William Tibbitts, IHS Privacy Act Officer, Division of Regulatory Affairs, Records Access and Policy Liaison, Office of Management Services, 801 Thompson Avenue, TMP, Suite 450, Rockville, MD 20852-1627; call non-toll free (301) 443-1116; send via facsimile to (301) 443-2316, or send your e-mail requests, comments, and return address to: William.Tibbitts@ihs.gov.

FOR FURTHER INFORMATION CONTACT: Ms. Patricia Lee-McCoy, Director, Division of Health Professions Support, Office of Public Health Support, 801 Thompson Avenue, TMP, Suite 450A, Rockville, MD 20852-1627, Telephone (301) 443-4242.

SUPPLEMENTARY INFORMATION:

A. Major Modification of 09-17-0002, “Indian Health Service Scholarship and Loan Repayment Programs, HHS/IHS/OPHS/DHPS”: is to reflect the organizational, program, technology, statutory and implementation changes.

1. IHS is proposing to update the purposes by categorizing the two programs and listing the applicable purposes into each of the two programs.

2. IHS is proposing to modify/alter/delete several published routine uses and to include seven (7) new routine uses when all requirements have been met. IHS is modifying/altering routine use #4 to reflect program revisions and is renumbered as #5; routine use #5 is modified to include legal proceedings related to administrative claims and in the inclusive provision of the Department of Health and Human Service (DHHS)/Office of General Counsel (OGC) representation in litigation matters and is renumbered as #4; routine use #6 is deleted as no longer applicable; routine use(s) #7, 8, 9, 10, 11, and 12 are renumbered as #6, 7, 8, 9, 10, and 11 respectively.

IHS is proposing to add seven (7) new routine uses as follows: Routine use #12 is to provide disclosure to consumer

reporting agency for commercial credit report and to National Student Clearinghouse using the Loan Location Internet System; routine use #13 is to provide disclosure to any federal agency on delinquent debtors or defaulting participants to effect salary offset, court-ordered administrative offset, and to the Treasury Department, Internal Revenue Service (IRS); routine use #14 is to allow disclosure to debt collection agents and authorized federal and non-federal entities for collection purposes; routine use #15 is to provide disclosure of applicant's information to IRS for verification and credit worthiness; routine use #16 is to provide disclosure of applicant's information to IRS on uncollectible debt as taxable income; routine use #17 is to allow disclosure to IRS of any IHS debtors or defaulting participants' information for IRS offset on tax refund; and routine use #18 is to allow disclosure of lenders or educational institutions' information to federal or non-federal entities to collect Federal debt, identification of an individual and the nature of the debt.

In addition to updating and making editorial corrections to improve the clarity of the system notice, this alteration requires the updating of the system manager listing, and revisions of the Categories of Records, Purposes, Authority, Safeguard, Retention and Disposal, Notification and Access Procedures sections. IHS is proposing to add two (2) new notification procedures by addressing requests by facsimile and requests by electronic mail.

Dated: January 31, 2007.

Charles W. Grim,

Assistant Surgeon General, Director, Indian Health Service.

**Department of Health and Human Resources
09-17-0002**

SYSTEM NAME:

Indian Health Service Scholarship and Loan Repayment Programs, HHS/IHS/OPHS/DHPS.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Office of Public Health Support (OPHS), Division of Health Professions Support (DHPS), Scholarship Branch, Loan Repayment Branch, Health Professions Support Branch, Indian Health Service, 12300 Twinbrook Parkway, Suite 450A, Rockville, MD 20852. Washington National Records Center, 4205 Suitland Road, Suitland, MD 20746-8001. Records are also located at the Indian Health Service (IHS) Area Offices. A list of the IHS

Area Offices where individually identifiable data are currently located is available upon request to the Policy-Coordinating Official(s) at IHS Headquarters East, 12300 Twinbrook Parkway, Suite 450A, Rockville, MD 20852.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Applicants for and recipients of benefits from scholarship and loan repayment programs administered by the IHS. The IHS scholarship program includes the Health Professions Pre-Graduate Scholarship Program for Indians, the Health Professions Preparatory Scholarship Program for Indians; and the Health Professions Scholarship Program for Indians. Also included are records of scholarship or loan repayment recipients who are fulfilling their IHS service obligations as a result of receiving funds from these IHS programs, and individuals who have an expressed and/or obligated interest in employment in or an assignment to an IHS medical facility, Tribal medical/health care facility, Title V urban healthcare entity, or other facility described in sections 104 and 108 of the Indian Health Care Improvement Act, as amended (IHCIA).

CATEGORIES OF RECORDS IN THE SYSTEM:

Contains: Name, telephone number(s), work, school, home and/or mailing address; Social Security number; IHS scholarship or IHS loan repayment application; associated forms; employment data; professional performance and credentialing history of licensed health professionals; preference for site selection; personal, professional, and demographic background information; progress reports (which include related data, correspondence, and professional performance information); payroll forms; lender's loan repayment confirmation forms; Form W-4 (for withholding Federal taxes on scholarship recipients monthly stipends); IHS loan recipient's direct deposit form request (for monthly stipends for scholarship recipients and for annual loan repayment distribution among participants in the programs); deferment and placement data; and repayment/delinquent/default status information.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

25 U.S.C. 1613, including the Health Professions Preparatory Scholarship Program for Indians; 25 U.S.C. 1613a, Indian Health Professions Scholarship; 25 U.S.C. 1616a, IHS Loan Repayment Program; 5 U.S.C. 5514, Requirement

That Applicant Furnish Taxpayer Identifying Number; 42 U.S.C. 216(a), for PHS Commissioned Corps Officers, and 5 U.S.C. 3301 for civil service employees, both of which authorize verification of an individual's suitability for employment; Federal Records Act "44 U.S.C. 2901 et seq."; Privacy Act of 1974, as amended (5 U.S.C. 552a); Department Regulation "5 U.S.C. 301"; and 42 U.S.C. 254f, Assignment of Corps Personnel.

PURPOSE(S):

The purposes of this system of records are as follows:

1. *The IHS Scholarship Programs.*
 - (a) To select applicants for the IHS Scholarship Programs;
 - (b) To monitor scholarship related activities, such as payment tracking, deferment and/or postponement of service obligations owed default, placement, and debt collection through national credit company subscription(s);
 - (c) To select and match IHS scholarship recipients for qualified employment assignments with the following: IHS medical facilities, including but not limited to hospitals, health clinics and ambulatory stations; and any other programs as required under 25 U.S.C. 1616a;
 - (d) To monitor services provided by these IHS scholarship recipient/participant/obligated health care providers;
 - (e) To maintain records on and to verify individuals' credentials, educational background, prior and current performance history and data and previous and current employment and professional history information to verify and validate all claimed credentials are current, accurate, and in good standing;
 - (f) To assist Department of Health and Human Services (DHHS), Program Support Center (PSC) and other government officials in the collection of any and all overdue debts owed under the IHS Scholarship Program; and
 - (g) To negotiate site assignments, and to recruit and retain health professionals for Indian Health programs. Portions of records from this system of records may be used by staff of the DHHS/PSC; Division of Financial Operations (DFO), Debt Management, who maintain System No. 09-40-0012, "Debt Management and Collection System" and System No. 09-90-0024, "Unified Financial Management System", for activities related to the participant's breach of contract including debt collection information provided to PSC staff includes, but may not be limited to the participant's personal identification, number of years of support in school

while covered by an IHS scholarship contract, number of days served and still owed, and amount of funds expended and still owed.

2. The IHS Loan Repayment Agreement Program.

(a) To select applicants for the IHS Loan Repayment Program;

(b) To monitor loan repayment related activities including but not limited to service obligations, default and claims determinations;

(c) To assure IHS loan repayment recipients match to a health care facility serving high priority health professional shortage areas or populations as outlined by current IHS scoring criteria policy and procedure, such as IHS medical facilities, including but not limited to hospitals, health clinics and ambulatory stations; and any other programs as required under 25 U.S.C. 1616a;

(d) To monitor service provided by IHS loan repayment participants;

(e) To maintain records on and to verify individuals' credentials and educational background;

(f) To assist PSC and other governmental officials in the collection of overdue debts owed under the IHS Loan Repayment Agreement Program; and

(g) To negotiate site assignments, and recruit and retain health professionals for Indian Health programs. Portions of records from this system of records may be used by staff of the DHHS/PSC; Division of Financial Operations (DFO), Debt Management, who maintain System No. 09-40-0012, "Debt Management and Collection System" and System No. 09-90-0024, "Unified Financial Management System", for activities related to the participant's breach of contract including debt collection information provided to PSC staff includes, but may not be limited to the participant's personal identification, number of days served and still owed, and amount of funds expended and still owed.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

1. IHS may disclose records to a congressional office in response to a verified inquiry from the congressional office made at the written request of the subject individual.

2. Records may be disclosed to authorized persons employed by the grantee institution (the educational institution which the recipient of a scholarship grant is attending or the hospital affiliated with an educational institution the IHS loan repayment recipient is attending to complete his or

her residency requirement) as needed for the administration of a scholarship grant award.

3. Records may be disclosed to other Federal agencies that also provide scholarship funding at the request of these Federal agencies to detect or curtail fraud and abuse in Federal scholarship programs, and to collect delinquent loans or benefit payments owed to the Federal Government.

4. IHS may disclose information from these records in litigations and/or proceedings related to an administrative claim when:

(a) IHS has determined that the use of such records is relevant and necessary to the litigation and/or proceedings related to an administrative claim and would help in the effective representation of the affected party listed in subsections (i) through (iv) below, and that such disclosure is compatible with the purpose for which the records were collected. Such disclosure may be made to the DHHS/Office of General Counsel (OGC) and/or Department of Justice (DOJ), pursuant to an agreement between IHS and OGC, when any of the following is a party to litigation and/or proceedings related to an administrative claim or has an interest in the litigation and/or proceedings related to an administrative claim:

(i) DHHS or any component thereof; or

(ii) Any DHHS employee in his or her official capacity; or

(iii) Any DHHS employee in his or her individual capacity where the DOJ (or DHHS, where it is authorized to do so) has agreed to represent the employee; or

(iv) The United States or any agency thereof (other than DHHS) where HHS/OGC has determined that the litigation and/or proceedings related to an administrative claim is likely to affect DHHS or any of its components.

(b) In the litigation and/or proceedings related to an administrative claim described in subsection (a) above, information from these records may be disclosed to a court or other tribunal, or to another party before such tribunal in response to an order of a court or administrative tribunal, provided that the covered entity discloses only the information expressly authorized by such order.

5. IHS may provide to any organization, program or facility administered under the authority of the IHCA (Pub. L. 93-437, 25 U.S.C. 1601 et seq.) solely to provide health care services for the benefit of Indians, whether directly by our service; or by any federally recognized Tribe under authority of the Indian Self-

Determination and Education Assistance Act (ISDEAA) (Pub. L. 93-638, as amended, 25 U.S.C. 450 et seq.); a list of obligated recipients of scholarship grants, and any relevant information pursuant to recruiting and retaining these individuals for the purpose of meeting the health care needs of the requesting organization, program, facility or the federally recognized Tribe under IHCA and ISDEAA.

6. IHS may disclose records consisting of names, disciplines, current mailing addresses, and dates of graduation of scholarship recipients and loan repayment program participants to IHS discipline representatives, IHS and Tribal scholarship coordinators, and Indian health program health professional recruiters for the purpose of mentoring students during their training, assisting them to find appropriate positions upon completion of their training, and helping them to understand the nature of their professional service obligation.

IHS may disclose records consisting of names of the IHS scholarship or IHS loan repayment recipient, professional school he or she is attending, and the date of graduation to Indian health programs as defined by the IHCA; health professions associations and other interested health professions groups which have responsibility for coordinating funds paid to students from Federal and other sources.

8. IHS may disclose records contained in this system of records to HHS contractors and subcontractors for the purpose of collecting, compiling, aggregating, analyzing, or refining records in the system. Contractors and/or subcontractors are required to maintain Privacy Act safeguards with respect to such records.

9. IHS may disclose records contained in this system of records to HHS contractors and subcontractors for the purpose of recruiting, screening, and matching health/allied health professionals for assignment to or employment in a medical facility located in one of the options cited in section 108(a)(2)(A) of the IHCA. In addition, HHS contractor and subcontractors:

(a) May disclose biographic data and information supplied by potential applicants;

(i) To references listed on application and associated forms for the purpose of evaluating the applicant's professional qualifications, experience, and suitability; and

(ii) To a state or local Government medical licensing board and/or to the Federation of State Medical Boards or a

similar non-Government entity for the purpose of verifying that all claimed background and employment data are valid and all claimed credentials are current and in good standing.

(b) May disclose biographic data and information supplied by references listed on application and associated forms to other references for the purpose of inquiring into the applicant's professional qualifications and suitability; and

(c) May disclose professional suitability evaluation information to IHS officials, prospective employers, or to officials of prospective employers, or to site representatives, for the purpose of appraising the applicant's professional qualifications and suitability for site assignment or employment.

Contractors and/or subcontractors are required to maintain Privacy Act safeguards with respect to such records.

10. IHS may disclose records contained in this system of records to private parties such as present and former employers references listed on application and associated forms, other references, and education institutions. The purpose of such disclosures is to obtain information to evaluate an individual's professional accomplishments, performance, and educational background, and to determine if an applicant is suitable for employment in/assignment to a medical facility located at one of the sites listed in section 108(a)(2)(A) of the IHCA.

11. IHS may disclose records contained in this system of records to other Federal agencies that also provide scholarship or educational loan repayment funding at the request of these Federal agencies in conjunction with a computer matching program conducted by these Federal agencies to detect or curtail fraud and abuse in Federal scholarship or educational loan repayment programs, and to collect delinquent loans or benefit payments owed to the Federal Government.

12. IHS may disclose information from this system of records to a consumer reporting agency (credit bureau) to obtain an applicant's or participant's commercial credit report for the following purposes: (1) To establish his or her credit worthiness; (2) to assess and verify his or her ability to repay debts owed to the Federal Government; and (3) to determine and verify the eligibility of loans submitted for repayment. IHS may also disclose information from this system of records to the National Student Clearinghouse using the Loan Locator Internet System or similar system to assist in the verification of loan data submitted by Loan Repayment Program (LRP)

applicants. Disclosures are limited to the individual's name, address, Social Security number and other information necessary to identify him or her; locate all student loans and verify payment addresses; identify the funding being sought or amount and status of the debt; and the program under which the applicant or claim is being processed.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Disclosures pursuant to 5 U.S.C. 552a(b)(12): Disclosures may be made from this system to "consumer reporting agencies" as defined in the Fair Credit Reporting Act (15 U.S.C. 158a(f)) or the Federal Claims Collection Act of 1966 (31 U.S.C. 3701(a)(3)). The purposes of these disclosures are: (1) To provide an incentive for debtors to repay delinquent Federal Government debts by making these debts part of their credit records; and (2) to enable PHS agencies to improve the quality of loan and scholarship decisions by taking into account the financial reliability of applicants. Disclosure of records will be limited to the individual's name, social security number, and other information necessary to establish the identity of the individual, the amount, status, and history of the claim, and the agency or program under which the claim arose.

13. IHS may disclose from this system of records a delinquent debtor's or a defaulting participant's name, address, social security number, and other relevant information necessary to identify him or her; the amount, status, and the history of the claim; and the agency or program under which the claim arose, as follows:

(a) To any Federal agency to effect a salary offset for debts owed by Federal employees; if the claim arose under the Social Security Act, and the employee must have agreed in writing to the salary offset with the supporting document from the requesting Federal agency.

(b) To any Federal agency to effect authorized administrative offset; i.e., withhold money, other than Federal salaries, payable to or held on behalf of the individual that is court ordered and/or in accordance with a specific law/mandate.

(c) To the Treasury Department, Internal Revenue Service (IRS), to request an individual's current mailing address to locate him or her for purposes of either collecting or compromising a debt or to pay a commercial credit report prepared.

14. IHS may disclose to debt collection agents, other Federal agencies, and other third parties who are authorized to collect a Federal debt,

information necessary to identify a delinquent debtor or a defaulting participant. Disclosure will be limited to the individual's name, address, social security number, and other information necessary to identify him or her; the amount, status, and history of the claim; and the agency or program under which the claim arose.

15. IHS may disclose to the IRS information about an individual applying for the IHS loan repayment or scholarship program authorized by the Public Health Service Act to find out whether the applicant has a delinquent tax account. This disclosure is for the sole purpose of determining the applicant's creditworthiness and is limited to the individual's name, address, social security number, and other relevant information necessary to identify him or her, and the program for which the information is being obtained.

16. IHS may report to the IRS, as taxable income, the written-off amount of a debt owed by an individual to the Federal Government when a debt becomes partly or wholly uncollectible, either because the time period for collection under statute or regulations has expired, or because the government agrees with the individual to forgive or compromise the debt.

17. IHS may disclose from this system of records to the Department of Treasury, IRS: (1) A delinquent debtor's or a defaulting participant's name, address, social security number, and other relevant information necessary to identify the individual; (2) the amount of the debt; and (3) the program under which the debt arose, so that the IRS can offset against the debt any income tax refunds which may be due to the individual.

18. IHS may disclose information provided by the lender or education institution to other Federal agencies, debt collection agents, and other third parties who are authorized to collect a Federal debt. The purpose of this disclosure is to identify an individual who is delinquent in loan or benefit payments owed to the Federal Government and the nature of the debt.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained in paper format (i.e., file folders), and in computerized and electronic format (i.e., forms, database(s), etc.).

RETRIEVABILITY:

Records which identify individual persons are indexed by name or

assigned identification number of scholarship or loan repayment applicant or recipient.

SAFEGUARDS:

1. *Authorized users:* Access is limited only to authorized personnel in the performance of their duties. Authorized personnel include and are limited to: The system manager, his or her staff, IHS Area Office Scholarship or IHS Loan Repayment Coordinators, IHS Headquarters Branch Chiefs while acting as advisors to scholarship or IHS loan repayment recipients, and PSC debt management staff for activities related to the participant's breach of contract including debt collection.

2. *Physical safeguards:* Paper records are stored in locked file cabinets. The records storage areas are secured during off-duty hours. Electronic records are stored in areas where fire and life safety codes are strictly enforced. Any and all records pertaining to IHS Scholarship and Loan Repayment Program databases are to be enforced by the current Security Guidelines provided by HHS/IHS. All automated and non-automated documents are protected during lunch hours and non-working hours in locked file cabinets or locked storage areas. The Automated Data Processing remote stations are locked during non-standard working hours. Twenty-four hour, 7-day security guards perform random checks on the physical security of the data and the storage areas. Backup files are maintained in an off-site facility with controlled entrances and exits.

3. *Procedural safeguards:* All IHS personnel who make use of records contained in this system are made aware of their responsibilities under the provisions of the Privacy Act and are required to maintain Privacy Act safeguards with respect to such records. The records storage areas are not left unattended during office hours, including lunch hours. Records are not removed from these areas in which they are maintained in the absence of proper charge-out procedures. Twenty-four hour, seven-day security guards perform random checks on the physical security of all records storage areas. A data set name controls the release of data to only authorized users. When copying records for authorized purposes, care is taken to ensure that any imperfect pages are not left in the reproduction room where they can be read, but are destroyed or obliterated.

RETENTION AND DISPOSAL:

1. Scholarship applications of individuals not selected for participation in the program are retained for 1 full year, and then

destroyed by shredding. Applications, contracts, and other records of IHS scholarship recipients are retained through the completion or other disposition of the scholarship service obligation, then sent to the Federal Records Center (FRC) for an additional 15-year retention period and destroyed in accordance with FRC disposal standards. Automated historical tapes are sent to a FRC and the initial records are destroyed in accordance with IHS Records Control Schedule.

The records for the scholarship applicants, who are not obligated to the IHS, are destroyed 6 years and 3 months after final payment, or upon resolution of any adverse audit findings, whichever is later.

2. Loan repayment applications of individuals not selected for participation in the program are retained until the end of the fiscal year. Loan repayment applications, upon notification, are applied to the loan repayment cycle of the following fiscal year. The records for the loan repayment participants are destroyed 6 to 10 years after the final payment, or upon resolution of any adverse audit findings, whichever is later.

Records are transferred to the FRC 2 years after final repayment or when closed, for 4 years, and are then subsequently disposed of in accordance with the IHS Records Disposition Schedule. The IHS Records Disposition Schedule regulations for these records may be obtained by writing to the System Manager(s) at the address listed below.

SYSTEM MANAGER(S) AND ADDRESS:

Policy Coordinating Official(s):
Director, Division of Health Professions Support, Office of Public Health Support, Indian Health Service, 12300 Twinbrook Parkway, Suite 450A, Rockville, Maryland 20852.

Director, Division of Grants Operations, Office of Management Services, Indian Health Service, 12300 Twinbrook Parkway, Suite 360, Rockville, Maryland 20852.

Chief, Scholarship Branch, Division of Health Professions Support, Office of Public Health Support, Indian Health Service, 12300 Twinbrook Parkway, Suite 450A, Rockville, Maryland 20852.

Chief, Loan Repayment Branch, Division of Health Professions Support, Office of Public Health Support, Indian Health Service, 12300 Twinbrook Parkway, Suite 450A, Rockville, Maryland 20852.

NOTIFICATION PROCEDURES:

Requests in person: A subject individual who appears in person at a

specific location seeking access to or disclosure of records relating to him or her shall provide his or her name, current address, Grant Identification Number, last four digits of their social security number or other identification numbers, dates of enrollment in the IHS scholarship or loan repayment program, and at least one piece of tangible identification such as a driver's license, passport, or voter registration card. Identification papers with current photographs are preferred, but not required. If a subject individual has no identification, but is personally known to an agency employee, such employee shall make a written record verifying the subject individual's identity. Where the subject individual has no identification papers, the responsible agency official shall require that the subject individual certify in writing that he or she is the individual who he or she claims to be and that he or she understands that the knowing and willful request or acquisition of a record concerning an individual under false pretense is a criminal offense subject to a 5,000 dollar fine.

Requests by mail: A written request must contain the name and address of the requestor, last 4 digits of their respective social security number and/or signature which is either notarized to verify his or her identity or includes a written certification that the requestor is the person he or she claims to be and that he or she understands that the knowing and willful request or acquisition of records pertaining to an individual under false pretenses is a criminal offense subject to a 5,000 dollar fine. In addition, the following information is needed: Dates of enrollment in the IHS Scholarship Program or IHS Loan Repayment Agreement program, and current enrollment status, such as pending application approval, deferment or service obligation, or shortage area placement.

Requests by facsimile: A written request must contain the name and address of the requestor, last 4 digits of their respective social security number and/or signature. In addition, the following information is needed: Dates of enrollment in the IHS scholarship program or IHS Loan Repayment Agreement Program, and current enrollment status, such as pending application approval, deferment or service obligation, or shortage area placement. The IHS Scholarship and Loan Repayment programs will authorize transmission and reception of all faxed information only if the fax cover sheets contain the following Confidentiality Statement or a similar

standard procedural statement for liability purposes:

“THIS FAX IS INTENDED ONLY FOR THE USE OF THE PERSON OR OFFICE TO WHOM IT IS ADDRESSED, AND CONTAINS PRIVILEGED OR CONFIDENTIAL INFORMATION PROTECTED BY LAW. ALL RECIPIENTS ARE HEREBY NOTIFIED THAT INADVERTENT OR UNAUTHORIZED RECEIPT DOES NOT WAIVE SUCH PRIVILEGE, AND THAT UNAUTHORIZED DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION IS PROHIBITED. IF YOU HAVE RECEIVED THIS FAX IN ERROR, PLEASE DESTROY THE ATTACHED DOCUMENT(S) AND NOTIFY THE SENDER OF THE ERROR BY CALLING.”

Requests by telephone: Since positive identification of the caller cannot be established, telephone requests are not honored; the caller is asked to submit his or her request in writing.

Requests by electronic mail: Since positive identification of the requestor cannot be established, and the electronic transmission of personal identifiers is not encrypted, the security safeguards is not guaranteed from an unauthorized disclosure, so electronic mail requests are not honored and will be deleted from the IHS e-mail system; and the computer user is asked to submit his or her request in writing and/or by facsimile transmission.

Record access procedures: Same as notification procedures. Requestors should also provide a reasonable description of the record being sought. Requestors may also request an accounting of disclosures that have been made of their record, if any.

CONTESTING RECORD PROCEDURES:

Contact the Policy Coordinating Official(s), provide a reasonable description of the record, and specify the information being contested, the corrective action sought, and the reasons for requesting the correction, along with supporting information to show how the record is inaccurate, incomplete, untimely, or irrelevant.

RECORD SOURCE CATEGORIES:

Information will be collected from the following sources:

Education institutions attended; internship and/or residency training progress reports; IHS site selection questionnaires; IHS Scholarship or Loan Repayment applicants; Indian health programs human resources department; financial institutions from which these applicants have obtained educational loans; Bureau of Health Professions Area Resources File tapes; health

professional associations; HHS contractors/subcontractors; consumer reporting agencies/credit bureaus; lending institutions; PHS Commissioned Personnel Operations Division and U.S. Office of Personnel Operations Division and U.S. Office of Personnel Management personnel records; other Federal agencies, including but not limited to the Department of Treasury, the IRS, and the U.S. Postal Service; State or local Government medical licensing boards and/or the Federation of State Medical Boards or a similar non-Government entity; and third parties who provide references concerning the subject individual.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

[FR Doc. 07-501 Filed 2-5-07; 8:45 am]

BILLING CODE 4165-16-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel, Molecular Toxicology of DNA Adducts.

Date: February 23, 2007.

Time: 9 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: The Radisson Governor's Inn, I-40 at Davis Drive, Exit 280, Research Triangle Park, NC 27709.

Contact Person: Teresa Nesbitt, BS, PhD, DVM, Chief, Scientific Review Branch, Division of Extramural Research and Training, Nat'l Institute of Environmental Health Sciences, P.O. Box 12233, MD EC-30, Research Triangle Park, NC 27709, (919) 541-7571, nesbitt@mail.nih.gov.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: January 28, 2007.

Anna Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 07-494 Filed 2-5-07; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG-2007-27156]

National Maritime Security Advisory Committee

AGENCY: Coast Guard, DHS.

ACTION: Committee Management; Notice of Federal Advisory Committee Meeting.

SUMMARY: The National Maritime Security Advisory Committee (NMSAC) will meet on February 28, 2007, in Arlington, Virginia to discuss various issues relating to national maritime security. This meeting will be open to the public.

DATES: NMSAC will meet on Wednesday, February 28, 2007, from 9 a.m. to 4 p.m. Please note that the meeting may close early if the committee has completed its business.

ADDRESSES: NMSAC will meet in the Cavalier Ballroom at the Sheraton National Hotel, 900 South Orme Street, Arlington, Virginia 22204. Send written material, comments and requests to make oral presentations to Mr. Ike Eisentrout, Commandant (CG-3PCP-1), NMSAC Executive Assistant, U.S. Coast Guard Headquarters, Room 5302, 2100 Second St. SW., Washington, DC 20593-0001. Written material, comments and requests to make oral presentations at the meeting should reach the contact person listed above by February 15, 2007. Requests to have a copy of your material distributed to each member of the committee prior to the meeting should reach the contact person listed above by February 15, 2007 (please

provide 25 paper copies or one electronic copy). Comments must be identified by [USCG–2007–27156] and may be submitted by one of the following methods:

- *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *E-mail*:

Brian.K.Eisentrout@uscg.mil. One electronic copy, (include the docket number in the subject line of the message).

- *Fax*: 202–372–1905.

- *Mail*: Mr. Ike Eisentrout, Commandant (CG–3PCP–1), NMSAC Executive Assistant, U.S. Coast Guard Headquarters, Room 5302, 2100 Second St. SW., Washington, DC 20593–0001.

Instructions: All submissions (twenty-five paper copies) received must include the words “Department of Homeland Security” and the docket number for this action [USCG–2007–27156]. Comments received will be posted without alteration at www.regulations.gov, including any personal information provided.

Docket: For access to the docket to read background documents or comments received by the NMSAC, go to <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Mr. Ike Eisentrout, Commandant (CG–3PCP–1), NMSAC Executive Assistant, U.S. Coast Guard Headquarters, Room 5302, 2100 Second St. S.W., Washington, DC 20593–0001,

Brian.K.Eisentrout@uscg.mil, 202–372–1119, Fax 202–372–1905.

SUPPLEMENTARY INFORMATION: Notice of the meeting is given pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. 2 (Pub. L. 92–463). The NMSAC purpose is to advise and make recommendations to the Secretary of Homeland Security via the Commandant of the Coast Guard on policies and procedures dealing with National Maritime Security. The NMSAC will meet for the purpose of discussing the items listed below on the tentative agenda.

Meeting Agenda

The agenda includes the following:

- (1) Welcome and opening remarks;
- (2) Old Committee Action Items.
- (3) Unfinished Committee Action

Items to include: Report from the Transportation Workers Identification Card (TWIC) Contact-less Specifications Workgroup and updates on the TWIC Implementation Guide.

(4) Miscellaneous Updates on: the Maritime Sector Coordinating Council; the Safe Port Act of 2006; the Secure Freight Initiative and the Domestic

Nuclear Detection Office Maritime Strategy.

- (5) Public Comments.
- (6) New Committee Action Items.
- (7) Closing Remarks.

Procedural

The meeting is open to the public. However, participation in NMSAC deliberations is limited to NMSAC members, Department of Homeland Security officials, and persons attending the meeting for special presentations. Please note that the meeting may close early if all business is finished. The Sheraton National Hotel is a public facility, but persons attending should be ready to show a photo identification card for admittance to the meeting. At the Chair's discretion, members of the public may make oral presentations during the meeting. If you would like to make an oral presentation at the meeting, please notify the NMSAC Executive Assistant no later than February 15, 2007. If you would like a copy of your material distributed to each member of the Committee in advance of the meeting, please follow the instructions prescribed above.

Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact the Executive Assistant as soon as possible.

Dated: January 30, 2007.

M. P. O'Malley,

Captain, U.S. Coast Guard, Chief, Office of Port and Facility Activities, Designated Federal Official, NMSAC.

[FR Doc. E7–1879 Filed 2–5–07; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1605–DR]

Alabama; Amendment No. 9 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Alabama (FEMA–1605–DR), dated August 29, 2005, and related determinations.

EFFECTIVE DATE: January 25, 2007.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal

Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated January 25, 2007, the President amended the cost-sharing arrangements regarding Federal funds provided under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), in a letter to R. David Paulison, Director, Federal Emergency Management Agency, Department of Homeland Security, as follows:

I have determined that the damage in certain areas of the State of Alabama resulting from Hurricane Katrina during the period of August 29 to September 26, 2005, is of sufficient severity and magnitude that special cost sharing arrangements are warranted regarding Federal funds provided under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act).

Therefore, I amend my declaration of August 29, 2005, as amended on September 1, 2005, to authorize Federal funds for all categories of Public Assistance at 90 percent of total eligible costs relating to this disaster, except for assistance previously approved at 100 percent.

This adjustment to State and local cost sharing applies only to Public Assistance costs and direct Federal assistance eligible for such adjustments under applicable law. The Stafford Act specifically prohibits a similar adjustment for funds provided to States for Other Needs Assistance (Section 408) and the Hazard Mitigation Grant Program (Section 404). These funds will continue to be reimbursed at 75 percent of total eligible costs.

This cost share is effective as of the date of the President's major disaster declaration.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Under Secretary for Federal Emergency Management and Director of FEMA.

[FR Doc. E7–1846 Filed 2–5–07; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency****[FEMA-1676-DR]****Missouri; Amendment No. 1 to Notice of a Major Disaster Declaration****AGENCY:** Federal Emergency Management Agency, DHS.**ACTION:** Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Missouri (FEMA-1676-DR), dated January 15, 2007, and related determinations.

EFFECTIVE DATE: January 22, 2007.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective January 22, 2007.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,*Under Secretary for Federal Emergency Management and Director of FEMA.*

[FR Doc. E7-1847 Filed 2-5-07; 8:45 am]

BILLING CODE 9110-10-P**DEPARTMENT OF HOMELAND SECURITY****Federal Emergency Management Agency****[FEMA-3272-EM]****Oklahoma; Amendment No. 1 to Notice of an Emergency Declaration****AGENCY:** Federal Emergency Management Agency, DHS.**ACTION:** Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Oklahoma (FEMA-3272-EM), dated January 14, 2007, and related determinations.

EFFECTIVE DATE: January 26, 2007.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective January 26, 2007.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,*Under Secretary for Federal Emergency Management and Director of FEMA.*

[FR Doc. E7-1851 Filed 2-5-07; 8:45 am]

BILLING CODE 9110-10-P**DEPARTMENT OF HOMELAND SECURITY****Federal Emergency Management Agency****Notice of Adjustment of Statewide Per Capita Threshold for Recommending a Cost Share Adjustment****AGENCY:** Federal Emergency Management Agency, DHS.**ACTION:** Notice.

SUMMARY: FEMA gives notice that we are increasing the statewide per capita threshold for recommending cost share adjustments for disasters declared on or after January 1, 2007, through December 31, 2007.

DATES: *Effective Date:* February 6, 2007. *Applicability Date:* This notice applies to major disasters declared on or after January 1, 2007.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-2705.

SUPPLEMENTARY INFORMATION: Pursuant to 44 CFR 206.47, FEMA annually adjusts the statewide per capita threshold that is used to recommend an increase of the Federal cost share from seventy-five percent (75%) to not more than ninety percent (90%) of the eligible cost of permanent work under section 406 and emergency work under section 403 and section 407 of the Robert T.

Stafford Disaster Relief and Emergency Assistance Act. The adjustment to the threshold is based on the Consumer Price Index for All Urban Consumers published annually by the U.S. Department of Labor. For disasters declared on January 1, 2007, through December 31, 2007, the qualifying threshold is \$117 of State population.

We base the adjustment on an increase in the Consumer Price Index for All Urban Consumers of 2.5 percent for the 12-month period ended in December 2006. The Bureau of Labor Statistics of the U.S. Department of Labor released the information on January 18, 2007.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individual and Household Housing; 97.049, Individual and Household Disaster Housing Operations; 97.050, Individual and Household Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,*Under Secretary for Federal Emergency Management and Director of FEMA.*

[FR Doc. E7-1852 Filed 2-5-07; 8:45 am]

BILLING CODE 9110-10-P**DEPARTMENT OF THE INTERIOR****Bureau of Land Management****[UTU79796]****Notice of Proposed Reinstatement of Terminated Oil and Gas Lease, Utah**

January 31, 2007.

AGENCY: Bureau of Land Management, Interior.**ACTION:** Notice.

SUMMARY: In accordance with Title IV of the Federal Oil and Gas Royalty Management Act (Pub.L. 97-451), Whiting Petroleum Corporation timely filed a petition for reinstatement of oil and gas lease UTU79796 for lands in San Juan County, Utah, and it was accompanied by all required rentals and royalties accruing from October 1, 2006, the date of termination.

FOR FURTHER INFORMATION CONTACT: Douglas F. Cook, Chief, Branch of Fluid Minerals at (801) 539-4040.

SUPPLEMENTARY INFORMATION: The Lessee has agreed to new lease terms for rentals and royalties at rates of \$10 per acre and 16⅔ percent, respectively. The

\$500 administrative fee for the lease has been paid and the lessee has reimbursed the Bureau of Land Management for the cost of publishing this notice.

Having met all the requirements for reinstatement of the lease as set out in Section 31 (d) and (e) of the Mineral Leasing Act of 1920 (30 U.S.C. 188), the Bureau of Land Management is proposing to reinstate lease UTU79796, effective October 1, 2001, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Douglas F. Cook,

Chief, Branch of Fluid Minerals.

[FR Doc. E7-1891 Filed 2-5-07; 8:45 am]

BILLING CODE 4310--\$S-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UTU79795]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease, Utah

January 31, 2007.

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: In accordance with Title IV of the Federal Oil and Gas Royalty Management Act (Pub. L. 97-451), Whiting Petroleum Corporation timely filed a petition for reinstatement of oil and gas lease UTU79795 for lands in San Juan County, Utah, and it was accompanied by all required rentals and royalties accruing from October 1, 2006, the date of termination.

FOR FURTHER INFORMATION CONTACT: Douglas F. Cook, Chief, Branch of Fluid Minerals at (801) 539-4040.

SUPPLEMENTARY INFORMATION: The Lessee has agreed to new lease terms for rentals and royalties at rates of \$10 per acre and 16⅓ percent, respectively. The \$500 administrative fee for the lease has been paid and the lessee has reimbursed the Bureau of Land Management for the cost of publishing this notice.

Having met all the requirements for reinstatement of the lease as set out in Section 31(d) and (e) of the Mineral Leasing Act of 1920 (30 U.S.C. 188), the Bureau of Land Management is proposing to reinstate lease UTU79795, effective October 1, 2001, subject to the original terms and conditions of the

lease and the increased rental and royalty rates cited above.

Douglas F. Cook,

Chief, Branch of Fluid Minerals.

[FR Doc. E7-1892 Filed 2-5-07; 8:45 am]

BILLING CODE 4310--\$S-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY-923-1310-FI; WYW146511]

Wyoming: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease.

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2-3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement from John P. Strang for noncompetitive oil and gas lease WYW146511 for land in Fremont County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Pamela J. Lewis, Chief, Branch of Fluid Minerals Adjudication, at (307) 775-6176.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of \$5.00 per acre or fraction thereof, per year and 16⅓ percent, respectively. The lessee has paid the required \$500 administrative fee and \$163.00 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW146511 effective September 1, 2006, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. BLM has not issued a valid lease affecting the lands.

Pamela J. Lewis,

Chief, Branch of Fluid Minerals Adjudication.

[FR Doc. E7-1889 Filed 2-5-07; 8:45 am]

BILLING CODE 4310-22-P

NATIONAL TRANSPORTATION SAFETY BOARD

Sunshine Act Meeting

TIME AND DATE: 8:30 a.m., Tuesday, February 13, 2007.

PLACE: NTSB Conference Center, 429 L'Enfant Plaza, SW., Washington, DC 20594.

STATUS: The two items are open to the public.

MATTERS TO BE CONSIDERED:

7862 *Aviation Aircraft Accident Report—Weather Encounter and Subsequent Collision into Terrain*, Bali Hai Helicopter Tours, Inc., Bell 206B, N16849, Kalaheo, Hawaii, September 24, 2004.

7861 *Aviation Accident Brief and Safety Recommendation Letter—Weather Encounter and Subsequent Crash into the Pacific Ocean*, Heli-USA Airways, Inc., Aerospatiale AS350BA, N355NT, Haena, Hawaii, September 23, 2005.

NEWS MEDIA CONTACT: Telephone: (202) 314-6100.

Individuals requesting specific accommodations should contact Chris Bisett at (202) 314-6305 by Friday, February 9, 2007.

The public may view the meeting via a live or archived webcast by accessing a link under "News & Events" on the NTSB home page at www.nts.gov.

FOR MORE INFORMATION CONTACT: Vicky D'Onofrio, (202) 314-6410.

Dated: February 2, 2007.

Vicky D'Onofrio,

Federal Register Liaison Officer.

[FR Doc. 07-541 Filed 2-2-07; 1:16 pm]

BILLING CODE 7533-01-M

NUCLEAR REGULATORY COMMISSION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of pending NRC action to submit an information collection request to OMB and solicitation of public comment.

SUMMARY: The NRC is preparing a submittal to OMB for review of continued approval of information collections under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information Pertaining to the Requirement To Be Submitted

1. *The title of the information collection:* "NRC Forms 366, 366A, 366B, Licensee Event Report."
2. *Current OMB approval number:* 3150-0104.
3. *How often the collection is required:* On occasion, as defined reactor events are reportable as they occur.
4. *Who is required or asked to report:* Holders of operating licenses for commercial nuclear power plants.
5. *The number of annual respondents:* 104.

6. *The number of hours needed annually to complete the requirement or request:* 32,000 (25,600 reporting + 6,400 recordkeeping). This is estimated to be 80 hours for each of 400 reports annually or approximately 31 hours per recordkeeper.

7. *Abstract:* With NRC Forms 366, 366A, and 366B, the NRC collects reports of the types of reactor events and problems that are believed to be significant and useful to the NRC in its efforts to identify and resolve possible threats to the public safety. These forms are designed to provide the information necessary for engineering studies of operational anomalies and trends and patterns analysis of abnormal occurrences. The same information is used for other analytic procedures that aid in identifying accident precursors.

Submit, by April 9, 2007, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?
2. Is the burden estimate accurate?
3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?
4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the draft supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O-1 F23, Rockville, MD 20852. OMB clearance requests are available at the NRC worldwide Web site: <http://www.nrc.gov/public-involve/doc-comment/omb/index.html>. The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions about the information collection requirements may be directed to the NRC Clearance Officer, Margaret A. Janney, U.S.

Nuclear Regulatory Commission, T5-F52, Washington, DC 20555-0001, by telephone at 301-415-7245, or by Internet electronic mail at INFOCOLLECTS@NRC.GOV.

Dated at Rockville, Maryland, this 31st day of January 2007.

For the Nuclear Regulatory Commission
Margaret A. Janney,
NRC Clearance Officer, Office of Information Services.

[FR Doc. E7-1868 Filed 2-5-07; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-346]

Firstenergy Nuclear Operating Company And Firstenergy Nuclear Generation Corp.; Notice of Withdrawal of Application for Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (NRC, the Commission) has granted the request of FirstEnergy Nuclear Operating Company and FirstEnergy Nuclear Generation Corp. (the licensee) to withdraw its January 11, 2005, application for proposed amendment to Facility Operating License No. NPF-3 for the Davis-Besse Nuclear Power Station, Unit 1, located in Ottawa County.

The proposed amendment would have revised the updated safety analysis report (USAR) by modifying the design requirements for protection from tornado missiles. Specifically, the proposed amendment would have allowed certain structures, systems, and components that are currently provided with physical protection from tornado-induced missiles to be evaluated for acceptability based on the Electric Power Research Institute "Tornado Missile Risk Evaluation Methodology" (TORMIS).

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on February 15, 2005 (70 FR 7766). However, by letter dated January 26, 2007, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated January 11, 2005, and the licensee's letter dated January 26, 2007, which withdrew the application for license amendment. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville,

Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the internet at the NRC Web site, <http://www.nrc.gov/reading-rm.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 30th day of January 2007.

For The Nuclear Regulatory Commission.

Thomas J. Wengert,
Project Manager, Plant Licensing Branch III-2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E7-1869 Filed 2-5-07; 8:45 am]

BILLING CODE 7590-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-55192; File No. S7-24-89]

Joint Industry Plan; Notice of Filing and Immediate Effectiveness of Amendment No. 19 to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis, Submitted by the American Stock Exchange LLC, the Boston Stock Exchange, Inc., the Chicago Stock Exchange, Inc., the Chicago Board Options Exchange, Inc., the International Securities Exchange, LLC, the National Association of Securities Dealers, Inc., the National Stock Exchange, Inc., the Nasdaq Stock Market LLC, NYSE Arca, Inc., and the Philadelphia Stock Exchange, Inc.

January 29, 2007.

I. Introduction and Description

Pursuant to Rule 608 of the Securities Exchange Act of 1934 (the "Act")¹ notice is hereby given that on January 19, 2007, the operating committee ("Operating Committee" or "Committee")² of the Joint Self-

¹ 17 CFR 242.608.

² The Plan Participants (collectively, "Participants") are: the American Stock Exchange, LLC ("Amex"), the Boston Stock Exchange, Inc. ("BSE"), the Chicago Board Options Exchange, Inc. ("CBOE"), the Chicago Stock Exchange, Inc. ("CHX"), the International Securities Exchange, LLC ("ISE"), the National Stock Exchange, Inc.

Regulatory Organization Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis ("Nasdaq/UTP Plan" or "Plan") filed with the Securities and Exchange Commission ("Commission") amendments to the Plan. These amendments represent Amendment 19 to the Plan and reflect the addition of the New York Stock Exchange as a new Participant to the Plan and the modification of the legal name of the International Securities Exchange. Amendment 19 was unanimously approved by the Committee on November 16, 2006.³ The Commission is publishing this notice of filing and immediate effectiveness to solicit comments from interested persons on Amendment No. 19.

II. Background

The Plan governs the collection, processing, and dissemination on a consolidated basis of quotation information and transaction reports in Eligible Securities⁴ for each of its Participants. This consolidated information informs investors of the current quotation and recent trade prices of Nasdaq securities. It enables investors to ascertain from one data source the current prices in all the markets trading Nasdaq securities. The Plan serves as the required transaction reporting plan for its Participants, which is a prerequisite for their trading Eligible Securities.

The Commission originally approved the Plan on a pilot basis on June 26, 1990.⁵ The parties did not begin trading until July 12, 1993; accordingly, the pilot period commenced on July 12, 1993. The Plan was most recently extended on December 28, 2006 for a period of 120 days.⁶

("NSX"), the Nasdaq Stock Market LLC ("Nasdaq"), NYSE Arca, Inc. ("NYSEArca"), the National Association of Securities Dealers, Inc. ("NASD"), the Pacific Exchange ("PCX"), and the Philadelphia Stock Exchange, Inc. ("Phlx").

³ See letter from Bridget M. Farrell, Chairman, OTC/UTP Operating Committee, to Nancy M. Morris, Secretary, Commission, dated January 17, 2007.

⁴ The Plan defines "Eligible Securities" as any Nasdaq Global Market or Nasdaq Capital Market security, as defined in NASD Rule 4200.

⁵ See Securities Exchange Act Release No. 28146, 55 FR 27917 (July 6, 1990).

⁶ See Securities Exchange Act Release No. 54988 (December 20, 2006), 71 FR 78240.

III. Description and Purpose of the Amendment⁷

The following is a summary of the changes to the Plan prepared by the Participants:

A. Section I.A shall be amended to add the New York Stock Exchange as a Participant and modify the International Securities Exchange to reflect a legal name change.

B. Section VIII.C shall be amended to add the New York Stock Exchange using the symbol "N" and modify the International Securities Exchange to reflect a legal name change.

C. The signature block shall be amended to add the New York Stock Exchange as a Participant and modify the International Securities Exchange to reflect a legal name change.

IV. Date of Effectiveness of the Amendment

The changes set forth in Amendment No. 19 are concerned solely with the administration of the Plan and thus are being put into effect upon filing with the Commission pursuant to Rule 608(b)(3)(ii).⁸ At any time within 60 days of the filing of any such amendment, the Commission may summarily abrogate the amendment and require that such amendment be re-filed in accordance with paragraph (a)(1) of Rule 608 under the Act⁹ and reviewed in accordance with paragraph (b)(2) of Rule 608 under the Act,¹⁰ if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets, to remove impediments to, and perfect mechanisms of, a national market system or otherwise in furtherance of the purposes of the Act.¹¹

V. Solicitation of Comments

The Commission seeks general comments on Amendment No. 19. Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-24-89 on the subject line.

⁷ The complete text of the Plan, as amended by Amendment No. 19, is attached as Exhibit A.

⁸ 17 CFR 242.608(b)(3)(ii).

⁹ 17 CFR 242.608(a)(1).

¹⁰ 17 CFR 242.608(b)(2).

¹¹ 17 CFR 242.608(b)(3)(iii).

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 S7-24-89. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the Plan amendment that are filed with the Commission, and all written communications relating to the Plan amendment 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 Plan amendment also will be available for inspection and copying at the Office of the Secretary of the Committee, currently located at NYSE Arca, Inc., 100 South Wacker Drive, Suite 1800, Chicago, IL 60606. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number S7-24-89 and should be submitted on or before February 27, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Florence E. Harmon,
Deputy Secretary.

Exhibit A

Nasdaq UTP Plan
Amended and Restated Plan
Amendment No. 19

The undersigned registered national securities association and national securities exchanges (collectively referred to as the "Participants"), have jointly developed and hereby enter into this Nasdaq Unlisted Trading Privileges Plan ("Nasdaq UTP Plan" or "Plan").

I. Participants

The Participants include the following:

¹² 17 CFR 200.30-3(a)(27).

A. Participants

1. American Stock Exchange LLC, 86 Trinity Place, New York, New York 10006.
2. Boston Stock Exchange, 100 Franklin Street, Boston, Massachusetts 02110.
3. Chicago Stock Exchange, 440 South LaSalle Street, Chicago, Illinois 60605.
4. Chicago Board Options Exchange, Inc., 400 South LaSalle Street, 26th Floor, Chicago, Illinois 60605.
5. International Securities Exchange, LLC, 60 Broad Street, New York, New York 10004.
6. National Association of Securities, Dealers, Inc., 1735 K Street, NW., Washington, DC 20006.
7. National Stock Exchange, Inc., 440 South LaSalle Street, 26th Floor, Chicago, Illinois 60605.
8. New York Stock Exchange LLC, 11 Wall Street, New York, New York, 10005.
9. NYSE Arca, Inc., 100 South Wacker Drive, Suite 1800, Chicago, IL 60606.
10. Philadelphia Stock Exchange, 1900 Market Street, Philadelphia, Pennsylvania 19103.
11. The Nasdaq Stock Market LLC, 1 Liberty Plaza, 165 Broadway, New York, NY 10006.

B. Additional Participants

Any other national securities association or national securities exchange, in whose market Eligible Securities become traded, may become a Participant, provided that said organization executes a copy of this Plan and pays its share of development costs as specified in Section XIII.

II. Purpose of Plan

The purpose of this Plan is to provide for the collection, consolidation and dissemination of Quotation Information and Transaction Reports in Eligible Securities from the Participants in a manner consistent with the Exchange Act.

It is expressly understood that each Participant shall be responsible for the collection of Quotation Information and Transaction Reports within its market and that nothing in this Plan shall be deemed to govern or apply to the manner in which each Participant does so.

III. Definitions

A. "Current" means, with respect to Transaction Reports or Quotation Information, such Transaction Reports or Quotation Information during the fifteen (15) minute period immediately following the initial transmission thereof by the Processor.

B. "Eligible Security" means any Nasdaq Global Market or Nasdaq Capital Market security, as defined in NASDAQ Rule 4200. Eligible Securities under this Nasdaq UTP Plan shall not include any security that is defined as an "Eligible Security" within Section VII of the Consolidated Tape Association Plan.

A security shall cease to be an Eligible Security for purposes of this Plan if: (i) The security does not substantially meet the requirements from time to time in effect for continued listing on Nasdaq, and thus is suspended from trading; or (ii) the security has been suspended from trading because the issuer thereof is in liquidation, bankruptcy or other similar type proceedings. The determination as to whether a security substantially meets the criteria of the definition of Eligible Security shall be made by the exchange on which such security is listed provided, however, that if such security is listed on more than one exchange, then such determination shall be made by the exchange on which, the greatest number of the transactions in such security were effected during the previous twelve-month period.

C. "Commission" and "SEC" shall mean the U.S. Securities and Exchange Commission.

D. "Exchange Act" means the Securities Exchange Act of 1934.

E. "Market" shall mean (i) When used with respect to Quotation Information, the NASD in the case of an NASD Participant, or the Participant on whose floor or through whose facilities the quotation was disseminated; and (ii) when used with respect to Transaction Reports, the Participant through whose facilities the transaction took place or is reported, or the Participant to whose facilities the order was sent for execution.

F. "NASD" means the National Association of Securities Dealers Inc.

G. "NASD Participant" means an NASD member that is registered as a market maker or an electronic communications network or otherwise utilizes the facilities of the NASD pursuant to applicable NASD rules.

H. "Transaction Reporting System" means the System provided for in the Transaction Reporting Plan filed with and approved by the Commission pursuant to SEC Rule 11Aa3-1, subsequently re-designated as Rule 601 of Regulation NMS, governing the reporting of transactions in Nasdaq securities.

I. "UTP Quote Data Feed" means the service that provides Subscribers with the National Best Bid and Offer quotations, size and market center identifier, as well as the Best Bid and

Offer quotations, size and market center identifier from each individual Participant in Eligible Securities and, in the case of NASD, the NASD Participant(s) that constitute NASD's Best Bid and Offer quotations.

J. "Nasdaq System" means the automated quotation system operated by Nasdaq.

K. "UTP Trade Data Feed" means the service that provides Vendors and Subscribers with Transaction Reports.

L. "Nasdaq Security" or "Nasdaq-listed Security" means any security listed on the Nasdaq Global Market or Nasdaq Capital Market.

M. "News Service" means a person that receives Transaction Reports or Quotation Information provided by the Systems or provided by a Vendor, on a Current basis, in connection with such person's business of furnishing such information to newspapers, radio and television stations and other news media, for publication at least fifteen (15) minutes following the time when the information first has been published by the Processor.

N. "OTC Montage Data Feed" means the data stream of information that provides Vendors and Subscribers with quotations and sizes from each NASD Participant.

O. "Participant" means a registered national securities exchange or national securities association that is a signatory to this Plan.

P. "Plan" means this Nasdaq UTP Plan, as from time to time amended according to its provisions, governing the collection, consolidation and dissemination of Quotation Information and Transaction Reports in Eligible Securities.

Q. "Processor" means the entity selected by the Participants to perform the processing functions set forth in the Plan.

R. "Quotation Information" means all bids, offers, displayed quotation sizes, the market center identifiers and, in the case of NASD, the NASD Participant that entered the quotation, withdrawals and other information pertaining to quotations in Eligible Securities required to be collected and made available to the Processor pursuant to this Plan.

S. "Regulatory Halt" means a trade suspension or halt called for the purpose of dissemination of material news, as described at Section X hereof or that is called for where there are regulatory problems relating to an Eligible Security that should be clarified before trading therein is permitted to continue, including a trading halt for extraordinary market activity due to system misuse or malfunction under

Section X.E.1. of the Plan ("Extraordinary Market Regulatory Halt").

T. "Subscriber" means a person that receives Current Quotation Information or Transaction Reports provided by the Processor or provided by a Vendor, for its own use or for distribution on a non-Current basis, other than in connection with its activities as a Vendor.

U. "Transaction Reports" means reports required to be collected and made available pursuant to this Plan containing the stock symbol, price, and size of the transaction executed, the Market in which the transaction was executed, and related information, including a buy/sell/cross indicator and trade modifiers, reflecting completed transactions in Eligible Securities.

V. "Upon Effectiveness of the Plan" means July 12, 1993, the date on which the Participants commenced publication of Quotation Information and Transaction Reports on Eligible Securities as contemplated by this Plan.

W. "Vendor" means a person that receives Current Quotation Information or Transaction Reports provided by the Processor or provided by a Vendor, in connection with such person's business of distributing, publishing, or otherwise furnishing such information on a Current basis to Subscribers, News Services or other Vendors.

IV. Administration of Plan

A. Operating Committee: Composition

The Plan shall be administered by the Participants through an operating committee ("Operating Committee"), which shall be composed of one representative designated by each Participant. Each Participant may designate an alternate representative or representatives who shall be authorized to act on behalf of the Participant in the absence of the designated representative. Within the areas of its responsibilities and authority, decisions made or actions taken by the Operating Committee, directly or by duly delegated individuals, committees as may be established from time to time, or others, shall be binding upon each Participant, without prejudice to the rights of any Participant to seek redress from the SEC pursuant to Rule 608 of Regulation NMS under the Exchange Act or in any other appropriate forum.

An Electronic Communications Network, Alternative Trading System, Broker-Dealer or other securities organization ("Organization") which is not a Participant, but has an actively pending Form 1 Application on file with the Commission to become a national securities exchange, will be

permitted to appoint one representative and one alternate representative to attend regularly scheduled Operating Committee meetings in the capacity of an observer/advisor. If the Organization's Form 1 petition is withdrawn, returned, or is otherwise not actively pending with the Commission for any reason, then the Organization will no longer be eligible to be represented in the Operating Committee meetings. The Operating Committee shall have the discretion, in limited instances, to deviate from this policy if, as indicated by majority vote, the Operating Committee agrees that circumstances so warrant.

Nothing in this section or elsewhere within the Plan shall authorize any person or organization other than Participants and their representatives to participate on the Operating Committee in any manner other than as an advisor or observer, or in any Executive Session of the Operating Committee.

B. Operating Committee: Authority

The Operating Committee shall be responsible for:

1. Overseeing the consolidation of Quotation Information and Transaction Reports in Eligible Securities from the Participants for dissemination to Vendors, Subscribers, News Services and others in accordance with the provisions of the Plan;
2. Periodically evaluating the Processor;
3. Setting the level of fees to be paid by Vendors, Subscribers, News Services or others for services relating to Quotation Information or Transaction Reports in Eligible Securities, and taking action in respect thereto in accordance with the provisions of the Plan;
4. Determining matters involving the interpretation of the provisions of the Plan;
5. Determining matters relating to the Plan's provisions for cost allocation and revenue-sharing; and
6. Carrying out such other specific responsibilities as provided under the Plan.

C. Operating Committee: Voting

Each Participant shall have one vote on all matters considered by the Operating Committee.

1. The affirmative and unanimous vote of all Participants entitled to vote shall be necessary to constitute the action of the Operating Committee with respect to:

- a. Amendments to the Plan;
- b. amendments to contracts between the Processor and Vendors, Subscribers, News Services and others receiving

Quotation Information and Transaction Reports in Eligible Securities;

c. Replacement of the Processor, except for termination for cause, which shall be governed by Section V(B) hereof;

d. Reductions in existing fees relating to Quotation Information and Transaction Reports in Eligible Securities; and

e. Except as provided under Section IV(C)(3) hereof, requests for system changes; and

f. All other matters not specifically addressed by the Plan.

2. With respect to the establishment of new fees or increases in existing fees relating to Quotation Information and Transaction Reports in Eligible Securities, the affirmative vote of two-thirds of the Participants entitled to vote shall be necessary to constitute the action of the Operating Committee.

3. The affirmative vote of a majority of the Participants entitled to vote shall be necessary to constitute the action of the Operating Committee with respect to:

a. Requests for system changes reasonably related to the function of the Processor as defined under the Plan. All other requests for system changes shall be governed by Section IV(C)(1)(e) hereof.

b. Interpretive matters and decisions of the Operating Committee arising under, or specifically required to be taken by, the provisions of the Plan as written;

c. Interpretive matters arising under Rules 601 and 602 of Regulation NMS; and

d. Denials of access (other than for breach of contract, which shall be handled by the Processor);

4. It is expressly agreed and understood that neither this Plan nor the Operating Committee shall have authority in any respect over any Participant's proprietary systems. Nor shall the Plan or the Operating Committee have any authority over the collection and dissemination of quotation or transaction information in Eligible Securities in any Participant's marketplace, or, in the case of the NASD, from NASD Participants.

D. Operating Committee: Meetings

Regular meetings of the Operating Committee may be attended by each Participant's designated representative and/or its alternate representative(s), and may be attended by one or more other representatives of the parties. Meetings shall be held at such times and locations as shall from time to time be determined by the Operating Committee.

Quorum: Any action requiring a vote only can be taken at a meeting in which a quorum of all Participants is present. For actions requiring a simple majority vote of all Participants, a quorum of greater than 50% of all Participants entitled to vote must be present at the meeting before such a vote may be taken. For actions requiring a 2/3rd majority vote of all Participants, a quorum of at least 2/3rd of all Participants entitled to vote must be present at the meeting before such a vote may be taken. For actions requiring a unanimous vote of all Participants, a quorum of all Participants entitled to vote must be present at the meeting before such a vote may be taken.

A Participant is considered present at a meeting only if a Participant's designated representative or alternate representative(s) is either in physical attendance at the meeting or is participating by conference telephone, or other acceptable electronic means.

Any action sought to be resolved at a meeting must be sent to each Participant entitled to vote on such matter at least one week prior to the meeting via electronic mail, regular U.S. or private mail, or facsimile transmission, provided however that this requirement may be waived by the vote of the percentage of the Committee required to vote on any particular matter, under Section C above.

Any action may be taken without a meeting if a consent in writing, setting forth the action so taken, is sent to and signed by all Participant representatives entitled to vote with respect to the subject matter thereof. All the approvals evidencing the consent shall be delivered to the Chairman of the Operating Committee to be filed in the Operating Committee records. The action taken shall be effective when the minimum number of Participants entitled to vote have approved the action, unless the consent specifies a different effective date.

The Chairman of the Operating Committee shall be elected annually by and from among the Participants by a majority vote of all Participants entitled to vote. The Chairman shall designate a person to act as Secretary to record the minutes of each meeting. The location of meetings shall be rotated among the locations of the principal offices of the Participants, or such other locations as may from time to time be determined by the Operating Committee. Meetings may be held by conference telephone and action may be taken without a meeting if the representatives of all Participants entitled to vote consent thereto in writing or other means the Operating Committee deems acceptable.

E. Advisory Committee

(a) **Formation.** Notwithstanding any other provision of this Plan, an Advisory Committee to the Plan shall be formed and shall function in accordance with the provisions set forth in this section.

(b) **Composition.** Members of the Advisory Committee shall be selected for two-year terms as follows:

(1) **Operating Committee Selections.** By affirmative vote of a majority of the Participants entitled to vote, the Operating Committee shall select at least one representative from each of the following categories to be members of the Advisory Committee: (i) A broker-dealer with a substantial retail investor customer base, (ii) a broker-dealer with a substantial institutional investor customer base, (iii) an alternative trade system, (iv) a data vendor, and (v) an investor.

(2) **Participant Selections.** Each Participant shall have the right to select one member of the Advisory Committee. A Participant shall not select any person employed by or affiliated with any participant or its affiliates or facilities.

(c) **Function.** Members of the Advisory Committee shall have the right to submit their views to the Operating Committee on Plan matters, prior to a decision by the Operating Committee on such matters. Such matters shall include, but not be limited to, any new or modified product, fee, contract, or pilot program that is offered or used pursuant to the Plan.

(d) **Meetings and Information.** Members of the Advisory Committee shall have the right to attend all meetings of the Operating Committee and to receive any information concerning Plan matters that is distributed to the Operating Committee; provided, however, that the Operating Committee may meet in executive session if, by affirmative vote of a majority of the Participants entitled to vote, the Operating Committee determines that an item of Plan business requires confidential treatment.

V. Selection and Evaluation of the Processor

A. Generally

The Processor's performance of its functions under the Plan shall be subject to review by the Operating Committee at least every two years, or from time to time upon the request of any two Participants but not more frequently than once each year. Based on this review, the Operating Committee may choose to make a recommendation to the Participants with respect to the continuing operation of the Processor.

The Operating Committee shall notify the SEC of any recommendations the Operating Committee shall make pursuant to the Operating Committee's review of the Processor and shall supply the Commission with a copy of any reports that may be prepared in connection therewith.

B. Termination of the Processor for Cause

If the Operating Committee determines that the Processor has failed to perform its functions in a reasonably acceptable manner in accordance with the provisions of the Plan or that its reimbursable expenses have become excessive and are not justified on a cost basis, the Processor may be terminated at such time as may be determined by a majority vote of the Operating Committee.

C. Factors To Be Considered in Termination for Cause

Among the factors to be considered in evaluating whether the Processor has performed its functions in a reasonably acceptable manner in accordance with the provisions of the Plan shall be the reasonableness of its response to requests from Participants for technological changes or enhancements pursuant to Section IV(C)(3) hereof. The reasonableness of the Processor's response to such requests shall be evaluated by the Operating Committee in terms of the cost to the Processor of purchasing the same service from a third party and integrating such service into the Processor's existing systems and operations as well as the extent to which the requested change would adversely impact the then current technical (as opposed to business or competitive) operations of the Processor.

D. Processor's Right To Appeal Termination for Cause

The Processor shall have the right to appeal to the SEC a determination of the Operating Committee terminating the Processor for cause and no action shall become final until the SEC has ruled on the matter and all legal appeals of right therefrom have been exhausted.

E. Process for Selecting New Processor

At any time following effectiveness of the Plan, but no later than upon the termination of the Processor, whether for cause pursuant to Section IV(C)(1)(c) or V(B) of the Plan or upon the Processor's resignation, the Operating Committee shall establish procedures for selecting a new Processor (the "Selection Procedures"). The Operating Committee, as part of the process of

establishing Selection Procedures, may solicit and consider the timely comment of any entity affected by the operation of this Plan. The Selection Procedures shall be established by a two-thirds majority vote of the Plan Participants, and shall set forth, at a minimum:

1. The entity that will:

(a) Draft the Operating Committee's request for proposal for bids on a new processor;

(b) Assist the Operating Committee in evaluating bids for the new processor; and

(c) Otherwise provide assistance and guidance to the Operating Committee in the selection process.

2. The minimum technical and operational requirements to be fulfilled by the Processor;

3. The criteria to be considered in selecting the Processor; and

4. The entities (other than Plan Participants) that are eligible to comment on the selection of the Processor.

Nothing in this provision shall be interpreted as limiting Participants' rights under Section IV or Section V of the Plan or other Commission order.

VI. Functions of the Processor

A. Generally

The Processor shall collect from the Participants, and consolidate and disseminate to Vendors, Subscribers and News Services, Quotation Information and Transaction Reports in Eligible Securities in a manner designed to assure the prompt, accurate and reliable collection, processing and dissemination of information with respect to all Eligible Securities in a fair and non-discriminatory manner. The Processor shall commence operations upon the Processor's notification to the Participants that it is ready and able to commence such operations.

B. Collection and Consolidation of Information

For as long as Nasdaq is the Processor, the Processor shall be capable of receiving Quotation Information and Transaction Reports in Eligible Securities from Participants by the Plan-approved, Processor sponsored interface, and shall consolidate and disseminate such information via the UTP Quote Data Feed, the UTP Trade Data Feed, and the OTC Montage Data Feed to Vendors, Subscribers and News Services. For so long as Nasdaq is not registered as a national securities exchange and for so long as Nasdaq is the Processor, the Processor shall also collect, consolidate, and disseminate the quotation information contained in

NQDS. For so long as Nasdaq is not registered as a national securities exchange and after Nasdaq is no longer the Processor for other SIP datafeeds, either Nasdaq or a third party will act as the Processor to collect, consolidate, and disseminate the quotation information contained in NQDS.

C. Dissemination of Information

The Processor shall disseminate consolidated Quotation Information and Transaction Reports in Eligible Securities via the UTP Quote Data Feed, the UTP Trade Data Feed, and the OTC Montage Data Feed to authorized Vendors, Subscribers and News Services in a fair and non-discriminatory manner. The Processor shall specifically be permitted to enter into agreements with Vendors, Subscribers and News Services for the dissemination of quotation or transaction information on Eligible Securities to foreign (non-U.S.) marketplaces or in foreign countries.

The Processor shall, in such instance, disseminate consolidated quotation or transaction information on Eligible Securities from all Participants.

Nothing herein shall be construed so as to prohibit or restrict in any way the right of any Participant to distribute quotation, transaction or other information with respect to Eligible Securities quoted on or traded in its marketplace to a marketplace outside the United States solely for the purpose of supporting an intermarket linkage, or to distribute information within its own marketplace concerning Eligible Securities in accordance with its own format. If a Participant requests, the Processor shall make information about Eligible Securities in the Participant's marketplace available to a foreign marketplace on behalf of the requesting Participant, in which event the cost shall be borne by that Participant.

1. Best Bid and Offer

The Processor shall disseminate on the UTP Quote Data Feed the best bid and offer information supplied by each Participant, including the NASD Participant(s) that constitute NASD's single Best Bid and Offer quotations, and shall also calculate and disseminate on the UTP Quote Data Feed a national best bid and asked quotation with size based upon Quotation Information for Eligible Securities received from Participants. The Processor shall not calculate the best bid and offer for any individual Participant, including the NASD.

The Participant responsible for each side of the best bid and asked quotation making up the national best bid and offer shall be identified by an

appropriate symbol. If the quotations of more than one Participant shall be the same best price, the largest displayed size among those shall be deemed to be the best. If the quotations of more than one Participant are the same best price and best displayed size, the earliest among those measured by the time reported shall be deemed to be the best. A reduction of only bid size and/or ask size will not change the time priority of a Participant's quote for the purposes of determining time reported, whereas an increase of the bid size and/or ask size will result in a new time reported. The consolidated size shall be the size of the Participant that is at the best.

If the best bid/best offer results in a locked or crossed quotation, the Processor shall forward that locked or crossed quote on the appropriate output lines (*i.e.*, a crossed quote of bid 12, ask 11.87 shall be disseminated). The Processor shall normally cease the calculation of the best bid/best offer after 6:30 p.m., Eastern Time.

2. Quotation Data Streams

The Processor shall disseminate on the UTP Quote Data Feed a data stream of all Quotation Information regarding Eligible Securities received from Participants. Each quotation shall be designated with a symbol identifying the Participant from which the quotation emanates and, in the case of NASD, the NASD Participant(s) that constitute NASD's Best Bid and Offer quotations. In addition, the Processor shall separately distribute on the OTC Montage Data Feed the Quotation Information regarding Eligible Securities from all NASD Participants from which quotations emanate. The Processor shall separately distribute NQDS for so long as Nasdaq is not registered as a national securities exchange and for so long as Nasdaq is the Processor. For so long as Nasdaq is not registered as a national securities exchange and after Nasdaq is no longer the Processor for other SIP datafeeds, either Nasdaq or a third party will act as the Processor to collect, consolidate, and disseminate the quotation information contained in NQDS.

3. Transaction Reports

The Processor shall disseminate on the UTP Trade Data Feed a data stream of all Transaction Reports in Eligible Securities received from Participants. Each transaction report shall be designated with a symbol identifying the Participant in whose Market the transaction took place.

D. Closing Reports

At the conclusion of each trading day, the Processor shall disseminate a "closing price" for each Eligible Security. Such "closing price" shall be the price of the last Transaction Report in such security received prior to dissemination. The Processor shall also tabulate and disseminate at the conclusion of each trading day the aggregate volume reflected by all Transaction Reports in Eligible Securities reported by the Participants.

E. Statistics

The Processor shall maintain quarterly, semi-annual and annual transaction and volume statistical counts. The Processor shall, at cost to the user Participant(s), make such statistics available in a form agreed upon by the Operating Committee, such as a secure Web site.

VII. Administrative Functions of the Processor

Subject to the general direction of the Operating Committee, the Processor shall be responsible for carrying out all administrative functions necessary to the operation and maintenance of the consolidated information collection and dissemination system provided for in this Plan, including, but not limited to, record keeping, billing, contract administration, and the preparation of financial reports.

VIII. Transmission of Information to Processor by Participants*A. Quotation Information*

Each Participant shall, during the time it is open for trading be responsible promptly to collect and transmit to the Processor accurate Quotation Information in Eligible Securities through any means prescribed herein.

Quotation Information shall include:

1. Identification of the Eligible Security, using the Nasdaq Symbol;
2. The price bid and offered, together with size;
3. The NASD Participant along with the NASD Participant's market participant identification or Participant from which the quotation emanates;
4. Identification of quotations that are not firm; and
5. Through appropriate codes and messages, withdrawals and similar matters.

B. Transaction Reports

Each Participant shall, during the time it is open for trading, be responsible promptly to collect and transmit to the Processor Transaction

Reports in Eligible Securities executed in its Market by means prescribed herein. With respect to orders sent by one Participant Market to another Participant Market for execution, each Participant shall adopt procedures governing the reporting of transactions in Eligible Securities specifying that the transaction will be reported by the Participant whose member sold the security. This provision shall apply only to transactions between Plan Participants.

Transaction Reports shall include:

1. Identification of the Eligible Security, using the Nasdaq Symbol;
2. The number of shares in the transaction;
3. The price at which the shares were purchased or sold;
4. The buy/sell/cross indicator;
5. The Market of execution; and,
6. Through appropriate codes and messages, late or out-of-sequence trades, corrections and similar matters.

All such Transaction Reports shall be transmitted to the Processor within 90 seconds after the time of execution of the transaction. Transaction Reports transmitted beyond the 90-second period shall be designated as "late" by the appropriate code or message.

The following types of transactions are not required to be reported to the Processor pursuant to the Plan:

1. Transactions that are part of a primary distribution by an issuer or of a registered secondary distribution or of an unregistered secondary distribution;
2. Transactions made in reliance on Section 4(2) of the Securities Act of 1933;
3. Transactions in which the buyer and the seller have agreed to trade at a price unrelated to the Current Market for the security, e.g., to enable the seller to make a gift;
4. Odd-lot transactions;
5. The acquisition of securities by a broker-dealer as principal in anticipation of making an immediate exchange distribution or exchange offering on an exchange;
6. Purchases of securities pursuant to a tender offer; and
7. Purchases or sales of securities effected upon the exercise of an option pursuant to the terms thereof or the exercise of any other right to acquire securities at a pre-established consideration unrelated to the Current Market.

C. Symbols for Market Identification for Quotation Information and Transaction Reports

The following symbols shall be used to denote the marketplaces:

Code	Participant
A	American Stock Exchange LLC
B	Boston Stock Exchange, Inc.
W	Chicago Board Options Exchange, Inc.
M	Chicago Stock Exchange, Inc.
I	International Securities Exchange, LLC
D	NASD
Q	Nasdaq Stock Market LLC
C	National Stock Exchange, Inc.
N	New York Stock Exchange LLC
P	NYSE Arca, Inc.
X	Philadelphia Stock Exchange, Inc.

D. Whenever a Participant determines that a level of trading activity or other unusual market conditions prevent it from collecting and transmitting Quotation Information or Transaction Reports to the Processor, or where a trading halt or suspension in an Eligible Security is in effect in its Market, the Participant shall promptly notify the Processor of such condition or event and shall resume collecting and transmitting Quotation Information and Transaction Reports to it as soon as the condition or event is terminated. In the event of a system malfunction resulting in the inability of a Participant or its members to transmit Quotation Information or Transaction Reports to the Processor, the Participant shall promptly notify the Processor of such event or condition. Upon receiving such notification, the Processor shall take appropriate action, including either closing the quotation or purging the system of the affected quotations.

IX. Market Access

Consistent with the state of electronic technology and pursuant to the requirements of Rule 610 of Regulation NMS, a Participant that operates an SRO trading facility shall provide for fair and efficient order execution access to quotations in each Eligible Security displayed through its trading facility. In the case of a Participant that operates an SRO display-only quotation facility, trading centers posting quotations through such SRO display-only quotation facility must provide for fair and efficient order execution access to quotations in each Eligible Security displayed through the SRO display-only quotation facility. A Participant that operates an SRO trading facility may elect to allow such access to its quotations through the utilization of private electronic linkages between the

Participant and other trading centers. In the case of a Participant that operates an SRO display-only quotation facility, trading centers posting quotations through such SRO display-only quotation facility may elect to allow such access to their quotations through the utilization of private electronic linkages between the trading center and SRO trading facilities of Plan Participants and/or other trading centers.

In accordance with Regulation NMS, a Participant shall not impose, or permit to be imposed, any fee or fees for the execution of an order against a protected quotation of the Participant or of a trading center posting quotes through a Participant's SRO display-only quotation facility in an Eligible Security or against any other quotation displayed by the Participant in an Eligible Security that is the Participant's displayed best bid or offer for that Eligible Security, where such fee or fees exceed the limits provided for in Rule 610(c) of Regulation NMS. As required under Regulation NMS, the terms of access to a Participant's quotations or of a trading center posting quotes through a Participant's SRO display-only quotation facility in an Eligible Security may not be unfairly discriminatory so as to prevent or inhibit any person from obtaining efficient access to such displayed quotations through a member of the Participant or a subscriber of a trading center.

If quotations in an Eligible Security are displayed by a Participant that operates an SRO trading facility (or are displayed by a trading center that posts quotations through an SRO display-only quotation facility) that complies with the fair and efficient access requirements of Regulation NMS (an "NMS Compliant Facility"), including prior to the compliance date of such access requirements, that Participant (or trading center posting quotes through an SRO display-only quotation facility) shall no longer be required to permit each NASD market participant to have direct telephone access to the specialist, trading post, market maker and supervisory center in such Eligible Security that trades on that NMS Compliant Facility. For quotations in Eligible Securities that are displayed by a Participant that operates an SRO trading facility that is not an NMS Compliant Facility, such telephone access requirement will continue to be applicable to the Participant.

X. Regulatory Halts

A. Whenever, in the exercise of its regulatory functions, the Listing Market for an Eligible Security determines that

a Regulatory Halt is appropriate pursuant to Section III.S, the Listing Market will notify all other Participants pursuant to Section X.E and all other Participants shall also halt or suspend trading in that security until notification that the halt or suspension is no longer in effect. The Listing Market shall immediately notify the Processor of such Regulatory Halt as well as notice of the lifting of a Regulatory Halt. The Processor, in turn, shall disseminate to Participants notice of the Regulatory Halt (as well as notice of the lifting of a regulatory halt) through the UTP Quote Data Feed. This notice shall serve as official notice of a regulatory halt for purposes of the Plan only, and shall not substitute or otherwise supplant notice that a Participant may recognize or require under its own rules. Nothing in this provision shall be read so as to supplant or be inconsistent with a Participant's own rules on trade halts, which rules apply to the Participant's own members. The Processor will reject any quotation information or transaction reports received from any Participant on an Eligible Security that has a Regulatory Halt in effect.

B. Whenever the Listing Market determines that an adequate publication or dissemination of information has occurred so as to permit the termination of the Regulatory Halt then in effect, the Listing Market shall promptly notify the Processor and each of the other Participants that conducts trading in such security pursuant to Section X.F. Except in extraordinary circumstances, adequate publication or dissemination shall be presumed by the Listing Market to have occurred upon the expiration of one hour after initial publication in a national news dissemination service of the information that gave rise to the Regulatory Halt.

C. Except in the case of a Regulatory Halt, the Processor shall not cease the dissemination of quotation or transaction information regarding any Eligible Security. In particular, it shall not cease dissemination of such information because of a delayed opening, imbalance of orders or other market-related problems involving such security. During a regulatory halt, the Processor shall collect and disseminate Transaction Information but shall cease collection and dissemination of all Quotation Information.

D. For purposes of this Section X, "Listing Market" for an Eligible Security means the Participant's Market on which the Eligible Security is listed. If an Eligible Security is dually listed, Listing Market shall mean the Participant's Market on which the Eligible Security is listed that also has

the highest number of the average of the reported transactions and reported share volume for the preceding 12-month period. The Listing Market for dually-listed Eligible Securities shall be determined at the beginning of each calendar quarter.

E. For purposes of coordinating trading halts in Eligible Securities, all Participants are required to utilize the national market system communication media ("Hoot-n-Holler") to verbally provide real-time information to all Participants. Each Participant shall be required to continuously monitor the Hoot-n-Holler system during market hours, and the failure of a Participant to do so at any time shall not prevent the Listing Market from initiating a Regulatory Halt in accordance with the procedures specified herein.

1. The following procedures shall be followed when one or more Participants experiences extraordinary market activity in an Eligible Security that is believed to be caused by the misuse or malfunction of systems operated by or linked to one or more Participants.

a. The Participant(s) experiencing the extraordinary market activity or any Participant that becomes aware of extraordinary market activity will immediately use best efforts to notify all Participants of the extraordinary market activity utilizing the Hoot-n-Holler system.

b. The Listing Market will use best efforts to determine whether there is material news regarding the Eligible Security. If the Listing Market determines that there is non-disclosed material news, it will immediately call a Regulatory Halt pursuant to Section X.E.2.

c. Each Participant(s) will use best efforts to determine whether one of its systems, or the system of a direct or indirect participant in its market, is responsible for the extraordinary market activity.

d. If a Participant determines the potential source of extraordinary market activity pursuant to Section X.1.c., the Participant will use best efforts to determine whether removing the quotations of one or more direct or indirect market participants or barring one or more direct or indirect market participants from entering orders will resolve the extraordinary market activity. Accordingly, the Participant will prevent the quotations from one or more direct or indirect market participants in the affected Eligible Securities from being transmitted to the Processor.

e. If the procedures described in Section X.E.1.a.–d. do not rectify the situation, the Participant(s)

experiencing extraordinary market activity will cease transmitting all quotations in the affected Eligible Securities to the Processor.

f. If the procedures described in Section X.E.1.a–e do not rectify the situation within five minutes of the first notification through the Hoot-n-Holler system, or if Participants agree to call a halt sooner through unanimous approval among those Participants actively trading impacted Eligible Securities, the Listing Market may determine based on the facts and circumstances, including available input from Participants, to declare an Extraordinary Market Regulatory Halt in the affected Eligible Securities. Simultaneously with the notification of the Processor to suspend the dissemination of quotations across all Participants, the Listing Market must verbally notify all Participants of the trading halt utilizing the Hoot-n-Holler system.

g. Absent any evidence of system misuse or malfunction, best efforts will be used to ensure that trading is not halted across all Participants.

2. If the Listing Market declares a Regulatory Halt in circumstances other than pursuant to Section X.E.1.f, the Listing Market must, simultaneously with the notification of the Processor to suspend the dissemination of quotations across all Participants, verbally notify all Participants of the trading halt utilizing the Hoot-n-Holler system.

F. If the Listing Market declares a Regulatory Halt, trading will resume according to the following procedures:

1. Within 15 minutes of the declaration of the halt, all Participants will make best efforts to indicate via the Hoot-n-Holler their intentions with respect to canceling or modifying transactions.

2. All Participants will disseminate to their members information regarding the canceled or modified transactions as promptly as possible, and in any event prior to the resumption of trading.

3. After all Participants have met the requirements of Section X.F.1–2, the Listing Market will notify the Participants utilizing the Hoot-n-Holler and the Processor when trading may resume. Upon receiving this information, Participants may commence trading pursuant to Section X.A.

XI. Hours of Operation

A. Quotation Information may be entered by Participants as to all Eligible Securities in which they make a market between 9:30 a.m. and 4 p.m. Eastern Time (“ET”) on all days the Processor is in operation. Transaction Reports

shall be entered between 9:30 a.m. and 4:01:30 p.m. ET by Participants as to all Eligible Securities in which they execute transactions between 9:30 a.m. and 4 p.m. ET on all days the Processor is in operation.

B. Participants that execute transactions in Eligible Securities outside the hours of 9:30 a.m. ET and 4 p.m., ET, shall be required to report such transactions as follows:

(i) Transactions in Eligible Securities executed between 4 a.m. and 9:29:59 a.m. ET and between 4:00:01 and 8 p.m. ET, shall be designated as “.T” trades to denote their execution outside normal market hours;

(ii) Transactions in Eligible Securities executed after 8 p.m. and before 12 a.m. (midnight) shall be reported to the Processor between the hours of 4 a.m. and 8 p.m. ET on the next business day (T+1), and shall be designated as “as/of” trades to denote their execution on a prior day, and be accompanied by the time of execution;

(iii) Transactions in Eligible Securities executed between 12 a.m. (midnight) and 4 a.m. ET shall be transmitted to the Processor between 4 a.m. and 9:30 a.m. ET, on trade date, shall be designated as “.T” trades to denote their execution outside normal market hours, and shall be accompanied by the time of execution;

(iv) Transactions reported pursuant to this provision of the Plan shall be included in the calculation of total trade volume for purposes of determining net distributable operating revenue, but shall not be included in the calculation of the daily high, low, or last sale.

C. Late trades shall be reported in accordance with the rules of the Participant in whose Market the transaction occurred and can be reported between the hours of 4 a.m. and 8 p.m.

D. The Processor shall collect, process and disseminate Quotation Information in Eligible Securities at other times between 4 a.m. and 9:30 a.m. ET, and after 4 p.m. ET, when any Participant or Nasdaq market participant is open for trading, until 8 p.m. ET (the “Additional Period”); provided, however, that the best bid and offer quotation will not be disseminated before 4 a.m. or after 8 p.m. ET. Participants that enter Quotation Information or submit Transaction Reports to the Processor during the Additional Period shall do so for all Eligible Securities in which they enter quotations.

XII. Undertaking by All Participants

The filing with and approval by the Commission of this Plan shall obligate each Participant to enforce compliance

by its members with the provisions thereof. In all other respects not inconsistent herewith, the rules of each Participant shall apply to the actions of its members in effecting, reporting, honoring and settling transactions executed through its facilities, and the entry, maintenance and firmness of quotations to ensure that such occurs in a manner consistent with just and equitable principles of trade.

XIII. Financial Matters

A. Development Costs

Any Participant becoming a signatory to this Plan after June 26, 1990, shall, as a condition to becoming a Participant, pay to the other Plan Participants a proportionate share of the aggregate development costs previously paid by Plan Participants to the Processor, which aggregate development costs totaled \$439,530, with the result that each Participant’s share of all development costs is the same.

Each Participant shall bear the cost of implementation of any technical enhancements to the Nasdaq system made at its request and solely for its use, subject to reapportionment should any other Participant subsequently make use of the enhancement, or the development thereof.

B. Cost Allocation and Revenue Sharing

The provisions governing cost allocation and revenue sharing among the Participants are set forth in Exhibit 1 to the Plan.

C. Maintenance of Financial Records

The Processor shall maintain records of revenues generated and development and operating expenditures incurred in connection with the Plan. In addition, the Processor shall provide the Participants with: (a) A statement of financial and operational condition on a quarterly basis; and (b) an audited statement of financial and operational condition on an annual basis.

XIV. Indemnification

Each Participant agrees, severally and not jointly, to indemnify and hold harmless each other Participant, Nasdaq, and each of its directors, officers, employees and agents (including the Operating Committee and its employees and agents) from and against any and all loss, liability, claim, damage and expense whatsoever incurred or threatened against such persons as a result of any Transaction Reports, Quotation Information or other information reported to the Processor by such Participant and disseminated by the Processor to Vendors. This indemnity agreement shall be in

addition to any liability that the indemnifying Participant may otherwise have. Promptly after receipt by an indemnified Participant of notice of the commencement of any action, such indemnified Participant will, if a claim in respect thereof is to be made against an indemnifying Participant, notify the indemnifying Participant in writing of the commencement thereof; but the omission to so notify the indemnifying Participant will not relieve the indemnifying Participant from any liability which it may have to any indemnified Participant. In case any such action is brought against any indemnified Participant and it promptly notifies an indemnifying Participant of the commencement thereof, the indemnifying Participant will be entitled to participate in, and, to the extent that it may wish, jointly with any other indemnifying Participant similarly notified, to assume and control the defense thereof with counsel chosen by it. After notice from the indemnifying Participant of its election to assume the defense thereof, the indemnifying Participant will not be liable to such indemnified Participant for any legal or other expenses subsequently incurred by such indemnified Participant in connection with the defense thereof but the indemnified Participant may, at its own expense, participate in such defense by counsel chosen by it without, however, impairing the indemnifying Participant's control of the defense. The indemnifying Participant may negotiate a compromise or settlement of any such action, provided that such compromise or settlement does not require a contribution by the indemnified Participant.

XV. Withdrawal

Any Participant may withdraw from the Plan at any time on not less than 30 days prior written notice to each of the other Participants. Any Participant withdrawing from the Plan shall remain liable for, and shall pay upon demand, any fees for equipment or services being provided to such Participant pursuant to the contract executed by it or an agreement or schedule of fees covering such then in effect.

A withdrawing Participant shall also remain liable for its proportionate share, without any right of recovery, of administrative and operating expenses, including start-up costs and other sums for which it may be responsible pursuant to Section XIV hereof. Except as aforesaid, a withdrawing Participant shall have no further obligation under the Plan or to any of the other Participants with respect to the period

following the effectiveness of its withdrawal.

XVI. Modifications to Plan

The Plan may be modified from time to time when authorized by the agreement of all of the Participants, subject to the approval of the SEC or which otherwise becomes effective pursuant to Section 11A of the Act and Rule 608 of Regulation NMS.

XVII. Applicability of Securities Exchange Act of 1934

The rights and obligations of the Participants and of Vendors, News Services, Subscribers and other persons contracting with Participant in respect of the matters covered by the Plan shall at all times be subject to any applicable provisions of the Act, as amended, and any rules and regulations promulgated thereunder.

XVIII. Operational Issues

A. Each Participant shall be responsible for collecting and validating quotes and last sale reports within their own system prior to transmitting this data to the Processor.

B. Each Participant may utilize a dedicated Participant line into the Processor to transmit trade and quote information in Eligible Securities to the Processor. The Processor shall accept from Exchange Participants input for only those issues that are deemed Eligible Securities.

C. The Processor shall consolidate trade and quote information from each Participant and disseminate this information on the Processor's existing vendor lines.

D. The Processor shall perform gross validation processing for quotes and last sale messages in addition to the collection and dissemination functions, as follows:

1. Basic Message Validation

(a) The Processor may validate format for each type of message, and reject non-conforming messages.

(b) Input must be for an Eligible Security.

2. Logging Function—The Processor shall return all Participant input messages that do not pass the validation checks (described above) to the inputting Participant, on the entering Participant line, with an appropriate reject notation. For all accepted Participant input messages (*i.e.*, those that pass the validation check), the information shall be retained in the Processor system.

XIX. Headings

The section and other headings contained in this Plan are for reference

purposes only and shall not be deemed to be a part of this Plan or to affect the meaning or interpretation of any provisions of this Plan.

XX. Counterparts

This Plan may be executed by the Participants in any number of counterparts, no one of which need contain the signature of all Participants. As many such counterparts as shall together contain all such signatures shall constitute one and the same instrument.

XXI. Depth of Book Display

The Operating Committee has determined that the entity that succeeds Nasdaq as the Processor should have the ability to collect, consolidate, and disseminate quotations at multiple price levels beyond the best bid and best offer from any Participant that voluntarily chooses to submit such quotations while determining that no Participant shall be required to submit such information. The Operating Committee has further determined that the costs of developing, collecting, processing, and disseminating such depth of book data shall be borne exclusively by those Participants that choose to submit this information to the Processor, by whatever allocation those Participants may choose among themselves. The Operating Committee has determined further that the primary purpose of the Processor is the collection, processing and dissemination of best bid, best offer and last sale information ("core data"), and as such, the Participants will adopt procedures to ensure that such functionality in no way hinders the collecting, processing and dissemination of this core data.

Therefore, implementing the depth of book display functionality will require a plan amendment that addresses all pertinent issues, including:

(1) Procedures for ensuring that the fully-loaded cost of the collection, processing, and dissemination of depth-of-book information will be tracked and invoiced directly to those Plan Participants that voluntarily choose to send that data, voluntarily, to the Processor, allocating in whatever manner those Participants might agree; and

(2) Necessary safeguards the Processor will take to ensure that its processing of depth-of-book data will not impede or hamper, in any way, its core Processor functionality of collecting, consolidating, and disseminating National Best Bid and Offer data, exchange best bid and offer data, and consolidated last sale data.

Upon approval of a Plan amendment implementing depth of book display, this article of the Plan shall be automatically deleted.

In witness whereof, this Plan has been executed as of the ____ day of _____, 200__, by each of the Signatories hereto.

American Stock Exchange LLC

By:

Boston Stock Exchange, Inc.

By:

Chicago Stock Exchange, Inc.

By:

Chicago Board Options Exchange, Inc.

By:

International Securities Exchange, LLC

By:

NASD

By:

National Stock Exchange, Inc.

By:

New York Stock Exchange LLC

By:

NYSE Arca, Inc.

By:

Philadelphia Stock Exchange, Inc.

By:

The Nasdaq Stock Market LLC

By:

Exhibit 1

1. Each Participant eligible to receive revenue under the Plan will receive an annual payment for each calendar year to be determined by multiplying (i) that Participant's percentage of total volume in Nasdaq securities reported to the Processor for that calendar year by (ii) the total distributable net operating income (as defined below) for that calendar year. In the event that total distributable net operating income is negative, each Participant eligible to receive revenue under the Plan will receive an annual bill for each calendar year to be determined according to the same formula (described in this paragraph) for determining annual payments to eligible Participants.

2. A Participant's percentage of total volume in Nasdaq securities will be calculated by taking the average of (i) The Participant's percentage of total trades in Nasdaq securities reported to the Processor for the year and (ii) the Participant's percentage of total share volume in Nasdaq securities reported to the Processor for the year (trade/volume average). For any given year, a Participant's percentage of total trades shall be calculated by dividing the total number of trades that that Participant reports to the Processor for that year by the total number of trades in Nasdaq securities reported to the Processor for the year. A Participant's total share

volume shall be calculated by multiplying the total number of trades in Nasdaq securities in that year that that Participant reports to the Processor by the number of shares for each such trade. Unless otherwise stated in this agreement, a year shall run from January 1 to December 31 and quarters shall end on March 31, June 30, September 30, and December 31. Processor shall endeavor to provide Participants with written estimates of each Participant's percentage of total volume within five business days of month end.

3. For purposes of this Exhibit 1, net distributable operating income for any particular calendar year shall be calculated by adding all revenues from the UTP Quote Data Feed, the UTP Trade Data Feed, and the OTC Montage Data Feed including revenues from the dissemination of information respecting Eligible Securities to foreign marketplaces (collectively, "the Data Feeds"), and subtracting from such revenues the costs incurred by the Processor, set forth below, in collecting, consolidating, validating, generating, and disseminating the Data Feeds. These costs include, but are not limited to, the following:

a. The Processor costs directly attributable to creating OTC Montage Data Feed, including:

1. Cost of collecting Participant quotes into the Processor's quote engine;

2. Cost of processing quotes and creating OTC Montage Data Feed messages within the Processor's quote engine;

3. Cost of the Processor's communication management subsystem that distributes OTC Montage Data Feed to the market data vendor network for further distribution.

b. The costs directly attributable to creating the UTP Quote Data Feed, including:

1. The costs of collecting each Participant's best bid, best offer, and aggregate volume into the Processor's quote engine and, in the case of NASD, the costs of identifying the NASD Participant(s) that constitute NASD's Best Bid and Offer quotations;

2. Cost of calculating the national best bid and offer price within the Processor's quote engine;

3. Cost of creating the UTP Quote Data Feed message within the Processor's quote engine;

4. Cost of the Processor's communication management subsystem that distributes the UTP Quote Data Feed to the market data vendors' networks for further distribution.

c. The costs directly attributable to creating the UTP Trade Data Feed, including:

1. The costs of collecting each Participant's last sale and volume amount into the Processor's quote engine;

2. Cost of determining the appropriate last sale price and volume amount within the Processor's trade engine;

3. Cost of utilizing the Processor's trade engine to distribute the UTP Trade Data Feed for distribution to the market data vendors;

4. Cost of the Processor's communication management subsystem that distributes the UTP Trade Data Feed to the market data vendors' networks for further distribution.

d. The additional costs that are shared across all Data Feeds, including:

1. Telecommunication Operations costs of supporting the Participant lines into the Processor's facilities;

2. Telecommunications Operations costs of supporting the external market data vendor network;

3. Data Products account management and auditing function with the market data vendors;

4. Market Operations costs to support symbol maintenance, and other data integrity issues;

5. Overhead costs, including management support of the Processor, Human Resources, Finance, Legal, and Administrative Services.

e. Processor costs excluded from the calculation of net distributable operating income include trade execution costs for transactions executed using a Nasdaq service and trade report collection costs reported through a Nasdaq service, as such services are market functions for which Participants electing to use such services pay market rate.

f. For the purposes of this provision, the following definitions shall apply:

1. "Quote engine" shall mean the Nasdaq's NT or Tandem system that is operated by Nasdaq to collect quotation information for Eligible Securities;

2. "Trade engine" shall mean the Nasdaq Tandem system that is operated by Nasdaq for the purpose of collecting last sale information in Eligible Securities.

3. At the time a Participant implements a Processor-approved electronic interface with the Processor, the Participant will become eligible to receive revenue.

4. Processor shall endeavor to provide Participants with written estimates of each Participant's quarterly net distributable operating income within 45 calendar days of the end of the quarter, and estimated quarterly payments or billings shall be made on the basis of such estimates. All quarterly payments or billings shall be made to

each eligible Participant within 45 days following the end of each calendar quarter in which the Participant is eligible to receive revenue, provided that each quarterly payment or billing shall be reconciled against a Participant's cumulative year-to-date payment or billing received to date and adjusted accordingly, and further provided that the total of such estimated payments or billings shall be reconciled at the end of each calendar year and, if necessary, adjusted by March 31st of the following year. Interest shall be included in quarterly payments and in adjusted payments made on March 31st of the following year. Such interest shall accrue monthly during the period in which revenue was earned and not yet paid and will be based on the 90-day Treasury bill rate in effect at the end of the quarter in which the payment is made. Monthly interest shall start accruing 45 days following the month in which it is earned and accrue until the date on which the payment is made.

In conjunction with calculating estimated quarterly and reconciled annual payments under this Exhibit 1, the Processor shall submit to the Participants a quarterly itemized statement setting forth the basis upon which net operating income was calculated, including a quarterly itemized statement of the Processor costs set forth in Paragraph 3 of this Exhibit. Such Processor costs and Plan revenues shall be adjusted annually based solely on the Processor's quarterly itemized statement audited pursuant to Processor's annual audit. Processor shall pay or bill Participants for the audit adjustments within thirty days of completion of the annual audit. By majority vote of the Operating Committee, the Processor shall engage an independent auditor to audit the Processor's costs or other calculation(s), the cost of which audit shall be shared equally by all Participants. The Processor agrees to cooperate fully in providing the information necessary to complete such audit.

[FR Doc. E7-1838 Filed 2-5-07; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-55187; File No. SR-Amex-2006-110]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of Proposed Rule Change Relating to Options Based on Commodity Pool ETFs

January 29, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4² thereunder, notice is hereby given that on November 24, 2006, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend certain rules to permit the listing and trading of options on equity interests issued by trust issued receipts ("Commodity TIRs"), partnership units, and other entities (referred herein to as "Commodity Pool ETFs") that hold or invest in commodity futures products.

The text of the proposed rule change is available at the Amex, the Commission's Public Reference Room, and www.amex.com.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Amex has substantially prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange states that the purpose of the proposed rule change is to enable

the listing and trading on the Exchange of options on interests in Commodity Pool ETFs that trade directly or indirectly commodity futures products. As a result, Commodity Pool ETFs are subject to the Commodity Exchange Act ("CEA") due to their status as a commodity pool,³ and therefore, regulated by the Commodity Futures Trading Commission ("CFTC").⁴ Commodity Pool ETFs may hold or trade in one or more types of investments that may include any combination of securities, commodity futures contracts, options on commodity futures contracts, swaps, and forward contracts. Currently, Commentary .06 to Amex Rule 915 provides securities deemed appropriate for options trading shall include shares or other securities ("Exchange-Traded Fund Shares") that are principally traded on a national securities exchange or through the facilities of a national securities association and reported as an NMS security, and that: (i) Represent an interest in a registered investment company organized as an open-end management investment company, a unit investment trust or a similar entity which holds securities constituting or otherwise based on or representing an investment in an index or portfolio of securities; or (ii) represent interest in a trust or other similar entity that holds a specified non-U.S. currency deposited with the trust or similar entity when aggregated in some specified minimum number may be surrendered to the trust by the beneficial owner to receive the specified non-U.S. currency and pays the beneficial owner interest and other distributions on the deposited non-U.S. currency, if any, declared and paid by the trust.

The Exchange proposes to amend Commentary .06 to Rule 915 to expand the type of options to include the listing and trading of options based on shares of Commodity Pool ETFs (the "Shares") that may hold or invest directly or indirectly in commodity futures products, including but not limited to, commodity futures contracts, options on commodity futures contracts, swaps,

³ A "commodity pool" is defined in CFTC Regulation 4.10(d)(1) as any investment trust, syndicate, or similar form of enterprise operated for the purpose of trading commodity interests. CFTC regulations further provide that a "commodity interest" means a commodity futures contract and any contract, agreement or transaction subject to Commission regulation under section 4c or 19 of the Act. See CFTC Regulation 4.10(a).

⁴ The manager or operator of a "commodity pool" is required to register, unless applicable exclusions apply, as a commodity pool operator ("CPO") and commodity trading advisor ("CTA") with the CFTC and become a member of the National Futures Association ("NFA").

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

and forward contracts. As part of this revision to Commentary .06 to Rule 915, the Exchange proposes to add paragraph (a)(v) requiring for Commodity Pool ETFs that a comprehensive surveillance sharing agreement be in place with the marketplace or marketplaces with last sale reporting that represent(s) the highest volume in such commodity futures contracts and/or options on commodity futures contracts on the specified commodities or non-U.S. currency, which are utilized by the national securities exchange where the underlying Commodity Pool ETFs are listed and traded.

As set forth in proposed amended Commentary .06 to Rule 915, Commodity Pool ETFs must be traded on a national securities exchange or through the facilities of a national securities association and must be an "NMS stock" as defined under Rule 600 of Regulation NMS. In addition, shares of Commodity Pool ETFs must meet either: (i) The criteria and guidelines under Commentary .01 to Rule 915; or (ii) be available for creation or redemption each business day in cash or in kind from the commodity pool, trust, or similar entity at a price related to net asset value. In addition, the commodity pool, trust or other similar entity shall provide that shares may be created even though some or all of the securities needed to be deposited have not been received by the commodity pool, trust or other similar entity, provided the authorized creation participant has undertaken to deliver the shares as soon as possible and such undertaking has been secured by the delivery and maintenance of collateral consisting of cash or cash equivalents satisfactory to the commodity pool, trust, or other similar entity which underlies the option as described in the prospectus.

Under the applicable continued listing criteria in Commentary .07 to Amex Rule 916, the Shares may be subject to delisting as follows: (1) Following the initial twelve-month period beginning upon the commencement of trading of the Shares, there are fewer than 50 record and/or beneficial holders of the Shares for 30 or more consecutive trading days; (2) the value of the index, non-U.S. currency, portfolio of commodities including commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities, or portfolio of securities on which the Shares are based is no longer calculated or available; or (3) such other event occurs or condition exists that in the opinion of the Exchange makes further dealing on the Exchange inadvisable. Additionally, the

Shares shall not be deemed to meet the requirements for continued approval, and the Exchange shall not open for trading any additional series of option contracts of the class covering such Shares, if the Shares are halted from trading on their primary market, or if the Shares are delisted in accordance with the terms of Amex Rule 916, or the value of the index or portfolio on which the Shares are based is no longer calculated or available.

The Exchange is also proposing to amend Amex Rule 3 to require members to establish, maintain, and enforce written policies and procedures to prevent the misuse of material nonpublic information it might have or receive in a related security, option or derivative or in the applicable related commodity, commodity futures or options on commodity futures, or any other related commodity derivatives. The Exchange further proposes to amend Amex Rule 957 to ensure that the specialist and Registered Traders handling the Shares provide the Exchange with all necessary information relating to their trading in the applicable, physical commodities, physical commodity options, commodity futures contracts, options on commodity futures contracts, any other derivatives based on such commodity. In addition, the revision to Rule 957 will prohibit a specialist or Registered Trader engaging in physical commodities, physical commodity options, commodity futures contracts, options on commodity futures contracts, any other derivatives based on such commodity from trading in an account which has not been reported to the Exchange.

The Exchange represents that it has an adequate surveillance program in place for options based on Commodity Pool ETFs. The Exchange may obtain trading information via the Intermarket Surveillance Group ("ISG") from other exchanges who are members or affiliates of the ISG and has entered into numerous comprehensive surveillance sharing agreements with various commodity futures exchanges worldwide. Prior to listing and trading options on Commodity Pool ETFs, the Exchange represents that it will either have the ability to obtain specific trading information via ISG or through a comprehensive surveillance sharing agreement with the exchange or exchanges where the particular commodity futures and/or options on commodity futures are traded.

The addition of Commodity Pool ETF options will not have any effect on the

rules pertaining to position and exercise limits⁵ or margin.⁶

This proposal is necessary to enable the Exchange to list and trade options on an expanding range of Commodity Pool ETFs currently approved for trading. The Exchange notes that The DB Commodity Index Tracking Fund (the "DBC Fund"), the United States Oil Fund, L.P. (the "Oil Fund"), and the PowerShares DB G10 Currency Harvest Fund (the "DBV Fund") are listed and traded on the Amex.⁷ The DBC Fund is a Commodity TIR and tracks the performance of the Deutsche Bank Liquid Commodity Index™—Excess Return, while the Oil Fund is a Partnership Unit and tracks the spot price of West Texas Intermediate light, sweet crude oil delivered to Cushing, Oklahoma.

The DBC Fund is a "feeder fund" that invests substantially all of its assets in the DB Commodity Index Tracking Master Fund, and the Master Fund in turn maintains a portfolio of exchange-traded futures on aluminum, gold, corn, wheat, heating oil and light, sweet crude oil. The Index is derived from the prices of those futures contracts. The Master Fund's portfolio is managed on an ongoing basis by DB Commodity Services LLC, a registered CPO and CTA, so that the value of the portfolio closely tracks the value of the Index over time.

The DBV Fund is a "feeder fund" that invests substantially all of its assets in the PowerShares DB G10 Currency Harvest Master Fund, and the Master Fund in turn maintains a portfolio of exchange-traded futures on foreign currencies that comprise the G-10 countries. The Index is derived from the prices of those futures contracts. The Master Fund's portfolio is managed on an ongoing basis by DB Commodity Services LLC, a registered CPO and CTA, so that the value of the portfolio closely tracks the value of the Index over time.

Unlike the DBC and DBV Funds, the Oil Fund does not invest through a master-feeder structure but rather trades directly in futures on crude and heating oil, natural gas, gasoline and other petroleum-based fuels, options on such

⁵ See Amex Rules 904 and 905.

⁶ See Amex Rule 462.

⁷ See Securities Exchange Act Release Nos. 53105 (January 11, 2006), 71 FR 3129 (January 19, 2006) (SR-Amex-2005-059) (approving the listing and trading of the DB Commodity Index Tracking Fund); 53582 (March 31, 2006), 71 FR 17510 (April 6, 2006) (SR-Amex-2005-127) (approving the listing and trading of Units of the United States Oil Fund, L.P.); and 54450 (September 14, 2006), 71 FR 55230 (September 21, 2006) (SR-Amex-2006-44) (approving the listing and trading of the PowerShares DB G10 Currency Harvest Fund).

futures contracts, forward contracts on oil and other over-the-counter derivatives based on the price of oil, other petroleum-based fuels, the futures contracts described above, and the indexes based on any of the foregoing. The Oil Fund's portfolio is managed by Victoria Bay Asset Management LLC with the aim of tracking the West Texas Intermediate light, sweet crude oil futures contract listed and traded on the New York Mercantile Exchange.

The Amex believes that it is reasonable to expect other types of Commodity Pool ETFs to be introduced for trading in the near future. The Exchange states that the proposed amendment to the Exchange's listing criteria for options on Commodity TIRs and Partnership Units is necessary to ensure that the Exchange will be able to list options on Commodity Pool ETFs that have been recently launched as well as any other similar Commodity Pool ETFs that may be listed and traded in the future.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b) of the Act⁸ in general, and furthers the objectives of Section 6(b)(5),⁹ of the Act in particular, in that it would remove impediments to and perfect the mechanism of a free and open market in a manner consistent with the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange states that no written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or

(ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-Amex-2006-110 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-Amex-2006-110. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the Amex. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Amex-2006-110 and should be submitted on or before February 27, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁰

Florence E. Harmon,
Deputy Secretary.

[FR Doc. E7-1827 Filed 3-5-07; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-55195; File No. SR-Amex-2006-117]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto Relating to Transaction Charges for Equities and ETFs

January 30, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 20, 2006, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. Amex has designated this proposal as one establishing or changing a due, fee, or other charge imposed by a self-regulatory organization pursuant to Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposal effective upon filing with the Commission. On January 26, 2007, the Exchange submitted Amendment No. 1 to the proposed rule change.⁵ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to revise the equities and Exchange Traded Fund Shares ("ETFs") Fee Schedules to establish new transaction charges and revise the cancellation fee charged for cancellations of orders in equities and ETFs.

The text of the proposed rule change is available on the Exchange's Web site (<http://www.amex.com/atamex/>)

¹⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

⁵ In Amendment No. 1, the Exchange made clean-up changes to its proposed rule text.

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

ruleFilings/2006/SR_Amex_2006_117_initial.pdf), at the Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The implementation of the new hybrid market trading platform (known as "AEMI"), the adoption and implementation of Regulation NMS by the Commission, and changes in the competitive landscape have resulted in a review by the Exchange of the fee schedule for equities and ETFs. The full costs of execution are a major factor in determining where order flow providers direct their orders. The Exchange will impose the new transaction charges on its members and member organizations effective January 2, 2007. The Exchange is currently in the process of moving its equities and ETFs on to the AEMI trading system. The new fees will apply to all equities and ETFs regardless of whether they have been moved on to AEMI. It is expected that by January 2, 2007, approximately one-quarter of the Exchange's equities and ETFs will be trading on AEMI.

Transaction Charges for Equities and ETFs

Currently, Amex transaction charges for equities and ETFs are assessed for all market participants monthly on a per-share basis with the application of various caps and discounts. The Exchange proposes to revise the manner in which transaction charges are applied in order to encourage market participants to send order flow to the Exchange and provide liquidity (*i.e.*, quotes and limit orders) at and around the National Best Bid and Offer ("NBBO"). The Amex Fee Schedule currently has separate schedules for equities and ETFs, and although the

proposed new fees will be the same for both product lines, the Exchange has decided to continue to maintain two separate Fee Schedules. Each Fee Schedule will be separated into two schedules one with the transaction charges for customers and the other with transaction charges for Specialists and Registered Traders.

Transaction Charges for Customers

Transaction charges for customers⁶ for executions in equities and ETFs will be divided into two tiers based on the average daily volume of each security as reported by the appropriate NMS Plan in the security industry-wide. As described below, the transaction charges will vary within each tier depending on the type of orders submitted for the customer account and the types of quotes and orders submitted for Specialist and Registered Trader accounts.

Tier One Pricing for Customers

Tier One pricing will be applied to all Amex-listed securities (equities and ETFs) whose industry-wide average daily trading volume is 500,000 shares or greater during the previous rolling quarter. In addition, Tier One pricing will apply to all securities traded on the Exchange pursuant to unlisted trading privileges ("UTP") regardless of the their average daily trading volume. All new listings including IPOs, transfers, and dual listings will initially be categorized as Tier One securities until the next quarterly recalculation. Based on third quarter average daily trading volumes, 55 Amex listed equities, 84 ETFs, and over 100 UTP securities would have been eligible for Tier One pricing. These Tier One securities currently represent approximately 60% of Amex daily volume. Determining whether a security receives Tier One pricing will be based on 12 weeks of trading data. Two weeks prior to the start of a calendar quarter the Exchange will announce which securities will be eligible for Tier One pricing during the next quarter beginning with the first trading day of the calendar quarter. For example, Tier One securities (except UTP securities) for the second quarter of 2007 will be determined based on average daily trading volume for the period beginning December 13, 2006 and ending March 14, 2007. An announcement will be made on March

15, 2007 setting forth the securities eligible for Tier One pricing effective April 1, 2007. The list of Tier One eligible securities will also be available on the Amex Web site.

Transaction charges for executions by customers of Tier One securities will vary depending on the type of order submitted to Amex. There will be no transaction charges for the execution of cross orders⁷ occurring within the AEMI trading system ("electronic crosses"). The lowest fees will be charged for the execution of limit orders⁸ which are not immediately executable when submitted to the Exchange and whose limit is near, at, or improves the prevailing national best bid (for buy orders) or the national best offer (for sell orders) (collectively, the NBBO) at the time of order entry. As set forth in the revised Fee Schedule, transaction charges for the execution of limit orders (1) at the current NBBO or that betters the current NBBO will be \$0.03 per 100 shares; (2) within three minimum price variations or "ticks" of the NBBO will be \$0.05 per 100 shares; and (3) all other limit orders at prices outside three ticks from the NBBO will be \$0.10 per 100 shares. Orders that are submitted prior to the opening of trading at 9:30 a.m. when NBBO data is not available will be charged as follows: the execution of market orders will be charged \$0.25 per 100 shares, and the execution of all limit orders will be charged \$0.03 per 100 shares (regardless of limit price). Transaction charges for negotiated⁹ and open-outcry cross transactions¹⁰ will be \$0.15 per 100 shares. Transaction charges for the execution of market,¹¹ marketable limit orders, and any other orders that take liquidity out of the market will be \$0.25 per 100 shares. Similarly, transaction charges for at the opening-only orders

⁷ A cross order is defined in Amex Rule 131-AEMI(r) as " * * an order submitted by a member or member organization to AEMI with buy and sell interest specified in a single order."

⁸ A limit order is defined in Amex Rules 131(b) and 131-AEMI(b) as " * * an order to buy or sell a stated amount of a security at a specified price, or at a better price if obtainable after the order is represented in the Trading Crowd or is received in the AEMI Book."

⁹ Negotiated Trades are one-to-one trades between two crowd members.

¹⁰ Open Outcry Cross Transactions are discussed in Amex Rule 151-AEMI and occur when a member executes a customer order to buy against a customer order to sell outside the AEMI system or in open outcry.

¹¹ A market order is defined in Amex Rules 131(a) and 131-AEMI(a) as " * * an order to buy or sell a stated amount of a security at the most advantageous price obtainable after the order is presented in the trading crowd or is received in the AEMI Book."

⁶ Customers will be defined for purposes of the proposed new fee schedule to include all market participants except Specialists and Registered Traders. Therefore, customers (and the fees charged to them) will include members, off-floor proprietary accounts, competing market makers, and other member and non-member broker-dealers.

(OPG)¹² and at-the-close orders (MCC, MOC, and LOC)¹³ will be \$0.25 per 100 shares.

The Exchange proposes to revise its traditional way of assessing transaction charges in order to provide incentives for liquidity providers to send limit orders in the most active securities to the Exchange at and around the NBBO. The Exchange believes that liquidity takers, market participants who send in market orders or marketable limit orders for immediate execution at the NBBO or better, should pay for the service of accessing liquidity at the best possible price.

Tier Two Pricing for Customers

Tier Two pricing will be applied to all Amex-listed securities (equities and ETFs) whose industry-wide average daily trading volume is less than 500,000 shares during the previous rolling quarter. Transaction charges for executions by customers of Tier Two securities will be \$0.30 per 100 shares for limit orders, market orders, and at-the-opening and at-the-close orders, and \$0.25 per 100 shares for electronic crosses, open-outcry cross transactions, and negotiated transactions.

Transaction Charges for Specialists and Registered Traders

Transaction charges for executions by Specialists and Registered Traders of all equities and ETFs will vary depending on the type of order or quote submitted to Amex. The lowest fee of \$0.03 per 100 shares will be charged for an execution against a Specialist or Registered Trader quote that had been entered at the NBBO and for negotiated trades. A transaction charge of \$0.05 per 100 shares will be charged for all other Specialist and Registered Trader

executions, including executions against a Specialist or Registered Trader quote that is within three or more ticks of the NBBO, executions of hit-or-take orders,¹⁴ executions in which the Specialist and/or Registered Trader has participated in a percentage order,¹⁵ intraday pair-offs, and the pair-offs of at-the-opening or at-the-close orders. Transaction charges for Specialists and Registered Traders are at lower rates in order to encourage them to quote more competitively and make more liquid markets.

Revisions to Cancellation Fees

Currently, the executing clearing member is charged \$0.25 for every equities and ETF order sent for a mnemonic and cancelled through Amex systems in a given month when the total number of equities and ETF orders executed for that mnemonic is less than or equal to 10% of the equities and ETF orders cancelled through Amex systems for that mnemonic in that same month. The fee does not apply to mnemonics for which fewer than 100,000 orders were cancelled through Amex systems and does not apply to the first 100,000 cancellations submitted for a mnemonic. To align the Exchange's cancellation fee with others in the industry, the proposed cancellation fee for orders and cancellations sent to Amex in equities and ETFs will be revised to apply to each clearing member mnemonic whose ratio of cancellations to executions is greater than 50-to-one. However, the Exchange also proposes to eliminate the 100,000 cancellation threshold, and the charge of \$0.25 per cancellation will apply to all cancellations beyond the 50-to-one ratio for that mnemonic. Thus, the proposed cancellation fee will apply to fewer clearing member mnemonics since the ratio of cancellations to executions is higher than the current ratio and the proposed cancellation fees are applicable on a marginal basis. For example, if a clearing member executes two orders and cancels 120 orders in a mnemonic, the clearing member will be assessed a cancellation fee only on 20 cancellations.

¹⁴ Hit-or-take orders are defined in Amex Rule 131-AEMI(t) and are available only for securities trading on the AEMI system. A hit-or-take order is a type of order that is available to any member to trade against the Amex Published Quote ("APQ"). It is an order that expires if not immediately executed but that is capable of generating away market obligations to clear better away markets.

¹⁵ A percentage order is defined in Rules 131(n) and 131-AEMI(m) as " * a limited price order to buy (or sell) 50% of the volume of a specified stock after its entry."

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,¹⁶ in general, and furthers the objectives of Section 6(b)(4),¹⁷ in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using facilities. Specifically, the Exchange is proposing to establish new transaction charges for equities and ETFs and revise its cancellation fees.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act¹⁸ and Rule 19b-4(f)(2) thereunder¹⁹ because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.²⁰

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

¹⁶ 15 U.S.C. 78f(b).

¹⁷ 15 U.S.C. 78f(b)(4).

¹⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁹ 17 CFR 19b-4(f)(2).

²⁰ For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change, the Commission considers the period to commence on January 26, 2007, the date on which the Exchange filed Amendment No. 1.

¹² An at the opening order is defined in Amex Rules 131(f) and 131-AEMI(e) as " * a market or limited price order which is to be executed on the opening in the stock on the Exchange or not at all, and any such order or portion thereof not so executed is to be treated as cancelled."

¹³ At-the-close orders are defined in Amex Rules 131(e), 131, Commentary .03, 131-AEMI(d) and 131-AEMI, Commentary 03. There are three types of at the close orders, market-at-the-close, limit-at-the-close, and market-at-4:00-p.m. cash-close. A market-at-the-close (MOC) order is an order to buy or sell a stated amount of a security at the Exchange's closing price. If the MOC order cannot be executed in its entirety at the Exchange closing price it will be cancelled. A limit-at-the-close (LOC) order is an order to buy or sell a stated amount of a security at the Exchange's closing price if that closing price is at the order's limit price, or better. If the LOC order cannot be so executed, in whole or in part, the amount of the order not so executed is to be cancelled. A market-at-4:00-p.m. cash-close (MCC) order is an order in an ETF that trades to 4:15, which is to be executed at or as close as practicable to the close of the regular equity trading session on the Exchange (normally 4 p.m. Eastern Time.)

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-Amex-2006-117 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-Amex-2006-117. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commissions Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of Amex. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Amex-2006-117 and should be submitted on or before February 27, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²¹

Florence E. Harmon,
Deputy Secretary.

[FR Doc. E7-1830 Filed 2-2-07; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-55190; File No. SR-CBOE-2006-106]

**Self-Regulatory Organizations;
Chicago Board Options Exchange,
Incorporated; Notice of Filing of
Proposed Rule Change, and
Amendment No. 1 Thereto, Relating to
an Interpretation of Paragraph (b) of
Article Fifth of Its Certificate of
Incorporation**

January 29, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 12, 2006, the Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. On January 17, 2007, the Exchange filed Amendment No. 1 to the proposed rule change.³ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

**I. Self-Regulatory Organization's
Statement of the Terms of Substance of
the Proposed Rule Change**

This filing presents an interpretation of the rules of CBOE made necessary by the proposed acquisition of the Board of Trade of the City of Chicago, Inc. ("CBOT") by Chicago Mercantile Exchange Holdings Inc. ("CME Holdings"). The acquisition is proposed to be accomplished by the merger of CBOT Holdings, Inc. ("CBOT Holdings"), of which CBOT is currently a subsidiary, with and into CME Holdings, with CME Holdings continuing as the surviving corporation and as the parent company of CBOT as well as of its existing wholly-owned subsidiary, Chicago Mercantile Exchange Inc. ("CME"). This interpretation is that upon the consummation of the acquisition of CBOT by CME Holdings, the right of members of CBOT to become and

remain members of CBOE without having to purchase a CBOE membership will be terminated, in that there no longer will be individuals who qualify as a member of CBOT within the meaning of the rule that creates that right. This right (sometimes referred to as the "exercise right") is granted to CBOT full members under paragraph (b) of Article Fifth of the CBOE Certificate of Incorporation ("Article Fifth(b)"), as previously interpreted in accordance with agreements between CBOE and CBOT dated September 1, 1992 (the "1992 Agreement"), August 7, 2001 as amended by letter agreements dated October 7, 2004, and February 14, 2005 (the "2001 Agreement"), and December 17, 2003 (the "2003 Agreement").⁴ Persons who are members of CBOE pursuant to the exercise right are sometimes referred to as "exercise members" of CBOE.

The proposed rule interpretation also describes how CBOE proposes to avoid disruption to its marketplace as a result of the termination of the exercise right on account of the acquisition of CBOT by CME Holdings. This will be accomplished by permitting certain "grandfathered" exercise members of CBOE to continue to have members' trading rights on CBOE for a limited period of time commencing with the effectiveness of the acquisition and continuing until such time as there is no longer any risk of market disruption by reason of the termination of the exercise right.

No textual changes to CBOE's rule provisions are proposed by this filing. The text of the proposed rule change is available at CBOE, the Commission's Public Reference Room, and www.cboe.com.

**II. Self-Regulatory Organization's
Statement of the Purpose of, and
Statutory Basis for, the Proposed Rule
Change**

In its filing with the Commission, the CBOE included statements concerning

⁴ The interpretations of Article Fifth(b) embodied in the 1992, 2001, and 2003 Agreements were the subject of proposed rule changes that were approved by the Commission under Section 19(b)(2) of the Act in Release Nos. 32430, 51733, and 51252, respectively. See Securities Exchange Act Release Nos. 32430 (June 8, 1993), 58 FR 32969 (June 14, 1993) (SR-CBOE-92-42); 51733 (May 24, 2005), 70 FR 30981 (May 31, 2005) (SR-CBOE-2005-19); and 51252 (February 25, 2005), 70 FR 10442 (March 3, 2005) (SR-CBOE-2004-16). CBOE also interpreted Article Fifth (b) in 2002 in other respects that are not directly pertinent to the proposed rule interpretation. See Securities Exchange Act Release No. 46719 (October 25, 2002), 67 FR 66689 (November 1, 2002) (SR-CBOE-2002-41). The Commission notes that although it approved the proposed rule changes referenced above, it has never approved the agreements discussed herein.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The text of Amendment No. 1 is available at CBOE, the Commission's Public Reference Room and <http://www.cboe.org/publish/RuleFilingsSEC/SR-CBOE-2006-106.al.pdf>. In Amendment No. 1, the Exchange added a paragraph to the Purpose Section discussing membership rights as reflected in CBOT Holding's S-4 filing on December 21, 2006, and attached several documents as Exhibits to Amendment No. 1, including a legal opinion letter dated January 16, 2007.

²¹ 17 CFR 200.30-3(a)(12).

the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to provide an interpretation of the rules of CBOE concerning the effect on the exercise right of the consummation of the proposed acquisition of CBOT by CME Holdings. The proposed rule change also includes a plan to enable CBOE to continue to provide fair and orderly markets when and if the exercise right is terminated upon the effectiveness of the acquisition of CBOT.

Background of the Exercise Right

Article Fifth(b) provides in part, "In recognition of the special contribution made to the organization and development of the [CBOE] by the members of [CBOT], * * * every present and future member of [CBOT] who applies for membership in the [CBOE] and who otherwise qualifies shall, so long as he remains a member of said Board of Trade, be entitled to be a member of the [CBOE] notwithstanding any such limitation on the number of members and without the necessity of acquiring such membership for consideration or value from the [CBOE], its members or elsewhere."

The "special contribution" of the members of CBOT referred to in Article Fifth(b) consisted primarily of CBOT's providing the seed capital for the start-up of CBOE in the early 1970s by means of direct cash expenditures, CBOT's guarantee of a bank loan to CBOE to fund additional CBOE start-up costs, and CBOT's contribution of intellectual property. As the owners of CBOT, its members, through their dues and other payments made to CBOT, were the principal source of the funds expended by CBOT in the development of CBOE and related intellectual property, and effectively bore the risk on the bank loan guaranteed by CBOT.

Although when CBOT first envisioned the creation of a market in listed securities put and call options, its intention was to trade these options in trading pits on CBOT itself, early in the planning process it recognized that

largely for regulatory reasons it would need to organize a new and separate securities exchange dedicated exclusively to the trading of listed securities options. This new exchange ultimately became the CBOE. Because a new and separate exchange with its own separate membership needed to be created to provide for the trading of listed securities options, CBOT was faced with the question of how to compensate its members for the funds they had provided (through CBOT) and the financial risks they had assumed as owners of CBOT in connection with the development of that new exchange.

CBOT's answer to this question, reflected in Article Fifth(b) of the Certificate of Incorporation of CBOE, was to give to each of its 1,402 members an "exercise right" to become a member of the new exchange without having to purchase a separate CBOE membership. From its very inception, the exercise right was tied to the continued ownership of a CBOT membership. Only those persons who continued to maintain the status of a CBOT member were entitled to the exercise right. By tying the exercise right to the continued ownership of a CBOT membership, CBOT sought to assure that any owner of a CBOT membership would receive a tangible benefit from the creation of CBOE, which would be reflected in the value of the CBOT membership, whether or not the owner of the CBOT membership might ever want to trade as a member of CBOE.

Previous Interpretations of Article Fifth(b)

The fundamental concept that the exercise right in Article Fifth(b) was a right of member-owners of CBOT was reflected in interpretations of that provision that have been embodied in various agreements between CBOE and CBOT. One such interpretation was embodied in the 1992 Agreement, which addressed, among other things, what would happen to the exercise right if the membership interests of the existing 1,402 member-owners of CBOT were divided into parts. That interpretation provided that, under those circumstances, all such parts, together with the trading rights appurtenant thereto, must be in the possession of an individual in order for that individual to be eligible to utilize the exercise right.⁵

Just such a division of the rights represented by membership on CBOT was effected by CBOT in its 2005 restructuring, when a CBOT member's ownership rights were separated from

that member's trading rights. The ownership rights of CBOT members were then further diluted in the subsequent public offering of shares of stock of CBOT Holdings. When CBOT first proposed to restructure in late 2000, CBOE's response was that the effect of this transaction would be to eliminate entirely the concept of CBOT "membership" as it existed when the exercise right was created as a right held by members of CBOT, and therefore would result in the termination of the exercise right. This interpretation of Article Fifth(b) was reflected in a filing made by CBOE with the Commission under Section 19(b) of the Act.⁶ CBOT disputed CBOE's response, and brought suit against CBOE in the Circuit Court of Cook County, Illinois. That lawsuit was dismissed on the ground that the Court's jurisdiction over matters involving exchange rules pertaining to membership was preempted by the Commission's jurisdiction under the Act. CBOT appealed the dismissal.

Subsequently, while CBOE's 19(b) filing and CBOT's appeal of the dismissal of its lawsuit were both pending, CBOE and CBOT settled their dispute on the basis of an interpretation of Article Fifth(b) by CBOE that would permit the exercise right to remain in existence following the restructuring of CBOT as long as specified conditions were satisfied. That interpretation was embodied in the 2001 Agreement. Among other things, that interpretation was subject to the condition that, in order to avail themselves of the exercise right to become and remain members of CBOE following the restructuring of CBOT, individuals needed to hold not only the trading rights of a full member of CBOT but also needed to hold the same number of shares of stock of CBOT Holdings originally issued to CBOT members in the restructuring.

In this manner, the agreed-upon interpretation of Article Fifth(b) embodied in the 2001 Agreement carried forward the basic concept noted above that, in order to be viewed as a CBOT member eligible to utilize the exercise right to become and remain a member of CBOE following the restructuring of CBOT, a person must continue to have an ownership interest in CBOT (or must be the delegate of such a person). To assure that this interpretation would not apply under any circumstances other than the restructuring, the interpretation was expressly made subject to the condition that it would apply only "in the absence

⁶ See Securities Exchange Act Release No. 43521 (November 3, 2000), 65 FR 69585 (November 17, 2000) (SR-CBOE-2000-44).

⁵ See 1992 Agreement, Section 2(b).

of any other material changes to the structure or ownership of the CBOT * * * not contemplated in the CBOT [restructuring].” The IPO of CBOT Holdings common stock, which followed soon after CBOT’s restructuring, was contemplated in the original restructuring transaction. Accordingly, consistent with the 2001 Agreement, the exercise right remained available following the IPO to CBOT members who continued to hold the ownership interest in CBOT Holdings that was issued to them in the restructuring, notwithstanding that the effect of the IPO was to reduce the percentage ownership represented by that interest.

The Proposed Acquisition of CBOT by CME Holdings

The present proposed acquisition of CBOT by CME Holdings, which would dramatically change the ownership of CBOT by making it a subsidiary of CME Holdings, was not contemplated as part of the original restructuring of CBOT. It is thus outside of the scope of the 2001 Agreement and the interpretation of Article Fifth(b) embodied therein. Similarly, once the proposed acquisition of CBOT is effective, an important condition of the interpretation embodied in the 2001 Agreement would cease to be satisfied—namely, that there not be any change to the ownership of CBOT not contemplated in its 2005 restructuring.

The significance of these consequences of the acquisition of CBOT by CME Holdings is twofold: First, it means that, upon the effectiveness of the acquisition of CBOT by CME Holdings, the 2001 Agreement and the interpretation of Article Fifth(b) embodied therein can no longer be relied upon as a basis for treating the exercise right as continuing in effect following the 2005 restructuring of CBOT. Second, it also means that the 2001 Agreement and the interpretation of Article Fifth(b) embodied therein cannot be relied upon to answer the further question of whether the exercise right will remain in existence following the acquisition of CBOT by CME Holdings, wholly apart from those questions raised by the 2005 restructuring. In other words, the agreed-upon interpretation that settled the exercise right issues raised by CBOT’s restructuring and subsequent IPO by its terms applies only so long as there is no further change to the structure or ownership of CBOT not then in contemplation. Consequently, the fact that there would be such a further change upon the effectiveness of the acquisition of CBOT by CME

Holdings, means that, insofar as issues pertaining to the continued availability of the exercise right are concerned, the parties are back in the position they were in before they reached the settlement reflected in the 2001 Agreement.

For this reason, and consistent with the position CBOE took when confronted with the proposed restructuring of CBOT in 2000, it is CBOE’s position that the effect of that restructuring of CBOT and the subsequent IPO was to eliminate the concept of a member-owner of CBOT as that concept was understood when Article Fifth(b) was first adopted in CBOE’s Certificate of Incorporation, and when it was subsequently interpreted in accordance with the 1992 Agreement. The ownership interest of CBOT members in CBOT will be further attenuated upon the effectiveness of CME Holdings’ acquisition of CBOT, when CBOT will become a subsidiary of CME Holdings. As explained above, both when the exercise right was first created and when it was interpreted in 1992, an essential feature of CBOT membership was the ownership rights in CBOT held by every CBOT member. Indeed, it was to compensate CBOT members for the contributions they made to the development of CBOE as the owners of CBOT that the exercise right was created in the first place. Consistent with the intended purpose of the exercise right, once CBOT members cease to be owners of CBOT, they will cease to be able to avail themselves of the exercise right as a means of acquiring membership in CBOE.

This view of the exercise right is consistent with, and indeed is mandated by, the interpretation of Article Fifth(b) embodied in the 1992 Agreement. That interpretation makes it clear that the exercise right is held only by individuals who hold one of the 1,402 CBOT memberships that were in existence when CBOT members made their “special contribution” to the development of CBOE, or by persons who are the delegates of such individuals. Consistent with this proposition, Section 3(d) of the 1992 Agreement addresses the possibility that CBOT, among other things, may merge or consolidate with, or be acquired by, another entity, and establishes three conditions that all must be satisfied for the exercise right to remain available following any such transaction. These three conditions are:

1. “* * * the survivor of such merger, consolidation or acquisition (“survivor”) is an exchange which provides or maintains a market in commodity futures contracts or

options, securities, or other financial instruments, and * * *

2. the 1,402 holders of CBOT Full Memberships are granted in such merger, consolidation or acquisition membership in the survivor (“Survivor Membership”), and * * *

3. such Survivor Membership entitles the holder thereof to have full trading rights and privileges in all products then or thereafter traded on the survivor (except that such trading rights and privileges need not include products that, at the time of such merger, consolidation or acquisition, are traded or listed, designated or otherwise authorized for trading on the other entity but not on the CBOT) * * *.”

If CBOT is acquired by CME Holdings as proposed, not only would all three of these conditions not be satisfied, as would be necessary for the exercise right to remain available following the acquisition, but in fact none of these three conditions would be satisfied. Condition 1 would not be satisfied because, in the context of Section 3(d) of the 1992 Agreement, the reference to “the” survivor of a merger, consolidation or acquisition means the acquiring entity that survives the transaction. Here, CME Holdings will be the acquiring entity that survives the acquisition, but it is not an exchange.

Condition 2 would not be satisfied because there will not be 1,402 holders of CBOT Full Memberships (defined as the 1,402 CBOT full memberships that were “existing” in 1992) who would be granted membership in the survivor. To the contrary, there would not be any holders of CBOT full memberships as they existed in 1992, since all of these memberships were stripped of their ownership attributes in the 2005 restructuring of CBOT. Likewise, CME Holdings—the survivor of the acquisition and the new owner of CBOT—would not be an exchange and would not be capable of granting membership interests in itself to anyone. In other words, this condition would allow the exercise right to remain in effect following an acquisition of CBOT only if the survivor of the acquisition that was the new owner of CBOT were an exchange owned by its members, including the former members of CBOT. In the case of the proposed CME Holdings acquisition, however, the surviving acquirer would not be an exchange, but would be a holding company in which many former members of CBOT may have no ownership interests whatsoever. Although CBOE has previously interpreted Article Fifth(b) to permit it to continue in existence, subject to stated conditions, following CBOT’s 2005 restructuring and subsequent IPO, the 2001 Agreement cannot be relied

upon for any purpose from and after the acquisition of CBOT by CME Holdings, for the reasons stated above.

Even if CBOT is considered to be the survivor of the proposed acquisition, Condition 2 would still not be satisfied because, following the acquisition, persons who were members prior to the acquisition will no longer be members as that term was commonly understood when Article Fifth(b) was adopted in 1972 and when it was interpreted in 1992. Not only will these persons not be owners of CBOT, but, except for trading rights, they will no longer have most of the other rights formerly held by members of CBOT. The S-4 registration statement filed by CBOT Holdings on December 21, 2006 in respect of the proposed acquisition reveals that, following the acquisition, CBOT's former Series B-1 members (who prior to the acquisition are the "full" members of CBOT entitled to the exercise right) will lose most of their membership rights. Among other things, they will be stripped of the right to elect directors and nominating committee members, the right to nominate candidates for election as directors, the right to call special meetings of members, the right to initiate proposals at meetings of members, the right to vote on extraordinary transactions involving CBOT, and the right to amend or repeal the bylaws of CBOT. In other words, following the acquisition of CBOT by CME Holdings, persons who had formerly been the full members of that exchange will simply be the holders of trading permits and will not be granted any of the other rights commonly associated with membership in an exchange.

Finally, condition 3 of Section 3(d) of the 1992 Agreement would not be satisfied following the acquisition of CBOT by CME Holdings. This is because, for the reason stated above in the discussion of condition 1, condition 3 contemplates an acquisition where the surviving acquirer is an exchange, and it requires that CBOT members must have essentially the same full trading rights on that surviving exchange as they had on CBOT prior to the acquisition. Here, the surviving acquirer would not be an exchange, and for that reason it is not possible for CBOT members to have any trading rights on the survivor. The conclusion is the same even if CBOE were to look through CME Holdings to what will be its two subsidiary exchanges (CME and CBOT). Although former CBOT members may be granted trading rights in all products traded and to be traded on both of those exchanges, save only for those products traded exclusively on CME at the time

of the acquisition, these rights will no longer be the same "full" trading rights that were held by CBOT full members in 1992. This is the case because, at least in respect of new products to be introduced on CME after the acquisition, the trading rights of CBOT members will be diluted by the trading rights granted to other persons (*i.e.*, CME members) to trade these same products. Once persons who are not members of CBOT are granted the right to trade products on the same terms as members of CBOT, as would be the case with new products introduced following the acquisition of CBOT by CME Holdings, then the trading rights inherent in CBOT membership will be reduced from what they were prior to the acquisition, and thus cannot support the availability of the exercise right to persons who hold those diminished rights.

Conclusion

Since the conditions of Section 3(d) of the 1992 Agreement will not be satisfied following the acquisition of CBOT by CME Holdings, the terms of that Section mandate that "Article Fifth(b) shall not apply" following the acquisition. In other words, once CBOT has been acquired by CME Holdings, the exercise right will no longer be available as a means of acquiring membership in CBOE.

Transitional Proposal

To prevent any risk that the loss of exercise members upon the termination of the exercise right might adversely affect liquidity in CBOE's market, CBOE is prepared to maintain the status quo for some period of time after the exercise right has been terminated. This result would be accomplished by staying, for an interim period of time, the impact of the termination of the exercise right on the trading access of those individuals who were exercise members of CBOE on a designated cut-off date. This would permit those individuals to continue to trade on CBOE in the capacity of CBOE members during that interim period.⁷ For this purpose, CBOE proposes the close of business on December 11, 2006 as the cut-off date for determining whether

⁷ In this respect, the decision to stay the effectiveness of what otherwise would result in a termination of trading access is analogous to the right of the Exchange under CBOE Rule 3.19. That Rule authorizes the Exchange, when the Exchange determines that there are extenuating circumstances, to permit a member "to retain the member's status for such period of time as the Exchange deems reasonably necessary" to enable the member to address specified problems that otherwise would cause the membership status to terminate.

exercise members would have the right, during the interim period, to continue to have trading access to CBOE.

Individuals who were exercise members of CBOE in good standing on that date would continue to be able to trade as members of CBOE during the interim period, notwithstanding the above-described effect on the exercise right of the acquisition of CBOT, but individuals who were not effective exercise members on that date would not be permitted to exercise or have trading access to CBOE during the interim period without obtaining a separate CBOE membership. This interim period would continue for so long as necessary to avoid any disruption to the market as a result of the loss of exercise members, which could involve CBOE adopting a plan to provide some form of trading access to such persons in the absence of the exercise right. Any such plan would be subject to the approval of CBOE members under Section 2.1 of the Exchange's Constitution, and to the approval of the Commission under Section 19(b) of the Act.⁸

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁰ in particular, in that it is a reasonable interpretation of existing rules of the Exchange that is designed to promote just and equitable principles of trade, to perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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

⁸ 15 U.S.C. 78s(b).

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form <http://www.sec.gov/rules/sro.shtml>; or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-CBOE-2006-106 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 No. SR-CBOE-2006-106. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site at <http://www.sec.gov/rules/sro.shtml>. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-CBOE-2006-106 and should be

submitted on or before February 27, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7-1828 Filed 2-5-07; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-55193; File No. SR-CBOE-2006-111]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Exchange Fees for Fiscal Year 2007

January 30, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 22, 2006, the Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been substantially prepared by the CBOE. The CBOE has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the CBOE under Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposal effective upon filing with the Commission.⁵ The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the CBOE Fees Schedule ("Fees Schedule") to make various changes for fiscal year 2007. The text of the proposed rule change is available at the CBOE, on the Exchange's Web site at <http://www.cboe.com>, and in the Commission's Public Reference Room.

¹¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

⁵ The Exchange has proposed that the changes to the Fees Schedule take effect on January 1, 2007.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to amend the Fees Schedule to make various fee changes. The proposed changes are the product of the Exchange's annual budget review. The Exchange proposes to amend the fees as noted below.

a. Options Transaction Fees

The Exchange proposes to revise per contract transaction fees in order to remain competitive and to streamline its Fees Schedule.

Equity Options: The Exchange proposes to charge all CBOE liquidity providers (CBOE market-maker, Designated Primary Market-Maker ("DPM"), Electronic Designated Primary Market-Maker ("e-DPM"), Lead Market-Maker ("LMM") and Remote Market-Maker ("RMM")) (collectively, "Liquidity Providers") a \$.20 per contract transaction fee.⁶ Currently, market-makers (including LMMs) are charged \$.22 per contract; DPMs are charged \$.16 per contract; e-DPMs are charged \$.25 per contract; and RMMs are charged \$.26 per contract.

Member firm proprietary transaction fees are currently \$.20 per contract for facilitation of customer orders and \$.24 per contract for non-facilitation orders. The Exchange proposes to charge a flat fee of \$.20 per contract for all member firm proprietary transactions. The public customer transaction fee would remain at \$.00, but public customer transactions would be subject to the proposed Customer Complex Order Fee.⁷ Broker-dealer and non-member

⁶ The \$.20 per contract transaction fee is the standard Liquidity Provider transaction fee and will be eligible for reduction pursuant to the "Liquidity Provider Sliding Scale," described in Section II.A.1.b. below.

⁷ See *infra* Section II.A.1.e.

market-maker transaction fees would be unchanged (at \$.25 per contract and \$.26 per contract, respectively).

The Exchange proposes to increase the Options Intermarket Linkage ("Linkage") transaction fee from \$.24 per contract to \$.26 per contract. This fee would match the Linkage transaction fee of at least one other options exchange.⁸

Index Options: The Exchange also proposes to charge index options⁹ Liquidity Providers a \$.20 per contract transaction fee. Currently, those rates range from \$.15 per contract to \$.26 per contract. The member firm proprietary transaction fee (both facilitation and non-facilitation orders) is proposed to be \$.20 per contract.

Public customer fees for transactions in index, ETF, and HOLDRs options currently range from \$.15 per contract to \$.45 per contract. The Exchange proposes to charge public customers \$.18 per contract, with the following exceptions. The Exchange proposes to charge customers a flat \$.30 per contract for transactions in options on the S&P 100 Index ("OEX" and "XEO") instead of the current rates of \$.35 and \$.20 per contract rates depending on the premium. The Exchange proposes to charge customers for transactions in options on the S&P 500 Index ("SPX") \$.44 per contract if the premium is greater than or equal to \$1 and \$.27 per contract if the premium is less than \$1, instead of the current \$.45 and \$.25 per contract rates depending on the premium. The Exchange proposes to charge customers a flat \$.40 per contract for transactions in options on the Jumbo Dow Jones Industrial Average ("DXL"), Morgan Stanley Retail Index ("MVR") and CBOE Volatility Index ("VIX")

instead of the current \$.45 and \$.25 per contract rates depending on the premium.

Broker-dealer transaction fees in index, ETF, and HOLDRs options currently range from \$.25 per contract to \$.45 per contract. The Exchange proposes to charge broker-dealers a flat \$.25 per contract, except for OEX, XEO, and SPX options. OEX and XEO options broker-dealer fees are proposed to be \$.30 per contract, and SPX options broker-dealer fees are proposed to be \$.40 per contract. Non-member market-maker transaction fees in index, ETF, and HOLDRs options currently range from \$.17 per contract to \$.47 per contract. The Exchange proposes to charge non-member market-makers a flat \$.26 per contract, except for OEX, XEO, and SPX options, which are proposed to be \$.30 per contract for OEX and XEO and \$.40 per contract for SPX.

Linkage transaction fees in index, ETF, and HOLDRs options currently range from \$.20 per contract to \$.45 per contract. The Exchange proposes to charge a flat \$.26 per contract fee for Linkage transactions.¹⁰

QQQQ and SPDR Options: The Exchange proposes to increase the customer transaction fee in S&P 500 Depositary Receipts ("SPDR") options from \$.15 per contract to \$.18 per contract. The public customer transaction fee for QQQQ options would remain at \$0.00, but public customer transactions would be subject to the proposed Customer Complex Order Fee.¹¹ All other proposed changes to the QQQQ and SPDR options transaction fees mirror the changes described above for equity options.

Surcharge Fees: The Exchange currently charges a \$.10 per contract

surcharge fee on all contracts traded by the DPM and market-makers in options on the Russell 2000 Index ("RUT").¹² The RUT surcharge fee is assessed by the Exchange to help it recoup license fees the Exchange pays to the Frank Russell Company for its license to trade the RUT product. Similarly, the Exchange charges a \$.10 per contract surcharge fee on all contracts traded by market-makers in options on Dow Jones indexes, except for DJX options and options on DIAMONDS ("DIA"), to help it recoup license fees paid to Dow Jones.

The Exchange proposes to amend the RUT and Dow Jones surcharge fees by expanding application of the fees to transactions of all market participants in these options, except for public customers (*i.e.*, CBOE and non-member market-maker, member firm and broker-dealer). The amended Dow Jones surcharge fee would apply only to DJX and DXL options. These surcharge fees would also apply to Linkage orders.

In addition, the Exchange proposes to adopt a similar \$.04 per contract surcharge fee on all contracts traded by market participants in OEX, XEO, and SPX options, except for public customers.

The proposed surcharge fees are similar to the surcharge fee currently assessed by the Exchange on transactions in MNX and NDX options¹³ and are similar to surcharge fees charged by other exchanges.

b. Liquidity Provider Sliding Scale

The Exchange proposes to adopt a program to reduce a Liquidity Provider's per contract transaction fee based on the number of contracts the Liquidity Provider trades in a month, based on the following sliding scale:

Tiers	Contracts per month	Rate (cents)
First	First 50,000	20
Second	Next 950,000	18
Third	Next 1,500,000	15
Fourth	Next 1,500,000	10
Fifth	Above 4,000,000	2

The sliding scale would apply to all Liquidity Providers for transactions in all products. A Liquidity Provider's \$.20 per contract rate will be reduced if the Liquidity Provider reaches the volume thresholds set forth in the sliding scale in a month. As a Liquidity Provider's

monthly volume increases, its per contract transaction fee will decrease. Under the sliding scale, the first 50,000 contracts traded in a month would be assessed at \$.20 per contract. The next 950,000 contracts traded (up to 1 million total contracts traded) would be

assessed at \$.18 per contract. The next 1.5 million contracts traded (up to 2.5 million total contracts traded) would be assessed at \$.15 per contract, and the next 1.5 million contracts traded (up to 4 million total contracts traded) would be assessed at \$.10 per contract. All

⁸ See Securities Exchange Act Release No. 54430 (September 12, 2006), 71 FR 55257 (September 21, 2006) (SR-NYSEArca-2006-20).

⁹ The index options transaction fee schedule includes transaction fees for options on exchange-traded funds ("ETFs") except QQQQ and SPDR options, and options on Holding Company Depositary Receipts ("HOLDRs").

¹⁰ See *supra* note 8.

¹¹ See *infra* Section II.A.1.e.

¹² See Fees Schedule, Footnote 12.

¹³ See Fees Schedule, Footnote 15.

contracts above 4 million contracts traded in a month would be assessed at \$.02 per contract. The Exchange will aggregate the trading activity of separate Liquidity Provider firms for purposes of the sliding scale if there is at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A.¹⁴

The Exchange proposes to provide Liquidity Providers with two incentives to prepay annual transaction fees. First, in order to be eligible to participate in the sliding scale above 1 million contracts (*i.e.*, at the \$.15 per contract rate and lower), a Liquidity Provider would be required to prepay their transaction fees for the first two tiers of the sliding scale for the entire year (*i.e.*, \$2.172 million). Second, if a Liquidity Provider prepays annual fees for the first four tiers of the sliding scale, the Liquidity Provider would receive a \$500,000 prepayment discount (total amount of the prepayment would be \$6.172 million instead of \$6.672 million).

Contract volume resulting from dividend, merger, and short stock interest strategies as defined in Footnote 13 of the Fees Schedule would not apply towards reaching the sliding scale volume thresholds, since that volume may have already received fee reductions as described in Footnote 13 of the Fees Schedule.

The Exchange believes the proposed sliding scale is objective in that the fee reductions are based solely on reaching stated volume thresholds, similar to the operation of the Exchange's current Prospective Fee Reduction Program.¹⁵ The sliding scale is intended to replace both the Prospective Fee Reduction Program and the Fixed Annual Fee Program.¹⁶

c. Prospective Fee Reduction Program

The Exchange proposes to discontinue its Prospective Fee Reduction Program for fiscal year 2007. This program served to limit market-maker and DPM fees in periods of high volume.¹⁷ The Exchange is eliminating this program due to the implementation of the Liquidity Provider Sliding Scale described above.

d. Fixed Annual Fee

The Exchange proposes to eliminate the fixed annual fee program for DPMs and e-DPMs, which is currently set forth in Section 23 of the Fees Schedule. This program offered DPMs and e-DPMs the alternative of choosing a fixed annual fee of \$2.25 million instead of being assessed transaction fees on a per contract basis for its DPM, e-DPM, and RMM transactions in equity options classes. The Exchange is eliminating this program due to the implementation of the Liquidity Provider Sliding Scale described above.

e. Customer Complex Order Fee

The Exchange proposes to adopt a customer transaction fee for certain complex orders in equity and QQQQ options ("Complex Orders").¹⁸ Specifically, the exchange proposes to adopt a transaction fee of \$.18 per contract for Complex Orders¹⁹ that "take liquidity" from the Exchange's complex order book. The fee would be charged only for the leg of the Complex Order consisting of the most contracts.

For purposes of the proposed fee, an order "takes liquidity" when it interacts with a complex order residing on the complex order book. The Exchange will not charge customers for Complex Orders if they are the liquidity provider (*i.e.*, they are first on the complex order book).²⁰

The proposed fee would apply solely to Complex Orders that take liquidity from the complex order book. Complex Orders that trade against orders in the Exchange's regular order book ("EBook") or against the displayed individual series quotes would not be assessed the fee. Also, Complex Orders that rest in the complex order book before executing would not be assessed the fee.

Much like broker-dealers, public customers that use sophisticated trading systems are able to take liquidity quickly from the complex order book. The Exchange believes the proposed fee is appropriate in that it would place such customer orders on a more equal footing with broker-dealer complex orders that are currently subject to transaction fees. According to the Exchange, the proposed fee is substantially similar to another

exchange's fee that was recently approved by the Commission.²¹

f. Member Firm Proprietary and Firm Facilitation Fee Cap

The Exchange currently caps member firm proprietary and firm facilitation fees at \$100,000 per month per firm.²² The Exchange proposes to increase the cap to \$125,000 per month per firm. No other changes to this program are proposed.

g. Customer Large Trade Discount Program

The Exchange proposes to amend the Customer Large Trade Discount program. The Customer Large Trade Discount program provides a discount in the form of a cap on the quantity of customer contracts that are assessed transaction fees for most CBOE index, ETF, and HOLDRs options.²³ Currently, customer transaction fees are charged only up to the first 5,000 contracts per order in Dow Jones options (including DIA) and SPX options, and only up to the first 3,000 contracts per order in other index, ETF, and HOLDRs options. The Exchange proposes to: (i) Increase the SPX options cap to 7,500 contracts; (ii) reduce the DIA options cap to 3,000 contracts; and (iii) for those index options currently capped at 3,000 contracts, increase the cap to 5,000 contracts. The cap for other ETF and HOLDRs options would remain unchanged at 3,000 contracts.

h. ORS Order Cancellation Fee

CBOE currently assesses an executing clearing firm \$1 for each cancelled Order Routing System ("ORS") order in excess of the number of orders that the executing clearing member executes in a month ("ORS Order Cancellation Fee").²⁴ The ORS Order Cancellation Fee is not charged if less than 500 ORS orders are cancelled in the month. The purpose of the ORS Cancellation Fee is to ease order backlogs on ORS.

Some correspondent firms route their orders through multiple CBOE executing clearing firms. Although the individual correspondent firm may cancel more orders than are filled, they may not incur the ORS Cancellation Fee because the executing clearing firm's total mix of orders from all their correspondents has more fills than cancels.

The Exchange proposes to address this situation by calculating the ORS

¹⁴ A Liquidity Provider's monthly contract volume would be determined at the firm affiliation level (*e.g.*, if five Liquidity Provider individuals are affiliated with member firm ABC as reflected by Exchange records for the entire month, all of the volume from those five individual Liquidity Providers will count towards firm ABC's sliding scale transaction fees for that month).

¹⁵ See *infra* Section II.A.1.c.

¹⁶ See *infra* Section II.A.1.d.

¹⁷ See Fees Schedule, Section 19.

¹⁸ Currently, no customer transaction fees are assessed in equity options and QQQQ options.

¹⁹ Complex orders are defined in CBOE Rule 6.53C.

²⁰ The Exchange will determine the liquidity provider and the liquidity taker based on time (*i.e.*, the order that arrives first on the complex order book is the liquidity provider).

²¹ See Securities Exchange Act Release No. 54751 (November 14, 2006), 71 FR 67667 (SR-ISE-2006-56).

²² See Fees Schedule, Section 20.

²³ See Fees Schedule, Section 18.

²⁴ See Fees Schedule, Section 14.

Cancellation Fee by the cancellation activity of each correspondent firm (and the executing clearing firm's own cancellation activity when it self clears), rather than by the aggregate cancellation activity of the executing clearing firm. Correspondent firms using multiple executing clearing firms would be evaluated separately, per executing clearing firm. The Exchange will be able to provide executing clearing members with information regarding the cancellation activity of each of its correspondent firms so that the executing clearing member can pass through any cancellation fees.

In addition, the Exchange proposes to increase the ORS Cancellation Fee from \$1.00 to \$1.25 per cancelled ORS order.

The Exchange proposes that the following ORS cancellation activity would be exempt from the fee: (i) Cancelled ORS orders that improve the Exchange's prevailing bid-offer ("BBO") market when received; and (ii) fill and cancellation activity occurring within the first one minute of trading following the opening of each option class. The Exchange believes the foregoing cancel activity is not an inappropriate use of systems capacity and therefore should not be subject to the fee.

The Exchange believes that the proposed ORS Cancellation Fee is similar to the cancellation fee of another exchange.²⁵

i. DPM Facilities Fee

The Exchange proposes to eliminate the DPM facilities fee, which the Exchange charges DPMs each month for use of Exchange floor trading stations. The elimination of this fee is intended to provide fee relief to DPMs in light of a recently adopted fee that DPMs may incur in fiscal year 2007.²⁶

j. Miscellaneous, Non-substantive Changes

The Exchange proposes various non-substantive clean-up changes to its Fees Schedule. The Section of the Fees Schedule entitled "Index Customer Boxes" under "Member Transaction Fee Policies and Rebate Programs" is proposed to be deleted, as that program is superseded by the Customer Large Trade Discount Program.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the

Act,²⁷ in general, and furthers the objectives of Section 6(b)(4)²⁸ of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE members and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act²⁹ and subparagraph (f)(2) of Rule 19b-4³⁰ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.³¹

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-CBOE-2006-111 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary,

Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-CBOE-2006-111. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CBOE-2006-111 and should be submitted on or before February 27, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.³²

Florence E. Harmon,
Deputy Secretary.

[FR Doc. E7-1860 Filed 2-5-07; 8:45 am]

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-55206; File No. SR-NASD-2007-008]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Extending the Pilot Periods for NASD Rules Governing Multiple MPIDs on the Trade Reporting Facilities and on the Alternative Display Facility

January 31, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

²⁵ See Securities Exchange Act Release No. 53862 (May 24, 2006), 71 FR 31244 (June 1, 2006) (SR-ISE-2006-23).

²⁶ See Securities Exchange Act Release No. 54804 (November 21, 2006), 71 FR 69150 (November 29, 2006) (SR-CBOE-2006-98) (Hybrid Electronic Quoting Fee).

²⁷ 15 U.S.C. 78f(b).

²⁸ 15 U.S.C. 78f(b)(4).

²⁹ 15 U.S.C. 78s(b)(3)(A).

³⁰ 17 CFR 240.19b-4(f)(2).

³¹ *Id.*

³² 17 CFR 200.30-3(a)(12).

("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 26, 2007, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been substantially prepared by NASD. NASD has filed the proposal pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6) thereunder,⁴ which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD proposes to amend NASD Rules 4613A(b) and 5140 to extend the pilot programs for the use of multiple Market Participant Symbols ("MPIDs") for Registered Reporting Alternative Display Facility ("ADF") electronic communications networks ("ECNs") and Trade Reporting Facility Participants. The text of the proposed rule change is available at NASD, the Commission's Public Reference Room, and www.nasd.com.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD 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. NASD 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

Rule 4613A(b) and IM-4613A-1

Rule 4613A(b) (Character of Quotations) provides that a Registered Reporting ADF ECN may request additional MPIDs for displaying quotes and orders and reporting trades through the ADF trade reporting facility, the Trade Reporting and Comparison

Service, for any ADF-Eligible Security. A Registered Reporting ADF ECN that is permitted the use of additional MPIDs for displaying quotes and orders is subject to the same rules applicable to the member's first quotation (*i.e.*, an ECN that displays one or more additional quotes/orders is required to comply with all rules applicable to ECNs in their display of quotes/orders). A Registered Reporting ADF ECN also is prohibited from using an additional MPID to accomplish indirectly what it is prohibited from doing directly through its Primary MPID. In addition, NASD staff retains full discretion to determine whether a bona fide regulatory and/or business need exists for being granted an additional MPID privilege and to limit or withdraw the additional MPID display privilege at any time. The procedures for requesting, and the restrictions surrounding the use of, multiple MPIDs are set forth in IM-4613A-1 (Procedures for Allocation of Multiple MPIDs).

The Commission approved Rule 4613A(b) and IM-4613A-1 on a pilot basis on August 11, 2006.⁵ By its terms, the pilot period expires on January 26, 2007, and NASD has determined to seek an extension of the pilot period until January 25, 2008. NASD believes that such an extension will provide additional time to analyze the use of multiple MPIDs on the ADF. NASD is not proposing any other changes to the pilot as this time.⁶

Rule 5140 and IM-5140

Rule 5140 (Multiple MPIDs for Trade Reporting Facility Participants) provides that any Trade Reporting Facility Participant that wishes to use more than one MPID for purposes of reporting trades to a Trade Reporting Facility must submit a written request to, and obtain approval from, NASD Operations for such additional MPIDs. In addition, IM-5140 (Use of Multiple MPIDs) states that NASD considers the issuance of, and trade reporting with, multiple MPIDs to be a privilege and not a right. A Trade Reporting Facility Participant must identify the purpose(s) and system(s) for which the multiple MPIDs will be used. If NASD determines that the use of multiple MPIDs is detrimental

to the marketplace, or that a Trade Reporting Facility Participant is using one or more additional MPIDs improperly or for other than the purpose(s) identified by the Participant, NASD staff retains full discretion to limit or withdraw its grant of the additional MPID(s) to such Trade Reporting Facility Participant for purposes of reporting trades to a Trade Reporting Facility. NASD believes that Rule 5140 and IM-5140 are necessary to consolidate the process of issuing, and tracking the use of, multiple MPIDs used to report trades to NASD Trade Reporting Facilities.

The Commission approved Rule 5140 on a pilot basis on November 6, 2006.⁷ By its terms, the pilot period expires on January 26, 2007, and NASD has determined to seek an extension of the pilot period until January 25, 2008. NASD believes that such an extension will provide additional time to analyze the use of multiple MPIDs on the Trade Reporting Facilities. NASD is not proposing any other changes to the pilot as this time. NASD proposes to implement the proposed rule change on January 27, 2007.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁸ which requires, among other things, that NASD rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change is consistent with these requirements because it would provide a process by which ECNs (in the case of the ADF) and Trade Reporting Facility Participants (in the case of the Trade Reporting Facilities) can request, and NASD can properly allocate, the use of additional MPIDs for displaying quotes and orders through the ADF or reporting trades to a Trade Reporting Facility.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASD does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

⁵ See Securities Exchange Act Release No. 54307 (August 11, 2006), 71 FR 47551 (August 17, 2006).

⁶ The expiration of the pilot period coincided with the expiration of the current ADF pilot period. See Securities Exchange Act Release No. 53699 (April 21, 2006), 71 FR 25271 (April 28, 2006). In a separate rule filing, NASD proposed to make the ADF rules permanent. See Securities Exchange Act Release No. 55181 (January 26, 2007) (SR-NASD-2007-005). At this time, NASD is seeking to extend only Rule 4613A(b) and IM-4613A-1 for another year.

⁷ See Securities Exchange Act Release No. 54715 (November 6, 2006), 71 FR 66354 (November 14, 2006); see also Securities Exchange Act Release No. 54715A (November 14, 2006), 71 FR 67183 (November 20, 2006) (correcting original approval order).

⁸ 15 U.S.C. 78o-3(b)(6).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change is subject to Section 19(b)(3)(A)(iii) of the Act⁹ and Rule 19b-4(f)(6) thereunder¹⁰ because the proposal: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative prior to 30 days after the date of filing or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.¹¹

NASD has requested that the Commission waive the 30-day operative delay in this case. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the benefits of the multiple MPID pilots to continue uninterrupted. For this reason, the Commission designates the proposed rule change to be operative upon filing with the Commission.¹²

At any time within 60 days of the filing of such proposed rule change the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASD-2007-008 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASD-2007-008. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASD-2007-008 and should be submitted on or before February 27, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Florence E. Harmon,
Deputy Secretary.

[FR Doc. E7-1859 Filed 2-5-07; 8:45 am]

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-55185; File No. SR-NYSEArca-2007-10]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Establishment of a Pilot Program That Increases Position and Exercise Limits for Options on the iShares® Russell 2000® Index Fund

January 29, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 25, 2007, the NYSE Arca, Inc. ("NYSE Arca" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been substantially prepared by NYSE Arca. NYSE Arca has filed the proposal pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6) thereunder,⁴ which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NYSE Arca proposes to amend Rule 6.8 to exempt options on the iShares® Russell 2000® Index Fund ("IWM") from the position and exercise limits provided for under the Rule 6.8 Pilot Program and to increase the standard position and exercise limits for IWM as part of an approximately six-month pilot ("Rule 6.8 IWM Pilot Program").⁵ The text of the proposed rule change is available at NYSE Arca, the Commission's Public Reference Room, and www.nysearca.com.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NYSE Arca included statements concerning the purpose of and basis for the proposed rule change and discussed

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

⁵ Due to the effective date of this filing, the duration of the pilot will actually be slightly less than six months so that the expiration date of the pilot may coincide with similar pilot programs in effect at other options exchanges.

⁹ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁰ 17 CFR 240.19b-4(f)(6).

¹¹ Rule 19b-4(f)(6) also requires the self-regulatory organization to give the Commission notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. NASD has satisfied the five-day pre-filing requirement.

¹² For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹³ 17 CFR 200.30-3(a)(12).

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. NYSE Arca has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Commentary .06 to Rule 6.8 on an approximately six-month pilot basis to exempt options on IWM from the Rule 6.8 Pilot Program. Under the Rule 6.8 Pilot Program, the position and exercise limits for IWM would be reduced on January 22, 2007 from 500,000 to 250,000 contracts. The Exchange now proposes to allow position and exercise limits for options on IWM to remain at 500,000 contracts on a pilot basis, from January 25, 2007 through July 22, 2007.

In June 2005, as a result of a 2-for-1 stock split, the position limit for IWM options was temporarily increased from 250,000 contracts (covering 25,000,000 shares) to 500,000 contracts (covering 50,000,000 shares). At the time of the split, the furthest IWM option expiration date was January 2007. Therefore, the temporary increase of the IWM position limit will revert to the pre-split level (as provided for in connection with the Rule 6.8 Pilot Program) of 250,000 contracts after expiration in January 2007, or on January 22, 2007.

The Exchange believes that a position limit of 250,000 contracts is too low and may be a deterrent to the successful trading of IWM options. Importantly, options on IWM are 1/10th the size of options on the Russell 2000® Index ("RUT"), which are presently listed on both the Chicago Board Options Exchange, Incorporated and the International Securities Exchange, LLC, have a position limit of 50,000 contracts.⁶ Traders on NYSE Arca who trade IWM options to hedge positions in RUT options would likely find a position limit of 250,000 contracts in IWM options too restrictive and insufficient to properly hedge. For example, if a trader held 50,000 RUT options and wanted to hedge that position with IWM options, the trader would need—at a minimum—500,000

IWM options to properly hedge the position. Therefore, the Exchange believes that a position limit of 250,000 contracts is too low and may adversely affect market participants' ability to provide liquidity in this product.

Additionally, IWM options have grown to become one of the largest options contracts in terms of trading volume. For example, the volume in options on IWM set a new single-day record on June 8, 2006, when 760,803 contracts (120,229 calls and 640,574 puts) traded on that day. This record level volume beat the previous single-day high of 727,521 contracts on May 17, 2006.

As a result, the Exchange proposes that options on IWM be subject to position and exercise limits of 500,000 contracts on a pilot basis to run from January 25, 2007 through July 22, 2007.⁷ The Exchange believes that increasing position and exercise limits for IWM options will lead to a more liquid and more competitive market environment for IWM options that will benefit customers interested in this product.

The Exchange would require that each member or member organization that maintains a position on the same side of the market in excess of 10,000 contracts in the IWM option class, for its own account or for the account of a customer, report certain information.⁸ This data would include, but would not be limited to, the option position, whether such position is hedged and if so, a description of the hedge, and if applicable, the collateral used to carry the position. Exchange market-makers (including LMMs) would continue to be exempt from this reporting requirement as market-maker information can be accessed through the Exchange's market surveillance systems. In addition, the general reporting requirement for customer accounts that maintain a position in excess of 200 contracts will remain at this level for IWM options.⁹

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with and furthers the objectives of Section 6(b)(5) of the Act,¹⁰ in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and

open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the forgoing rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹¹ and Rule 19b-4(f)(6) thereunder.¹²

A proposed rule change filed under 19b-4(f)(6) normally may not become operative prior to 30 days after the date of filing.¹³ However, Rule 19b-4(f)(6)(iii)¹⁴ permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver would permit position and exercise limits for options on IWM to continue at 500,000 option contracts for an approximately six-month pilot period. For this reason, the Commission designates the proposed rule change to be effective and operative upon filing with the Commission.¹⁵

¹¹ 15 U.S.C. 78s(b)(3)(A).

¹² 17 CFR 240.19b-4(f)(6).

¹³ 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has decided to waive the five-day pre-filing notice requirement.

¹⁴ *Id.*

¹⁵ For the purposes only of waiving the 30-day operative delay, the Commission has considered the

⁷ Pursuant to Commentary .03 to NYSE Arca Rule 6.9, the exercise limit established under Rule 6.9 for IWM options shall be equivalent to the position limit prescribed for IWM options in Commentary .06 under Rule 6.8. The increased exercise limits would only be in effect during the pilot period, to run from January 25, 2007 through July 22, 2007.

⁸ See NYSE Arca Rule 6.6(b).

⁹ See NYSE Arca Rule 6.6(a).

¹⁰ 15 U.S.C. 78f(b)(5).

⁶ See CBOE Rule 24.4(a) and ISE Rule 2004(a). While options on the RUT are presently not listed on NYSE Arca, the Exchange has looked into the feasibility of listing this product and may propose to do so in a future filing.

At any time within 60 days of the filing of such proposed rule change the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEArca-2007-10 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-NYSEArca-2007-10. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of NYSEArca. 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

proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

submissions should refer to File Number SR-NYSEArca-2007-10 and should be submitted on or before February 27, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁶

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7-1829 Filed 2-5-07; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-55186; File No. SR-NYSEArca-2007-08]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Further Extending the Time Period by Which the Exchange Will Enter Into the NASD/NYSE Arca Options Agreement Pursuant to Rule 17d-2

January 29, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 23, 2007, NYSE Arca, Inc. ("NYSE Arca" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a "non-controversial" rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6) thereunder,⁴ which renders the proposal effective upon filing with the Commission.⁵ The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend its undertaking⁶ to extend for 90 days from the date of this filing the time

period by which the Exchange will enter into an agreement with the National Association of Securities Dealers, Inc. ("NASD") pursuant to Rule 17d-2 under the Act⁷ (the "NASD/NYSE Arca Options Agreement" or "Agreement"). The Agreement would expand the allocation to NASD of regulatory responsibility to encompass all the regulatory oversight and enforcement responsibilities with respect to the options activities of Archipelago Securities, L.L.C. ("Archipelago Securities"),⁸ except for "real-time market surveillance."

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In connection with the Commission's approval of the Exchange's new electronic options trading platform, OX, Archipelago Securities became a routing broker for OX options orders on the Exchange.⁹ In Amendment No. 3 to its filing seeking approval of the OX platform,¹⁰ the Exchange proposed to

⁷ 17 CFR 240.17d-2.

⁸ Archipelago Securities, a wholly-owned subsidiary of Archipelago Holdings, Inc. and a registered broker-dealer, acts as the outbound order router for the NYSE Arca Marketplace (formerly known as the Archipelago Exchange) and, as such, is regulated as an exchange "facility" of NYSE Arca and NYSE Arca Equities, Inc. See 15 U.S.C. 78c(a)(2). As such, any proposed rule change relating to Archipelago Securities' order-routing function must be filed with the Commission, and must operate in a manner that is consistent with the provisions of the Act applicable to exchanges and with NYSE Arca rules.

⁹ See OX Approval Order, *supra* note 6. Pursuant to NYSE Arca Rule 6.1A(a)(15), which was adopted in connection with the establishment of the new OX trading platform, the term "OX Routing Broker" refers to the broker-dealer affiliate of the Exchange that acts as agent for routing orders entered into OX of OTP Holders, OTP Firms and OTP Firms' Sponsored Participants to other Market Centers for execution whenever such routing is permitted by Exchange Rules. Archipelago Securities is the Exchange's only OX Routing Broker.

¹⁰ See OX Approval Order, *supra* note 6.

¹⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

⁵ The Exchange has asked the Commission to waive the 5-day pre-filing notice requirement and the 30-day operative delay. See 15 U.S.C. 78s(b)(3)(A), 17 CFR 240.19b-4(f)(6)(iii).

⁶ See Securities Exchange Act Release No. 54238 (July 28, 2006), 71 FR 44758 (August 7, 2006) (SR-NYSEArca-2006-13) (OX Approval Order). See Securities Exchange Act Release No. 54690 (November 2, 2006), 71 FR 66211 (November 13, 2006) (SR-NYSEArca-2006-79) (90-Day Extension).

clarify that NASD, a self-regulatory organization unaffiliated with the Exchange or any of its affiliates, would continue to carry out oversight and enforcement responsibilities as the Designated Examining Authority designated by the Commission pursuant to Rule 17d-1 under the Act¹¹ with the responsibility for examining Archipelago Securities for compliance with the applicable financial responsibility rules. Furthermore, the Exchange represented that it would enter into the NASD/NYSE Arca Options Agreement pursuant to Rule 17d-2 under the Act,¹² to expand the allocation to NASD of regulatory responsibility to encompass all the regulatory oversight and enforcement responsibilities with respect to the options activities of Archipelago Securities, except for "real-time market surveillance."¹³ The Exchange agreed to submit the NASD/NYSE Arca Options Agreement to the Commission under Rule 17d-2 within 90 days of the date of the Commission's approval of the OX trading platform (July 28, 2006), which was October 26, 2006.¹⁴

On October 20, 2006, the Exchange submitted to the Commission a draft NASD/NYSE Arca Options Agreement and requested a ninety day extension¹⁵ of the October 26, 2006 deadline to January 24, 2007, in order for the Commission to review the proposed NASD/NYSE Arca Options Agreement. Based on the recommendation of the staff, the Exchange hereby seeks a further extension of time, permitting an additional 90 days from the date of this filing to enter into the NASD/NYSE Arca Options Agreement. NYSE Arca believes this will afford the Commission staff sufficient time to review, publish, and take action on the proposal.

The Exchange believes that the requested extension of time is consistent with the Act and the rules and regulations thereunder, will not significantly affect the protection of investors or the public interest, and does not impose any significant burden on competition. The Exchange notes that NASD already carries out oversight and enforcement responsibilities as the Designated Examining Authority designated by the Commission pursuant to Rule 17d-1 with the responsibility for examining Archipelago Securities for compliance with the applicable financial responsibility rules.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,¹⁶ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁷ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest,¹⁸ the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁹ and Rule 19b-4(f)(6) thereunder.²⁰

The Exchange has requested that the Commission waive the 30-day operative

delay, which would make the rule change effective and operative upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Such waiver will allow the Exchange to comply with its undertaking made in connection with the OX Approval Order to submit the NASD/NYSE Arca Options Agreement to the Commission. The Exchange requests a waiver of the 30-day period on the basis that the current deadline for entering into the NASD/NYSE Arca Options Agreement was January 24, 2007 and a delay of 30 days would place the Exchange out of compliance with its undertaking. Extending the compliance date for the Exchange's undertaking by an additional 90 days will provide time for the Exchange to finalize and file the Agreement. For these reasons, the Commission designates the proposal to be effective and operative upon filing with the Commission.²¹

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEArca-2007-08 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-NYSEArca-2007-08. This file number should be included on the subject line if e-mail is used. To help the

²¹ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹¹ 17 CFR 240.17d-1.

¹² 17 CFR 240.17d-2.

¹³ See OX Approval Order, *supra* note 6.

¹⁴ *Id.*

¹⁵ See 90-Day Extension, *supra* note 6.

¹⁶ 15 U.S.C. 78f(b).

¹⁷ 15 U.S.C. 78f(b)(5).

¹⁸ Pursuant to Rule 19b-4(f)(6)(iii) under the Act, the Exchange is required to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has requested that the Commission waive the 5-day pre-filing notice requirement. The Commission has determined to waive this requirement for this filing.

¹⁹ 15 U.S.C. 78s(b)(3)(A).

²⁰ 17 CFR 240.19b-4(f)(6).

Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-NYSEArca-2007-08 and should be submitted on or before February 27, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority:²²

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7-1861 Filed 2-5-07; 8:45 am]

BILLING CODE 8011-01-P

SMALL BUSINESS ADMINISTRATION

Public Federal Regulatory Enforcement Fairness Hearing; Region VI Regulatory Fairness Board

The U.S. Small Business Administration (SBA) Region VI Regulatory Fairness Board and the SBA Office of the National Ombudsman will hold a public hearing on Friday, February 23, 2007, at 10 a.m. The meeting will take place at the State Capitol, Blue Room, NE 23rd & Lincoln Boulevard, Oklahoma City, OK 73105. The purpose of the meeting is to receive comments and testimony from small business owners, small government entities, and small non-profit organizations concerning regulatory enforcement and compliance actions taken by Federal agencies.

Anyone wishing to attend or to make a presentation must contact Darla Booker, in writing or by fax, in order to be placed on the agenda. Darla Booker,

Public Information Officer, SBA, Oklahoma District Office, 301 NW 6th Street, Suite 116, Oklahoma City, OK 73102, phone (405) 609-8012 and fax (202) 401-0944, e-mail: Darla.booker@sba.gov.

For more information, see our Web site at www.sba.gov/ombudsman.

Matthew Teague,

Committee Management Officer.

[FR Doc. E7-1897 Filed 2-5-07; 8:45 am]

BILLING CODE 8025-01-P

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 Columbus Regional Airport Authority for Rickenbacker International 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 that was submitted for Rickenbacker International Airport under Part 150 in conjunction with the noise exposure map, and that this program will be approved or disapproved on or before July 23, 2007.

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 January 25, 2007. The public comment period ends March 25, 2007.

FOR FURTHER INFORMATION CONTACT: Ms. Katherine S. Jones, Federal Aviation Administration, Detroit Airports District Office, 11677 South Wayne Road, Suite 107, Romulus, Michigan, phone number (734) 229-2958. Comments on the proposed noise compatibility program should also be submitted to the above office.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA finds that the noise exposure maps submitted for Rickenbacker International Airport are in compliance with applicable requirements of Part 150, effective January 25, 2007. Further, FAA is

reviewing a proposed noise compatibility program for that airport which will be approved or disapproved on or before July 23, 2007. This notice also announces the availability of this program for public review and comment.

Under 49 U.S.C., section 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.

Columbus Regional Airport Authority submitted to the FAA on December 21, 2006 noise exposure maps, descriptions and other documentation that were produced during the Rickenbacker International Airport FAR Part 150 Noise Compatibility Program Update, December 2006. 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 Columbus Regional Airport Authority. The specific documentation determined to constitute the noise exposure maps includes: Existing (2006) Noise Exposure Map (NEM), Future (2011) NEM with Noise Compatibility Program (NCP), FAR Part 150 Noise Compatibility Program Update contains the required information for Section 47503 and section A150.101 including the following specific references: Current and forecast operations in Appendix J, Table 8; fleet mix and nighttime operations in Appendix J-Table 8,

²² 17 CFR 200.30-3(a)(12).

Appendix C—Tables C-6, C-7, C-8, and C-9; flight patterns in Appendix C—Exhibits C-5, C-6, C-7, C-8, and C-9, and land use in Exhibit 2-3. The FAA has determined that these maps for Rickenbacker International Airport are in compliance with applicable requirements. This determination is effective on January 25, 2007. 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 overlying of noise exposure contours onto the map depicting properties on the surface rests exclusively with the airport operator that submitted those maps, or with those public agencies and planning agencies with which consultation is required under section 47503 of the Act. The FAA has relied on the certification by the airport operator, under section 150.21 of FAR Part 150, that the statutorily required consultation has been accomplished.

The FAA has formally received the noise compatibility program for Rickenbacker International Airport, also effective on January 25, 2007. 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 formal review period, limited by law to a maximum of 180 days, will be completed on or before July 23, 2007.

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
Detroit Airports District Office, 11677 South Wayne, Road, Suite 107, Romulus, Michigan 48174.

Rickenbacker International Airport, 7161 Second Street, Columbus, Ohio 43217.

Columbus Regional Airport Authority, Port Columbus International Airport, 4400 International Gateway, Columbus, Ohio 43219.

Questions may be directed to the individual named above under the heading, **FOR FURTHER INFORMATION CONTACT**.

Issued in Romulus, Michigan, January 25, 2007.

Irene R. Porter,
Manager, Detroit Airports District Office,
Great Lakes Region.

[FR Doc. 07-507 Filed 2-5-07; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Opportunity for Public Comment on Property Release at Auburn-Opelika Airport, Auburn, AL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on land release request.

SUMMARY: Under the provisions of Title 49, U.S.C. Section 47153(c), notice is being given that the FAA is considering a request from Auburn University to waive the requirement that a 3.6-acre parcel of surplus property, located at the Auburn-Opelika Airport, be used for aeronautical purposes.

DATES: Comments must be received on or before March 8, 2007.

ADDRESSES: Comments on this notice may be mailed or delivered in triplicate to the FAA at the following address: Jackson Airports District Office, 100 West Cross Street, Suite B, Jackson, MS 39208-2307.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Auburn University, at the following address: Mr. William T. Hutto, Jr., Executive Director, Auburn University Aviation, 700 Airport Road, Auburn, AL 36830.

FOR FURTHER INFORMATION CONTACT: Keafur Grimes, Program Manager, Jackson Airports District Office, 100 West Cross Street, Suite B, Jackson, MS 39208-2307, (601) 664-9886. The land release request may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA is reviewing a request by Auburn University to release 3.6 acres of surplus property at the Auburn-Opelika Airport. The property will be swapped for a 3.542-acre parcel that is needed for aeronautical purposes. The appraised values of both properties are the same.

Any person may inspect the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**. In addition, any person may, upon request, inspect the request, notice and other documents germane to the request in person at the Auburn-Opelika Airport.

Dated: Issued in Jackson, Mississippi on January 26, 2007.

Rans D. Black,
Manager, Jackson Airports District Office,
Southern Region.

[FR Doc. 07-509 Filed 2-5-07; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Request To Release Airport Property at the Pueblo Memorial Airport, Pueblo, CO

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of Request to Release Airport Property.

SUMMARY: The FAA proposes to rule and invite public comment on the release of land at the Pueblo Memorial Airport under the provisions of Section 125 of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century (AIR 21).

DATES: Comments must be received on or before March 8, 2007.

ADDRESSES: Comments on this application may be mailed or delivered

to the FAA at the following address: Mr. Craig A. Sparks, Manager, Federal Aviation Administration, Northwest Mountain Region, Airports Division, Denver Airports District Office, 26805 E. 68th Ave., Suite 224, Denver, Colorado 80249.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Jerry Brienza, Airport Manager of Operations and Maintenance, Pueblo Memorial Airport, 31201 Bryan Circle, Pueblo, Colorado 81001.

FOR FURTHER INFORMATION CONTACT: Mr. Chris Schaffer, Project Manager, Federal Aviation Administration, Northwest Mountain Region, Airports Division, Denver Airports District Office, 26805 E. 68th Ave., Suite 224, Denver, Colorado 80249.

The request to release property may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA invites public comment on the request to release property at the Pueblo Memorial Airport under the provisions of the AIR 21.

On December 8, 2006, the FAA determined that the request to release property at the Pueblo Memorial Airport submitted by the City of Pueblo, Colorado met the procedural requirements of the Federal Aviation Regulations, Part 155. The FAA may approve the request, in whole or in part, no later than February 28, 2007.

The following is a brief overview of the request:

The Pueblo Memorial Airport requests the release of 0.68 acres of non-aeronautical airport property to the City of Pueblo, Colorado. The purpose of this release is to allow the City to sell the subject land that no longer serves any aeronautical purpose at the airport. The sale of this parcel will provide funds for airport improvements.

Any person may inspect the request by appointment at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

In addition, any person may inspect the application, notice and other documents germane to the application in person at the Pueblo Memorial Airport, 31201 Bryan Circle, Pueblo, Colorado 81001.

Issued in Denver, Colorado on January 31, 2007.

Craig A. Sparks,
Manager, Denver Airports District Office.
[FR Doc. 07-508 Filed 2-5-07; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Aviation Rulemaking Advisory Committee Meeting on Rotorcraft Issues

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of public meeting.

SUMMARY: This notice announces a public meeting of the FAA's Aviation Rulemaking Advisory Committee (ARAC) to discuss rotorcraft issues.

DATES: The meeting is scheduled for Thursday, March 1, 2007, starting at 5 p.m., Eastern Standard Time. Arrange for oral presentations by February 15, 2007.

ADDRESSES: Orange County Convention Center, West Building (Room W221C), 9800 International Drive, Orlando, Florida 32819.

FOR FURTHER INFORMATION CONTACT: Nicanor Davidson, Office of Rulemaking, ARM-207, FAA, 800 Independence Avenue, SW, Washington, DC 20591; Telephone (202) 267-5174; FAX (202) 267-5075; or e-mail at nicanor.davidson@faa.gov.

SUPPLEMENTARY INFORMATION: The referenced meeting is announced pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. app. III). The agenda for the meeting is as follows:

- Opening Remarks.
- Working Group Status Reports—Discussion and Approval of Damage Tolerance, and Fatigue Evaluation of Composite Rotorcraft Structure (proposed regulatory, Advisory Circular material package).
 - FAA Status Report.
 - Performance and Handling Qualities Requirements Notice of Proposed, Rulemaking.
 - Fatigue Tolerance Evaluation of Metallic Structures Notice of Proposed, Rulemaking and Advisory Circular package.
- Other Business.
- Future Meetings.
- Adjourn.

Attendance is open to the interested public, but will be limited to the availability of meeting room space. Please confirm your attendance with the person listed in the **FOR FURTHER INFORMATION CONTACT** section no later than February 15, 2007. Please provide the following information: Full legal name, country of citizenship, and name of your industry association, or applicable affiliation. If you are attending as a public citizen, please indicate so.

For persons participating by telephone, the call-in number is (817) 222-4871; the Passcode is "5359". To insure that sufficient telephone lines are available, please notify the person listed in the **FOR FURTHER INFORMATION CONTACT** section of your intent to participate by telephone by February 15, 2007. Anyone participating by telephone will be responsible for paying long-distance charges.

The public must make arrangements by February 15, 2007 to present oral statements at the meeting. Written statements may be presented to the committee at any time by providing 25 copies to the person listed in the **FOR FURTHER INFORMATION CONTACT** section or by providing copies at the meeting.

If you need assistance or require a reasonable accommodation for the meeting, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Sign and oral interpretation, as well as a listening device, can be made available if requested 10 calendar days before the meeting.

Issued in Washington, DC on January 31, 2007.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

[FR Doc. 07-497 Filed 2-5-07; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

RTCA Special Committee 147: Minimum Operational Performance Standards for Traffic Alert and Collision Avoidance Systems Airborne Equipment

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 147 meeting.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 147: Minimum Operational Performance Standards for Traffic Alert and Collision Avoidance Systems Airborne Equipment.

DATES: The meeting will be held February 15, 2007 from 9 a.m.-5 p.m.

ADDRESSES: The meeting will be held at RTCA, Inc., 1828 L St. NW., Suite 805, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC 20036; telephone (202) 833-9339; fax (202) 833-9434; Web site <http://www.rtca.org>.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 147 meeting. The agenda will include:

- February 15:
- Opening Session (Welcome and Introductory Remarks, Review/Approve meeting agenda for 64th meeting, Review/Approve Summary of Previous Meeting)
- FAA TCAS II Program Office activities and charter update
- SC-147 Activity Reports
- Operations Working Group (OWG) Report
- Surveillance Working Group (SWG) Report
- Requirements Working Group (RWG) Activities
- Closing Session (Other Business, Future Actions/Activities, Date and Place of Next Meeting, Adjourn).

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on January 31, 2007.

Francisco Estrada C.,

RTCA Advisory Committee.

[FR Doc. 07-505 Filed 2-5-07; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

First Meeting, Special Committee 213 Enhanced Flight Vision Systems/ Synthetic Vision System, (EFVS/SVS)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 213, Enhanced Flight Vision Systems/Synthetic Vision System, (EFVS/SVS).

SUMMARY: The FAA is issuing this notice to advise the public of a first meeting of RTCA Special Committee 213, Enhanced Flight Vision Systems/Synthetic Vision System, (EFVS/SVS).

DATES: The meeting will be held February 27-28, 2007 from 9 a.m.-5 p.m.

ADDRESSES: The meeting will be held at RTCA, Inc., 1828 L Street, NW., Suite 805, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC 20036; telephone (202) 833-9339; fax (202) 833-9434; Web site <http://www.rtca.org> for directions.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 213 meeting. The agenda will include:

- February 27-28:
- Opening Plenary Session (Welcome, Introductions, and Administrative Remarks, Agenda Overview).
- Federal Advisory Committee Act, RTCA Overview.
- Select Secretary.
- Review of Terms of Reference.
- FAA Progress to date.
- EFVS/SVS Manufacture briefings (20 minutes per briefing): Potential applications, proposed operational credit.
- Discussion on planned tasks.
- Initial organization of work.
- Initial task assignment for next meeting.
- Closed Plenary Session (Other Business, Establish Agenda, Date and Place of Next Meeting, Adjourn).

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on February 1, 2007.

Francisco Estrada C.,

RTCA Advisory Committee.

[FR Doc. 07-506 Filed 2-5-07; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Highway Safety Improvement Program "Five Percent Reports" Posted on DOT/FHWA Web Site

AGENCY: Federal Highway Administration (FHWA).

ACTION: Notice.

SUMMARY: In accordance with 23 U.S.C. 148, as amended by section 1401 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), States are required to submit reports describing at

least 5 percent of their public road locations exhibiting the most severe safety needs. In addition, these reports shall be made available to the public through the Department of Transportation's Web site. The FHWA is issuing this notice to advise the public that the reports submitted by the States are now available on the FHWA Web site, <http://safety.fhwa.dot.gov/fivepercent/index.htm>.

DATES: These reports were posted on the Web site on December 15, 2006.

ADDRESSES: The reports are posted on the FHWA Web site at: <http://safety.fhwa.dot.gov/fivepercent/index.htm>.

FOR FURTHER INFORMATION CONTACT:

George E. Rice, Jr., Office of Safety Design, (202) 366-9064, Kenneth Epstein, Office of Safety Programs, (202) 366-2157, or Raymond Cuprill, Office of the Chief Counsel, (202) 366-0971, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59; Aug. 10, 2005) amended section 148 of title 23, United States Code, to establish a new "core" Highway Safety Improvement Program (HSIP) that provides funds to State Departments of Transportation to improve conditions at hazardous highway locations and hazardous railway-highway grade crossings on all public roads.

Section 148, as amended, requires the States to submit reports describing at least 5 percent of a State's highway locations exhibiting the most severe safety needs, including an estimate of the potential remedies, their costs, and impediments to their implementation other than cost for each of the locations listed [23 U.S.C. 148(c)(1)(D)]. These reports are intended to help raise public awareness of the highway safety needs and challenges in the States. Section 148 also requires that these "5 Percent Reports" be posted on the Department of Transportation's Web site [23 U.S.C. 148(g)(3)(A)].

Please note that the reports provided by the States represent a variety of methods utilized and various degrees of road coverage. Therefore, the reports should not be compared to one another.

The reports that have been posted on the Web site are protected from discovery and admission into evidence. In accordance with 23 U.S.C. 148(g)(4), information collected or compiled for any purpose directly relating to these

reports shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location identified or addressed in the reports.

The FHWA provided guidance for the States to use in the preparation of these reports. Additional information about the program, including the guidance provided by the FHWA to the States, may be found at: <http://safety.fhwa.dot.gov/safetealu/fiveguidance.htm>.

Authority: 23 U.S.C. 148(c)(1)(D), 23 U.S.C. 148(g)(3)(A), and Section 1401 of Pub Law 109–59.

Issued on: January 26, 2007.

J. Richard Capka,

Federal Highway Administrator.

[FR Doc. E7–1844 Filed 2–5–07; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–02–12423, FMCSA–02–12844, FMCSA–04–19477]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 10 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemptions will provide a level of safety that will be equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective February 25, 2007. Comments must be received on or before March 8, 2007.

ADDRESSES: You may submit comments identified by DOT Docket Management System (DMS) Docket Numbers FMCSA–02–12423, FMCSA–02–12844, FMCSA–04–19477, using any of the following methods.

- **Web site:** <http://dmses.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.

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Instructions: All submissions must include the Agency name and docket numbers for this notice. Note that all comments received will be posted without change to <http://dms.dot.gov>, including any personal information provided. Please see the Privacy Act heading for further information.

Docket: For access to the docket to read background documents or comments received, go to <http://dms.dot.gov> at any time 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. The DMS is available 24 hours each day, 365 days each year. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our 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, etc.). You may review the Department of Transportation's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477; Apr. 11, 2000). This information is also available at <http://dms.dot.gov>.

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., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Exemption Decision

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from

the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds “such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.” The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381. This notice addresses 10 individuals who have requested renewal of their exemptions in a timely manner. FMCSA has evaluated these 10 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Roger C. Carson
Charles R. O’Connell
Henry A. Shelton
William T. Cummins
Dennis R. O’Dell, Jr.
Ronald A. Stevens
Harold D. Jones
Jerry W. Parker
Lester G. Kelley, II
Virgil A. Potts

These exemptions are extended subject to the following conditions: (1) That each individual have a physical examination every year (a) By an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist’s or optometrist’s report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver’s qualification file and retain a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application

for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 10 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (67 FR 68719; 68 FR 2629; 69 FR 71100; 68 FR 8794; 70 FR 8659; 69 FR 64806; 70 FR 2705). Each of these 10 applicants has requested timely renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the standard specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption standards. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by March 8, 2007.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 10 individuals from the vision requirement in 49 CFR 391.41(b)(10). The final decision to grant an exemption to each of these individuals was based on the merits of each case and only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would

otherwise show that any, or all of these drivers, are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Issued on: January 30, 2007.

Pamela M. Pelcovits,

Office Director, Policy Plans and Regulations.

[FR Doc. E7-1845 Filed 2-5-07; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

Solicitation of Applications for Fiscal Year (FY) 2007, Safety Data Improvement Program Grant Opportunity

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice.

SUMMARY: FMCSA announces that it has published an opportunity to apply for FY 2007 Safety Data Improvement Program Grant Opportunity funding on the grants.gov Web site (<http://www.grants.gov>). Section 4128 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users (SAFETEA-LU) establishes the Safety Data Improvement Program Grant Program Opportunity. The legislation supports a discretionary grant program that provides funding for States to improve the quality of crash and inspection truck and bus data reported by the States to FMCSA, as defined in Section 31102 of Title 49, United States Code. Eligible awardees can include a State agency located in one of the fifty States, the District of Columbia, Puerto Rico, Northern Mariana Islands, American Samoa, Guam, and the U.S. Virgin Islands. To apply for funding, applicants must be registered with grants.gov. Registration with grants.gov may take two to five days before the system will allow you to apply for grants using the grants.gov Web site (http://www.grants.gov/applicants/get_registered.jsp). Submit application in accordance with the instructions provided. Applications for grant funding must be submitted electronically to the FMCSA through the grants.gov Web site. The Catalog of Federal Domestic Assistance (CFDA)

number for Safety Data Improvement Program is 20.234.

DATES: FMCSA will initially consider funding for applications submitted by March 31, 2007, by qualified applicants. If additional funding remains available, applications submitted after March 31, 2007 will be considered on a case-by-case basis. Funds will not be available for allocation until fiscal year 2007 appropriations legislation is passed and signed into law. Funding is subject to reductions resulting from obligation limitations or rescissions as specified in SAFETEA-LU or other legislation.

FOR FURTHER INFORMATION CONTACT: Ms. Betsy Benkowski, Federal Motor Carrier Safety Administration, Office of Research and Analysis, Analysis Division, e-mail: betsy.benkowski@dot.gov, telephone: 202-366-5387, 400 7th Street, SW., Suite 8214, Washington, DC 20590. Office hours are from 8 a.m. to 4:30 p.m., ET, Monday through Friday, except Federal holidays.

Issued on January 29, 2007.

John H. Hill,

Administrator.

[FR Doc. E7-1842 Filed 2-5-07; 8:45 am]

BILLING CODE 4910-MC-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-04-17984]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration, DOT.

ACTION: Notice of renewal of exemption; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemption from the vision requirement in the Federal Motor Carrier Safety Regulations for Scott D. Goalder. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that renewing Mr. Goalder's exemption will provide a level of safety that will be equivalent to, or greater than, the level of safety maintained without the exemption for this commercial motor vehicle (CMV) driver.

DATES: This decision is effective February 25, 2007. Comments must be received on or before March 8, 2007.

ADDRESSES: You may submit comments identified by DOT Docket Management System (DMS) Docket Number FMCSA-

04 17984, using any of the following methods.

- *Web site:* <http://dmses.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, S.W., 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.

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Instructions: All submissions must include the Agency name and docket number for this notice. Note that all comments received will be posted without change to <http://dms.dot.gov>, including any personal information provided. Please see the Privacy Act heading for further information.

Docket: For access to the docket to read background documents or comments received, go to <http://dms.dot.gov> at any time 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. The DMS is available 24 hours each day, 365 days each year. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our 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, etc.). You may review the Department of Transportation's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477; Apr. 11, 2000). This information is also available at <http://dms.dot.gov>.

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., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Exemption Decision

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381. This notice addresses Mr. Scott D. Goalder who has requested renewal of his exemption in a timely manner. FMCSA has evaluated his application for renewal on its merits and decided to extend the exemption for a renewable two-year period.

This exemption is extended subject to the following conditions: (1) That Mr. Goalder have a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that he provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that he provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retain a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Mr. Goalder's exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) He 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. 31136(e) and 31315.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two-year periods. In accordance with 49 U.S.C. 31136(e) and 31315, the 1 applicant has satisfied the entry conditions for obtaining an exemption from the vision requirements (69 FR 33997; 69 FR 61292). This 1 applicant has requested timely renewal of the exemption and has submitted

evidence showing that the vision in the better eye continues to meet the standard specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of his record of safety while driving with the vision deficiency over the past two years indicates the applicant continues to meet the vision exemption standards. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for Mr. Goalder for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning Mr. Goalder's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of this driver submit comments by March 8, 2007.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published a notice of final disposition announcing its decision to exempt Mr. Goalder (69 FR 61293; Oct. 15, 2004) from the vision requirement in 49 CFR 391.41(b)(10). The final decision to grant an exemption to this individual was based on the merits of his case and only after careful consideration of the comments received to its notice of application. The notice of application stated in detail the qualifications, experience, and medical condition of this applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that this driver is not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of the driver.

Issued on: January 30, 2007.

Pamela M. Pelcovits,

Office Director, Policy and Program Development.

[FR Doc. E7-1835 Filed 2-5-07; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[FMCSA Docket No. FMCSA-2006-26321]

Qualification of Drivers; Exemption Applications; Diabetes

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt sixty-six individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemptions will enable these individuals to operate CMVs in interstate commerce.

DATES: The exemptions are effective February 6, 2007. The exemptions expire on February 6, 2009.

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., 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, Apr. 11, 2000). This statement is also available at <http://dms.dot.gov>.

Background

On December 13, 2006, FMCSA published a notice of receipt of Federal diabetes exemption applications from sixty-six individuals, and requested comments from the public (71 FR 74986). The public comment period closed on January 12, 2007 and no comments were received.

FMCSA has evaluated the eligibility of the sixty-six applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(3).

Diabetes Mellitus and Driving Experience of the Applicants

The Agency established the current standard for diabetes in 1970 because several risk studies indicated that diabetic drivers had a higher rate of crash involvement than the general population. The diabetes rule provides that "A person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control" (49 CFR 391.41(b)(3)).

FMCSA established its diabetes exemption program, based on the Agency's July 2000 study entitled "A Report to Congress on the Feasibility of a Program To Qualify Individuals With Insulin-Treated Diabetes Mellitus To Operate in Interstate Commerce as Directed by the Transportation Act for the 21st Century." The report concluded that a safe and practicable protocol to allow some drivers with Insulin-Treated Diabetes Mellitus (ITDM) to operate CMVs is feasible. The 2003 notice in conjunction with the November 8, 2005 (70 FR 67777) **Federal Register** Notice provides the current protocol for allowing such drivers to operate CMVs in interstate commerce.

These sixty-six applicants have had ITDM over a range of 1 to 38 years. These applicants report 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). In each case, 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. These drivers report no other disqualifying conditions,

including diabetes-related complications. Each meets the vision standard at 49 CFR 391.41(b)(10).

The qualifications and medical condition of each applicant were stated and discussed in detail in the December 13, 2006, **Federal Register** Notice (71 FR 74986). Because there were no docket comments on the specific merits or qualifications of any applicant, we have not repeated the individual profiles here.

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 applicants to operate CMVs in interstate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered medical reports about the applicants' 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 these applicants 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.

Conditions and Requirements

The terms and conditions of the exemption will be provided to the applicants in the exemption document and they include the following: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not they are related to an episode of hypoglycemia; (3) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized

Federal, State, or local enforcement official.

Discussion of Comments

FMCSA received no comments in this proceeding.

Conclusion

There were no comments to the docket, therefore, based upon its evaluation of the sixty-six exemption applications, FMCSA exempts, Louis T. Aceto, James D. Barton, Lawrence H. Behrens, Joel L. Bogenrief, Timothy W. Brogan, Eddy B. Brown, Kenneth E. Buck, Carolynnda Cain, Roy B. Carter, Bradley D. Case, Jonathan M. Cleek, David D. Collart, Donald L. Cowan, Michael J. Drake, Thomas D. Dyke, Glenn D. Folkers, Anthony L. Gentry, Howard L. Gocke, James S. Goldman, Carol D. Hardin, Jerry Hardy, Michael T. Hartley, David A. Heider, John A. Helm, John A. Herbert, Lester H. Hughes, Gayle E. Jones, Gerald P. Kargus, Christopher A. Knott, Norman L. Krietemeyer, Jerome A. Krupka, James A. Kunkel, Mark W. Lavorini, Jeffrey C. Link, Londell W. Luther, Harry E. Marsh, Joseph C. McMasters, George R. McMullen, James B. Morris, Bradley S. Mowdy, James R. Murphy, Ronald W. Nelson, Vincent A. Palumbo, Kent E. Pelkey, Keith E. Peterson, Victor C. Port, Lee F. Powell, Allen W. Quon, Armand O. Rondeau, Carl J. Satariano, Randall W. Skaggs, Louis L. Sorenson, James L. Spencer, Ronald D. Stewart, Andy L. Strommenger, Richard J. Symonies, Sr., Douglas K. Thompson, Richard L. Thompson, James L. Tjon, Lowell T. Tucker, Shawn P. Wathley, John P. Westbay, John M. White, Jeffrey M. Wood, Christopher T. Worsley, and Fredrick J. Young 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 each 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. 31136(e) and 31315. 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: January 30, 2007.

Pamela M. Pelcovits,

Office Director, Policy Plans and Regulation.

[FR Doc. E7-1839 Filed 2-5-07; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration, DOT.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and its implementing regulations, the Federal Railroad Administration (FRA) hereby announces that it is seeking approval of the following information collection activities. Before submitting these information collection requirements for clearance by the Office of Management and Budget (OMB), FRA is soliciting public comment on specific aspects of the activities identified below.

DATES: Comments must be received no later than April 9, 2007.

ADDRESSES: Submit written comments on any or all of the following proposed activities by mail to either: Mr. Robert Brogan, Office of Safety, Planning and Evaluation Division, RRS-21, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 17, Washington, DC 20590, or Ms. Gina Christodoulou, Office of Support Systems Staff, RAD-43, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 35, Washington, DC 20590. Commenters requesting FRA to acknowledge receipt of their respective comments must include a self-addressed stamped postcard stating, "Comments on OMB control number 2130-New."

Alternatively, comments may be transmitted via facsimile to (202) 493-6230 or (202) 493-6170, or E-mail to Mr. Brogan at robert.brogan@dot.gov, or to Ms. Christodoulou at gina.christodoulou@dot.gov. Please refer to the assigned OMB control number or collection title in any correspondence submitted. FRA will summarize comments received in response to this notice in a subsequent notice and include them in its information collection submission to OMB for approval.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Brogan, Office of Planning and Evaluation Division, RRS-21, Federal

Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 17, Washington, DC 20590 (*telephone:* (202) 493-6292) or Ms. Gina Christodoulou, Office of Support Systems Staff, RAD-43, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 35, Washington, DC 20590 (*telephone:* (202) 493-6139). (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Pub. L. No. 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 provide 60-days notice to the public for comment on information collection activities before seeking approval by OMB. 44 U.S.C. § 3506(c)(2)(A); 5 CFR §§ 1320.8(d)(1), 1320.10(e)(1), 1320.12(a). Specifically, FRA invites interested respondents to comment on the following summary of proposed information collection activities regarding (i) Whether the information collection activities are necessary for FRA to properly execute its functions, including whether the activities will have practical utility; (ii) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (iii) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (iv) ways for FRA to minimize the burden of information collection activities on the public by automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submission of responses). See 44 U.S.C. § 3506(c)(2)(A)(i)-(iv); 5 CFR 1320.8(d)(1)(i)-(iv). FRA believes that soliciting public comment will promote its efforts to reduce the administrative and paperwork burdens associated with the collection of information mandated by Federal regulations. In summary, FRA reasons that comments received will advance three objectives: (i) Reduce reporting burdens; (ii) ensure that it organizes information collection requirements in a "user friendly" format to improve the use of such information; and (iii) accurately assess the resources expended to retrieve and produce information requested. See 44 U.S.C. § 3501.

Below is a brief summary of proposed new information collection activities that FRA will submit for clearance by OMB as required under the PRA:

Title: Causal Analysis and Countermeasures to Reduce Rail-Related Suicides.

OMB Control Number: 2130–New.

Abstract: Pedestrian trespassing on railroad property resulting in serious injury or death is one of the two most serious safety problems—the second being grade crossing collisions—facing the railroad industry and its regulators not only in the United States but also in other countries. It is widely believed in the United States that the reported prevalence and incidence of railway suicide vastly under-represents the nature and extent of the problem. There is no central reporting system within the railroad industry or suicide prevention field that provides verifiable information about how many trespass deaths are accidental versus intentional. Therefore, there are no verifiable measures of the extent of rail-related suicides in this country. While railroad companies must report trespass incidents resulting in serious injury or death to the U.S. Federal Railroad Administration (FRA), injuries or deaths that are ruled by a medical examiner or coroner to be intentional are not reported. Preliminary figures from 2006 indicate there were approximately 500 deaths and 360 injuries reported to FRA—an increase of 100 incidents over the previous year—but suicides are not represented in these numbers. Unverifiable estimates from a number of sources range from 150 to more than 300 suicides per year on the U.S. railways. Like any other incident on the rail system, a suicide on the tracks results in equipment and facility damage, delays to train schedules, and trauma to railroad personnel involved in the incidents. As a result, FRA last year awarded a grant for the first phase of a five-year project to reduce suicides on the rail system to the Railroad Research Foundation (part of the Association of American Railroads) and its subcontractor, the American Association of Suicidology (AAS). In the course of the five-year project, the research project's goals include: (i) A prevalence assessment to determine verifiable numbers of suicides on the rail system; (ii) Development of a standardized reporting tool for industry use; (iii) A causal analysis and root cause analysis of suicide incidents that occur during the grant cycle; and (iv) Design and implementation of suicide prevention measures for the nation's rail system to reduce suicide injuries and deaths. AAS is also receiving a grant from the Federal Transit Administration (FTA) to study suicides on commuter rail lines throughout the country. Consequently, AAS has expanded its

study to include commuter lines as well, and will be using the same collection instruments once they are approved by the Office of Management and Budget.

This collection of information pertains to Phase II of the project, the causal analysis. In order to understand as much as possible about people who intend to die by placing themselves in the path of a train and, therefore, to design prevention strategies, AAS intends to conduct 70 psychological autopsies over the course of two years on people who die by rail-related suicide. Psychological autopsy is a recognized and accepted method for obtaining information about physical, emotional, and circumstantial contributors to a person's death. The 70 psychological autopsies proposed for the FRA and FTA projects will involve interviews with witnesses to these incidents—rail and commuter personnel and members of the public—as well as family members, friends, employers, and co-workers. After conducting a root cause analysis of this data, AAS will then work with the industry to design, pilot test, and implement effective countermeasures with the goal of reducing deaths, injuries, and psychological trauma.

Form Number(s): FRA F 6180.125A; FRA F 6180.125B.

Affected Public: Railroad Personnel, Members of the Public, Affected Family and Friends.

Respondent Universe: 210 Railroad Personnel/Members of the Public/Affected Family and Friends.

Frequency of Submission: On occasion.

Estimated Annual Burden: 60 hours.

Status: Regular Review.

Pursuant to 44 U.S.C. 3507(a) and 5 CFR §§ 1320.5(b), 1320.8(b)(3)(vi), FRA informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Authority: 44 U.S.C. §§ 3501–3520.

Issued in Washington, DC on January 31, 2007.

D.J. Stadler,

Director, Office of Budget, Federal Railroad Administration.

[FR Doc. E7–1826 Filed 2–5–07; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA 2006–26656; Notice 2]

Continental Tire North America, Grant of Petition for Decision of Inconsequential Noncompliance

Continental Tire North America (Continental) has determined that certain tires it produced in 2006 do not comply with S5.5(f) of 49 CFR 571.139, Federal Motor Vehicle Safety Standard (FMVSS) No. 139, “New pneumatic radial tires for light vehicles.” Pursuant to 49 U.S.C. 30118(d) and 30120(h), Continental has petitioned for a determination that this noncompliance is inconsequential to motor vehicle safety and has filed an appropriate report pursuant to 49 CFR Part 573, “Defect and Noncompliance Reports.” Notice of receipt of a petition was published, with a 30-day comment period, on December 26, 2006, in the **Federal Register** (71 FR 77436). NHTSA received no comments.

Affected are a total of approximately 1,369 model 225/70R16 103S Continental and General replacement tires manufactured during October 2006. S5.5(f) of FMVSS No. 139 requires the actual number of plies in the tread area to be molded on both sidewalls of each tire. The noncompliant tires are marked on the sidewall “TREAD 5 PLIES 2 STEEL + 2 POLYESTER + 1 NYLON” whereas the correct marking should be “TREAD 4 PLIES 2 STEEL + 2 POLYESTER.” Continental has corrected the problem that caused these errors so that they will not be repeated in future production.

Continental Tire believes that the noncompliance is inconsequential to motor vehicle safety and that no corrective action is warranted. Continental Tire states,

All other sidewall identification markings and safety information are correct. This noncompliant sidewall marking does not affect the safety, performance and durability of the tire; the tires were built as designed.

The agency agrees with Continental that the noncompliance is inconsequential to motor vehicle safety. The agency believes that the true measure of inconsequentiality to motor vehicle safety in this case is that there is no effect of the noncompliance on the operational safety of vehicles on which these tires are mounted. The safety of people working in the tire retread, repair, and recycling industries must also be considered.

Although tire construction affects the strength and durability, neither the

agency nor the tire industry provides information relating tire strength and durability to the number of plies and types of ply cord material in the tread and sidewall. Therefore, tire dealers and customers should consider the tire construction information along with other information such as the load capacity, maximum inflation pressure, and tread wear, temperature, and traction ratings, to assess performance capabilities of various tires. In the agency's judgment, the incorrect labeling of the tire construction information will have an inconsequential effect on motor vehicle safety because most consumers do not base tire purchases or vehicle operation parameters on the number of plies in a tire.

The agency believes the noncompliance will have no measurable effect on the safety of the tire retread, repair, and recycling industries. The use of steel cord construction in the sidewall and tread is the primary safety concern of these industries. In this case, since the tire sidewalls are marked correctly for the number of steel plies, this potential safety concern does not exist.

In consideration of the foregoing, NHTSA has decided that the petitioner has met its burden of persuasion that the noncompliance described is inconsequential to motor vehicle safety. Accordingly, Continental's petition is granted and the petitioner is exempted from the obligation of providing notification of, and a remedy for, the noncompliance.

Authority: 49 U.S.C. 30118, 30120; delegations of authority at CFR 1.50 and 501.8.

Issued on: January 30, 2007.

Daniel C. Smith,

Associate Administrator for Enforcement.

[FR Doc. E7-1843 Filed 2-5-07; 8:45 am]

BILLING CODE 4910-59-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Ex Parte No. 290 (Sub-No. 4)]

Railroad Cost Recovery Procedures—Productivity Adjustment

AGENCY: Surface Transportation Board.

ACTION: Proposed adoption of a Railroad Cost Recovery Procedures Productivity Adjustment.

SUMMARY: The Surface Transportation Board proposes to adopt 1.017 (1.7%) as the measure of average change in railroad productivity for the 2001–2005

(5-year) averaging period. This value is a decline of 0.2 of a percentage point from the current measure of 1.9% that was developed for the 2000–2004 period.

DATES: Comments are due February 20, 2007.

EFFECTIVE DATE: The proposed productivity adjustment is effective March 1, 2007.

ADDRESSES: Send comments (an original and 10 copies) referring to STB Ex Parte No. 290 (Sub-No. 4) to: Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.

FOR FURTHER INFORMATION CONTACT: Mac Frampton, (202) 565–1541. [Federal Information Relay Service (FIRS) for the hearing impaired: 1–800–877–8339].

SUPPLEMENTARY INFORMATION:

Additional information is contained in the Board's decision, which is available on our Web site <http://www.stb.dot.gov>. To purchase a copy of the full decision, write to, e-mail or call the Board's contractor, ASAP Document Solutions; 9332 Annapolis Rd., Suite 103, Lanham, MD 20706; e-mail asapdc@verizon.net; phone (202) 306–4004. [Assistance for the hearing impaired is available through FIRS: 1–800–877–8339.]

This action will not significantly affect either the quality of the human environment or energy conservation.

Pursuant to 5 U.S.C. 605(b), we conclude that our action will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

Decided: January 30, 2007.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams,

Secretary.

[FR Doc. E7-1818 Filed 2-5-07; 8:45 am]

BILLING CODE 4915-01-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2007–27159]

Amendments to Highway Safety Program Guidelines

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Request for comments, highway safety program guidelines.

SUMMARY: Section 402 of title 23 of the United States Code requires the

Secretary of Transportation to promulgate uniform guidelines for State highway safety programs.

NHTSA is seeking comments on proposed amendments to six (6) of the existing guidelines and one (1) new guideline to reflect program methodology and approaches that have proven to be successful and are based on sound science and program administration. The guidelines the agency proposes to revise are as follows: Guideline No. 4 Driver Education; Guideline No. 5 Non-Commercial Driver Licensing (formerly Driver Licensing); Guideline No. 7 Judicial and Court Services (formerly Traffic Courts); Guideline No. 10 Traffic Records; Guideline No. 17 Pupil Transportation Safety; and Guideline No. 21 Roadway Safety. This notice also proposes a new guideline, Guideline No. 12 Prosecutor Training and Outreach. NHTSA has developed Guideline No. 12 because it has found that conducting educational and training outreach to judges and prosecutors is an important element for law enforcement efforts to be truly effective as a deterrent to dangerous driving behaviors.

NHTSA believes the proposed revisions and additions will provide more accurate, current and detailed guidance to the States. The guidelines will be made publicly available on the NHTSA Web site.

DATES: You should submit your comments early enough to ensure that Docket Management receives them not later than 30 days after publication in the **Federal Register**.

ADDRESSES: You may submit comments in writing to: Docket Management, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590. Alternatively, you may submit your comments electronically by logging onto the Docket Management System (DMS) Web site at <http://dms.dot.gov>. Click on "Help & Information" or "Help/Info" to view instructions for filing your comments electronically. Regardless of how you submit your comments, you should mention the docket number of this document.

FOR FURTHER INFORMATION CONTACT: The following persons at the National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590:

For technical and policy issues:

Susan Kirinich, Research and Program Development, telephone (202) 366–1755, facsimile (202) 366–7149.

For legal issues:

Allison Rusnak, Office of the Chief Counsel, telephone (202) 366–1834, facsimile (202) 366–3820.

SUPPLEMENTARY INFORMATION:**Background**

Section 402 of title 23 of the United States Code requires the Secretary of Transportation to promulgate uniform guidelines for State highway safety programs. As the highway safety environment changes, it is necessary for NHTSA to update the guidelines to provide current information on effective program content for States to use in developing and assessing their traffic safety programs. Each of the proposed revised guidelines reflects the best science available and the real-world experience of NHTSA and the States in developing and managing traffic safety programs. NHTSA updates the guidelines periodically to address new issues and to emphasize program methodology and approaches that have proven to be effective in these program areas.

The guidelines offer direction to States in formulating their highway safety plans for highway safety efforts that are supported with section 402 and other grant funds. The guidelines provide a framework for developing a balanced highway safety program and serve as a tool with which States can assess the effectiveness of their own programs. NHTSA encourages States to use these guidelines and build upon them to optimize the effectiveness of highway safety programs conducted at the State and local levels. The revised guidelines will emphasize areas of national concern and highlight effective countermeasures. The six (6) guidelines NHTSA plans to revise along with the development of (1) one new guideline as a result of this Notice represent the second in a series of revisions to the guidelines. The Agency revised six (6) other guidelines on November 7, 2006 (71 FR 65172): Guideline No. 3 Motorcycle Safety; Guideline No. 8 Impaired Driving; Guideline No. 14 Pedestrian and Bicycle Safety; Guideline No. 15 Traffic Enforcement; Guideline No. 19 Speed Management; and Guideline No. 20 Occupant Protection. As each guideline is updated, it will include a date representing the date of its revision. The guidelines can be found in their entirety in the Highway Safety Grant Management Manual or at <http://www.nhtsa.dot.gov>.

Comments

Interested persons are invited to submit comments in response to this request for comments. Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the

docket number of this document in your comments.

Your comments must not be more than 15 pages long. (49 CFR 553.21). We established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents in your comments. There is no limit on the length of the attachments.

Please submit two copies of your comments, including the attachments, to Docket Management at the address given above under **ADDRESSES**. If you wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail. If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. In addition, you should submit two copies, from which you have deleted the claimed confidential business information, to Docket Management at the address given above under **ADDRESSES**. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation. (49 CFR part 512.)

We will consider all comments that Docket Management receives before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments that Docket Management receives after that date.

You may read the comments received by Docket Management at the address given above under **ADDRESSES**. The hours of the Docket are 9 a.m. to 5 p.m., Monday to Friday, except Federal holidays. You may also see the comments on the Internet. To read the comments on the Internet, take the following steps:

- Go to the Docket Management System (DMS) Web page of the Department of Transportation (<http://dms.dot.gov>).
- On that page, click on "search."
- On the next page (<http://dms.dot.gov/search/>), type in the five-digit docket number shown at the beginning of this document. Example: If the docket number were "NHTSA-2001-12345," you would type "12345."

After typing the docket number, click on "search."

- On the next page, which contains docket summary information for the docket you selected, click on the desired comments. You may download the comments.

Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material.

In consideration of the foregoing, NHTSA proposes to amend the guidelines as follows.

Highway Safety Program Guideline No. 4*Driver Education*

Each State, in cooperation with its political subdivisions and tribal governments, should develop and implement a comprehensive, culturally competent highway safety program, reflective of State demographics, to achieve a significant reduction in traffic crashes, fatalities and injuries on public roads. All programs should be data driven and the highway safety program should include a driver education and training program designed to educate new drivers and provide remedial training for existing drivers. This guideline describes the components that the State driver education program should include and the minimum criteria that the program components should meet.

I. Program Management

Each State should have centralized program planning, implementation and coordination to deliver comprehensive and uniform driver education. Evaluation should be used to revise existing programs, develop new programs and determine progress and success. The State Highway Safety Office (SHSO) should:

- Provide leadership, training and technical assistance to public and private providers of driver education to ensure consistency and quality;
- Identify an entity to provide oversight over driver education programs delivered within the State; and
- Evaluate the effectiveness of the State's driver education program.

II. Legislation, Regulation and Policy

Each State should enact and enforce laws and policies intended to reduce crashes caused by novice drivers. To enhance the effectiveness of driver education, States should:

- Enact Graduated Driver Licensing (GDL) laws that include three stages of licensure, and that place restrictions and sanctions on high-risk driving situations for novice drivers (*i.e.*, nighttime driving restrictions, passenger restrictions, zero tolerance, and required safety belt use);

- Ensure that the GDL restrictions and sanctions for GDL licensure are included, adapted as necessary and enforceable for motorcycle operators;
- Develop driver education standards and guidelines to which all driver education programs must adhere to satisfy licensing requirements for novice drivers; and

- Ensure that completion of driver education programs will not reduce time required for novice drivers to proceed through a GDL system.

III. Enforcement Program

Components of a State driver education enforcement program should include:

- Visible and well-publicized law enforcement of the components of the GDL and zero tolerance laws;
- Licensing sanctions for violations of these provisions;
- State agency oversight of driver education programs to ensure delivery of approved state curriculum; and
- Administrative or financial penalties for programs in non-compliance.

IV. Driver Education and Training Program

A driver education program should be available to all youths of licensing age, and include the following criteria:

- The program is taught by instructors certified by the State as qualified for these purposes; and
- It provides each student with practice driving and instruction in at least the following:
 - Basic driving techniques including: starting, stopping, turning and basic interaction in controlled environments in light and moderate traffic;
 - Advanced driving techniques including: techniques for handling emergencies, such as skid control, braking in emergencies, and oversteering to avoid a crash;
 - Rules of the road, and other State laws and local motor vehicle laws and ordinances;
 - Critical vehicle systems and sub-systems requiring preventive maintenance;
 - Vehicle and highway features:
 - That aid the driver in avoiding crashes;
 - That protect the driver and passengers in crashes; and

- That maximize the care of the injured.

- Signs, signals, and highway markings and highway design features that require understanding for safe operation of motor vehicles;
- Differences in characteristics of urban and rural driving including safe use of modern expressways;
- Safe Driving Practices including: making good driver decisions; use of occupant restraints; not driving under the influence; and dealing with fatigue, distractions and aggressive drivers; and
- Sharing the roadway with other users, especially pedestrians, bicycles, and motorcycles, who are more physically vulnerable to injury or death in the event of a crash.

Each State should also ensure:

- That research and development programs including adequate research, development and procurement of practice driving facilities, simulators, and other similar teaching aids for both school and other driver training use;
- There is a program for adult driver training and retraining; and
- Commercial driving schools are licensed and commercial driving instructors are certified in accordance with specific criteria adopted by the State.

V. Communication Program

States should develop and implement communication strategies directed at supporting policy and program elements. The SHSO should develop a statewide communications plan and campaign that:

- Informs the public about State GDL laws;
- Identifies audiences at particular risk and develops appropriate messages;
- Provides culturally competent materials;
- Informs parents/guardians about the role of supervised driving and the State's GDL law;
- Informs novice drivers about underage drinking and zero tolerance laws (in effect in all 50 States and the District of Columbia), such as including information in manuals for new drivers and including a question about the topic on the written test for a learner's permit;
- Informs the public on the role of parental monitoring/involvement; and
- Informs the public about State guidelines and regulation of driver education.

VI. Program Evaluation and Data

The SHSO should develop a comprehensive evaluation program to measure progress toward established project goals and objectives and optimize the allocation of limited

resources. The State should promote effective evaluation by:

- Supporting the analysis of police accident reports;
- Encouraging, supporting and training localities in process, impact and outcome evaluation of local programs;
- Evaluating the use of program resources and the effectiveness of existing countermeasures for the general public and high-risk populations; and
- Ensuring that evaluation results are used to identify problems, plan new programs and improve existing programs.

Highway Safety Program Guideline No. 5

Non-Commercial Driver Licensing

Each State, in cooperation with its political subdivisions and tribal governments, should develop and implement a comprehensive, culturally competent highway safety program, reflective of State demographics, to achieve a significant reduction in traffic crashes, fatalities and injuries on public roads. Each state should have a driver licensing program ensuring that every driver is adequately trained and tested, evaluated for physical and mental fitness, when appropriate, and possesses only one driver license and driver record.

I. Program Management

Each State should have a licensing agency that ensures only those qualified to operate motor vehicles obtain a valid State driver license applicable to vehicles they are authorized to operate. This agency should:

- Ensure that drivers are appropriately licensed for the vehicles they operate;
- Ensure that driver license applicants are appropriately screened for correct identity;
- Ensure that documents used to establish identity are appropriately analyzed;
- Take appropriate measures to ensure that applicants are not licensed in other states;
- Provide driver licenses that are tamper resistant to prevent fraudulent use of the document; and
- Provide driver licenses that clearly indicate if the driver is under 21 years of age.

II. Legislation, Regulation and Policy

A model driver licensing program should provide, at a minimum, that each driver:

- Hold only one license, which identifies the type(s) of vehicle(s) he or she is authorized to operate;

- Submits acceptable proof of identity in applying for an original, renewal or re-application of a driver's license;

- Passes an initial examination demonstrating his or her:

- Ability to operate the class(es) of vehicle(s) for which he or she is licensed;

- Ability to read and comprehend traffic signs and symbols;

- Knowledge of laws relating to traffic (rules of the road) safe driving procedures, vehicle and highway safety features, emergency situations that arise in the operation of and other driver responsibilities; and

- Visual acuity, which must meet or exceed State guidelines.

- Renews his/her license, in-person, periodically.

A model Graduated Driver Licensing (GDL) law should require each driver under age 18 to participate in a GDL System, a three-stage system that incrementally adds privileges for novice drivers as they gain experience driving. The three-stage process should include the following progressive steps:

- First, the young driver receives a learner's permit that requires completion of both a minimum of 6 months driving without an at-fault crash or traffic violation and supervised driving practice in which the supervising licensed driver is age 21 or older;

- Next, the young driver receives an intermediate, or provisional, permit that requires completion of a minimum of 6 months driving without an at-fault crash or traffic violation and imposes nighttime driving restrictions and teenage passenger restrictions; as well as adherence to State safety belt use requirements;

- The third and final stage is full licensure (with maximum blood alcohol limits of .02 until age 21); and

- The driver should receive driver education that meets standards set by the State that are related to the state driving manual and driving test and, to the greatest degree possible, increases the safety performance of new drivers. (Under no circumstance should driver education reduce the time required to pass through the GDL system.)

III. Driver Fitness

Each State should have:

- A system that provides medical evaluation of persons whom the driver licensing agency has reason to believe has mental or physical conditions that might impair their driving ability;

- A procedure that will keep the driver license agency informed of all licensed drivers who are currently applying for or receiving any type of tax,

welfare or other benefits or exemptions for the blind or visually impaired beyond established state vision requirements;

- A medical advisory board or equivalent allied health professional unit composed of qualified personnel to advise the driver license agency on medical criteria and vision guidelines; and

- Protection from civil liability for individuals who report, in good faith, potentially at-risk drivers to the licensing authority.

IV. Motorcycle Operator Licensing

States should require every person who operates a motorcycle on public roadways to pass an examination designed especially for motorcycle operation and to hold a license endorsement specifically authorizing motorcycle operation. Each State should have a motorcycle licensing system that requires:

- A motorcycle operator's manual that contains essential information on reducing the risks associated with riding a motorcycle;

- A motorcycle license examination, including knowledge and skill tests, and State licensing medical criteria;

- License examiner training specific to testing of motorcyclists;

- Motorcycle license endorsement;

- Cross referencing of motorcycle registrations with motorcycle licenses to identify motorcycle owners who do not have the proper endorsement;

- Motorcycle license renewal requirements;

- Learner's permits issued for a period of at least 90 days and the establishment of limits on the number and frequency of learner's permits issued per applicant to encourage each motorcyclist to get full endorsement; and

- Penalties for violation of motorcycle licensing requirements.

V. Driver Records, Data and Evaluation

Each State should maintain a driver control record on each licensed driver that includes identification information, principle residence, and driver history. In addition to the historical aspect, the traffic records system should be conducive to:

- Timely, accurate, and complete entry of data into the system;

- Ease of accessibility to the system to give timely, accurate and complete information on drivers for users of the system. Functional users may include courts, administrative/legal personnel, motor vehicle administration, law enforcement, research and development and private citizens etc.;

- Real-time availability of data available to provide DMV personnel and other system users with a rapid-response system for the information requested on standard and priority requests for eligibility of an applicant for issuance of a driver license;

- Ad-hoc reporting for statistical and other research purposes;

- Real time identification of problem drivers for enforcement or other operational countermeasures; and

- Medical restriction or suspension/revocation information.

Each license should be issued for a specific term, and should be renewed to remain valid. At time of issuance or renewal each driver's record should be checked.

There should be a driver improvement program to identify problem drivers for record review and other appropriate actions designed to reduce the frequency of their involvement in traffic crashes or violations.

The non-commercial driver licensing program should be periodically evaluated by the State. The evaluation should, among other issues, attempt to ascertain the extent to which driving without a license occurs.

VI. Communication Program

States should develop and implement communication strategies directed at supporting policy and program elements. The SHSO should develop a statewide communications plan and campaign that:

- Informs the public about State licensing requirements;

- Identifies audiences at particular risk and develops appropriate messages;

- Provides information about driver fitness requirements and mental or physical conditions that might impair driving abilities;

- Informs motorcycle registrants of the need to obtain an appropriate motorcycle endorsement or license;

- Provides culturally competent materials;

- Informs parents/guardians about the role of supervised driving and the State's GDL law; and

- Informs novice drivers about underage drinking and zero tolerance laws (in effect in all 50 States and the District of Columbia), such as including information in manuals for new drivers and including a question about the topic on the written test for a learner's permit.

Highway Safety Program Guideline No. 7

Judicial and Court Services

Each State, in cooperation with its political subdivisions and tribal

governments, should develop and implement a comprehensive, culturally competent highway safety program, reflective of State demographics, to achieve a significant reduction in traffic crashes, fatalities and injuries on public roads. Each State should have a comprehensive judicial services program as part of its overall highway safety program. Such judicial services programs should support courts in the competent and effective adjudication of both administrative and statutory law cases. Judicial services programs should, consistent with ethical and professional requirements, promote judicial outreach activity to reduce traffic crashes and resultant fatalities and injury. This document describes the four key components of state judicial services programs and the specific activities needed to implement those components. Additional information on judicial outreach is addressed in Highway Safety Guideline No. 8, Impaired Driving.

I. Program Management

Program planning, implementation, and coordination are essential for achieving and sustaining State traffic enforcement and adjudication functions. The State Highway Safety Office (SHSO), in conjunction with State and local court administrators, chief judges, and judicial educators should ensure that State traffic safety programs are well planned and coordinated. State SHSOs should provide leadership, training and technical assistance to:

- Implement and integrate regular traffic law and safety-related judicial education in judicial education programs for all judges;
- Generate broad-based support for traffic safety programs by informing all stakeholders, including court administrators and the judges they serve, of comprehensive highway safety plans for traffic enforcement;
- Coordinate traffic safety programs to include Commercial Motor Vehicle (CMV) safety activities such as the Motor Carrier Safety Assistance Program;
- Promote the dissemination of NHTSA-supported judicial traffic safety and education courses through coordination with State judicial educators and nationally based institutions such as the National Center For State Courts, National Council of Juvenile and Family Court Judges, and the National Judicial College; and
- Support the development and ethical implementation of judicial education programs for state, local, administrative, and tribal courts that

will accomplish the following objectives:

- Utilize enabling legislation and regulations to provide the public with effective and efficient court services;
- Provide the impetus for judges to be thoroughly educated on all facets of motor vehicle law;
- Develop cooperative relationships with other government branches, agencies, and entities, as well as community organizations, and traffic safety stakeholders; and
- Establish qualitative and quantitative performance measures by which the delivery of services can be evaluated.

II. Resource Management

The SHSO should coordinate with the courts to develop and maintain comprehensive management plans that identify and deploy those resources necessary to effectively provide efficient traffic law-related services to the public. The resource management plans should include specific components concerning the allocation of funding, personnel, and facilities. Comprehensive management plans should include:

- Periodic assessment of traffic law-related service demands and the resources needed to serve the needs of the public;
- Development of traffic law-related court service resource management plans that address budgetary requirements, staff allocation, and facilities requirements; and
- Employment of efficient accounting and data processing systems to facilitate prompt and accurate generation, retrieval, and sharing of information and records.

III. Training and Education

Training and education are essential to support and maintain the delivery of traffic law-related services by the judicial branch of government. To be effective adjudicators, and serve the needs of the public, judges must receive regular education and training of the highest caliber. Judicial education and training should be promoted and, where appropriate, presented by the SHSO or other training entities with experienced faculties in the area of traffic safety, including law and procedure. Judicial education and training should be:

- Adequately funded and where possible compulsory as a requirement to maintaining service in office;
- Provided by State or nationally based judicial education and training entities with experienced faculties in area of traffic-related law and procedure;

- Inclusive of education components consistent with models developed by the American Bar Association, for example the Code of Judicial Ethics and the Rules of Professional Conduct;
- Inclusive of case management components so as to foster productivity and the prompt and efficient disposition of cases;
- Specialized as to curriculum so as to address the needs of both statutory and administrative judges as well as hearing officers; and
- Assessed regularly so as to insure that education components address specialized traffic enforcement skills, techniques, or programs such as DWI/Drug Courts.

IV. Data and Evaluation

The SHSO, in conjunction with court administrators should develop a comprehensive evaluation program to measure progress toward established project goals and objectives. Utilizing comprehensive evaluation programs, the SHSO should effectively plan and implement statewide, county, local, and tribal traffic safety programs. Such programs should have as objectives the optimization of limited resource allocation and should measure the impact of traffic enforcement on court resources. Data that are collected should include case disposition summaries and reports, and other relevant workload information. Court administrators should:

- Include evaluation components in initial program planning so as to ensure that data will be available for evaluation;
- Insure that adequate resources and personnel are allocated to program planning and data collection;
- Regularly report results of program evaluations to project and program managers, legislative decision-makers, and to the public;
- Utilize results to guide future activities and to assess in justifying resources to governing bodies;
- Conduct surveys to assist in determining court and program effectiveness, including surveys that measure public knowledge and attitudes about court programs;
- Evaluate the effectiveness of services provided in support of priority safety programs; and
- Maintain and report court generated data to appropriate repositories through the use of effective records programs that:
 - Provide records rapidly and accurately;
 - Provide routine compilations of data for management use in the decision-making process;

- Provide data for operational planning and execution;
- Interface with a variety of data systems, including statewide traffic safety records systems that are accessible by other State and local governmental entities, agencies and courts;
- Provide for the evidentiary integrity of information so as to insure its admissibility in subsequent court and administrative hearing proceedings; and
- Work with court administrators to use the traffic court functional standards that are available through the National Center for State Courts.

Highway Safety Program Guideline No. 10

Traffic Records

Each State, in cooperation with its political subdivisions and tribal governments, should implement a traffic records system (TRS) to support highway and traffic safety decision making and long-range transportation planning. A complete TRS is necessary for identifying the locations and causes of crashes, for planning and implementing countermeasures, for operational management and control, and for evaluating highway safety programs and improvements. This guideline describes the components that a State TRS program should include and the criteria that the program components should meet.

I. Traffic Records System Information Components

A TRS has been defined as a virtual set of independent real systems (*e.g.*, driver conviction records, crash records, roadway data, etc.), which collectively form the information base for the management of the highway and traffic safety activities of a State. An updated concept of a TRS encourages States to take a global approach and work toward compiling data into a unified, accessible resource. Sharing and integrating data makes such a system possible, without necessarily duplicating costly and time-consuming tasks such as data entry. Achieving integrated access to data without bringing all the data into a single database is a goal of the TRS. The traffic records system should consist of the following major components:

A. The Crash Data Component documents the time, location, environment, and characteristics (*e.g.*, sequence of events, rollover, etc.) of a crash. It contains basic information about every reportable (as defined by State statute) motor vehicle crash on any public roadway in the State. Through links to other TRS components, the

Crash Data Component identifies the roadways, vehicles, and people (*e.g.*, drivers, occupants, pedestrians) involved in the crash. These data help to document the consequences of the crash (*e.g.*, fatalities, injuries, property damage, and violations charged), support the analysis of crashes in general, and the analysis of crashes within specific categories defined by:

- Person characteristics (*e.g.*, age or gender);
- Location characteristics (*e.g.*, roadway type or specific intersections);
- Vehicle characteristics (*e.g.*, condition and legal status); and
- The interaction of various components (*e.g.*, time of day, day of week, weather, driver actions, pedestrian actions, etc.)

B. The Roadway Data Component includes roadway location, identification, and classification, as well as a description of a road's total physical characteristics and usage. These attributes are tied to a location reference system. Linked safety and roadway information are valuable components that support a State's construction and maintenance program development. This roadway information should be available for all public roadways, including local roads.

The State Department of Transportation (State DOT) typically has custodial responsibility for the Roadway Data Component. This component includes various enterprise-related files such as:

Roadway Inventories

- Pavement
- Bridges
- Intersection

Roadside Appurtenances

- Traffic control devices
- Guard rails
- Barriers

Traffic

- VMT
- Travel by vehicle type

Other

- GIS
- LRS
- Project inventory

C. The Driver Data Component includes information about the State's population of licensed drivers as well as information about convicted traffic violators who are not licensed in that State. Information about persons licensed by the State should include: personal identification, driver license number, type of license, license status, driver restrictions, convictions for traffic violations in the State and the history of

convictions for critical violations in prior States, crash history (whether or not cited for a violation), driver improvement or control actions, and driver education data.

Custodial responsibility for the Driver Data Component usually resides in a State Department or Division of Motor Vehicles (DMV). Some commercial vehicle operator-related functions may be handled separately from the primary custodial responsibility for driver data. The structure of driver databases typically is oriented to individual "customers."

D. The Vehicle Data Component includes information on the identification and ownership of vehicles registered in the State. Data should be available regarding vehicle make, model, year of manufacture, body type, and vehicle history (including odometer readings) in order to produce the information needed to support analysis of vehicle-related factors that may contribute to a State's crash experience. Such analyses would be necessarily restricted to crashes involving in-State registered vehicles only.

Custodial responsibility for the vehicle data usually resides in a State Department or Division of Motor Vehicles. Some commercial vehicle-related functions may be handled separately from the primary custodial responsibility for all other vehicle data. The structure of vehicle databases typically is oriented to individual "customers."

E. The Citation/Adjudication Data Component, which identifies citation/arrest and adjudication activity of the State, includes information that tracks a citation from the time of its distribution to a law enforcement officer, through its issuance to an offender, its disposition and the posting of conviction in the driver history database. Case management systems, law enforcement records systems, and DMV driver history systems should share information to support:

- Citation tracking;
- Case tracking;
- Disposition reporting; and
- Specialized tracking systems for specific types of violators (*e.g.*, DUI tracking systems).

Information should be available to identify the type of violation, location, date and time, the enforcement agency, court of jurisdiction, and final disposition. Similar information for warnings and other motor vehicle incidents that would reflect enforcement activity are also useful for highway safety purposes and should be available at the local level.

The information should be used for determining the level of enforcement activity in the State, for accounting and controlling of citation forms, and for detailed monitoring of court activity regarding the disposition of traffic cases.

Custodial responsibility for the multiple systems that make up the Citation/Adjudication Data Component should be shared among local and State agencies, with law enforcement, courts, and the State Division or DMV sharing responsibility for some files (*e.g.*, portions of the citation tracking system). State-level agencies should have responsibility for managing the law enforcement information network (*e.g.*, a criminal justice information agency), for coordinating and promoting court case management technology (*e.g.*, an administrative arm of the State Supreme Court), and for assuring that convictions are forwarded to the DMV and actually posted to the drivers' histories (*e.g.*, the court records custodian and the DMV).

F. The Statewide Injury Surveillance System (SWISS) Data Component typically incorporates pre-hospital (EMS), trauma, emergency department (ED), hospital in-patient/discharge, rehabilitation and morbidity databases to track injury causes, magnitude, costs, and outcomes. Often, these systems rely upon other components of the TRS to provide information on injury mechanisms or events (*e.g.*, traffic crash reports). The custodial responsibility for various files within the SWISS typically is distributed among several agencies and/or offices within a State Department of Health.

This system should allow the documentation of information that tracks magnitude, severity, and types of injuries sustained by persons in motor vehicle related crashes. Although traffic crashes cause only a portion of the injuries within any population, they often represent one of the more significant causes of injuries in terms of frequency and cost to the community. The SWISS should support integration of the injury data with police reported traffic crashes and make this information available for analysis to support research, public policy, and decision making.

II. Traffic Records System Information Quality

A State's traffic records information should be maintained in a form that is of high quality and readily accessible to users throughout the State. Performance-based measures should be quantifiable and should be established for each attribute of each component, *e.g.*, the amount of elapsed time from initial data collection until entry in the

traffic records system, the level of accuracy and completeness the data must meet in order to pass edit and validation checks during data entry, the level of adoption of various standards and guidelines, etc. The definition of each performance-based measure and its relative significance may vary for each of the State's TRS data components.

The quality of a State's traffic records information is determined by the following attributes:

- **Timeliness**—information should be available within a timeframe to be meaningful for effective analysis of a State's highway safety programs, and for efficient conduct of each custodial agency's business and mission;
- **Consistency**—the information should be consistent with nationally accepted and published guidelines and standards (*e.g.*, MMUCC, NEMSIS), and data should be collected on uniform forms that are prescribed by the State for use by all jurisdictions;

- **Completeness**—the information should be complete in terms of all the people, events, things, or places represented by the records in the various components, and it should be complete in terms of all the variables required to be collected on those people, events, things, or places; The information should be accurate and should be achieved by the application of commonly used quality control methods; Inaccurate data should be returned to the reporting source for correction;
- **Accuracy**—the information should be accurate as determined by quality control methods to ensure accurate information is contained on individual reports (*e.g.*, validity and consistency checks in the data capture and data entry processes and feedback to jurisdictions submitting inaccurate reports);

- **Accessibility**—the information should be readily and easily accessible to the principal users of the traffic records system components, including both direct access (automated) and the ability to obtain periodic (standard) reports as well as reports and data by special request; and
- **Data Integration**—information in any traffic records system component should be capable of being linked with any other component through the use of common data variables where possible and permitted by law.

III. Uses of a Traffic Records System

The purpose of a State's traffic records system is to establish a base of useful information and data. This includes operational personnel, program managers, program analysts,

researchers, policy makers, and the public. To be of optimal value, the system should provide for the efficient flow of data to support a broad range of traffic safety and other activities, in particular the following:

- **Problem Identification**

Problem identification is the process of determining the locations and causes of crashes and their outcomes and of selecting those sites and issues that represent the best opportunity for highway safety improvements;

- **Research and Program Development**

The traffic records system should provide information to identify safety problems, trends, and baseline measures essential for data-driven planning decisions;

- **Policy Development**

The traffic records system should provide information to permit informed decisions in setting highway safety policy, including State Highway Safety Plans.

- **Analytic Resources Access**

Data users, and decision makers in particular, should have access to resources including skilled analytic personnel and easy to use software tools to support their needs. These tools should be specifically designed to meet needs such as addressing legislative issues (barriers as well as new initiatives), program and countermeasure development, management, and evaluation, as well as meeting all reporting requirements.

- **Public Access to Data**

The TRS should be designed to give the public or general non-government user reasonable access to data files, analytic results, and resources, but still meet State and Federal privacy and security standards.

- **Data Use and Improvement**

The TRS should be viewed as more than a collection of data repositories, and as a set of processes, methods, and component systems. Knowledge of how these data are collected and managed, along with where the bottlenecks and quality problems arise, is critical to users understanding proper ways to apply the data.

IV. Traffic Records System Management

The development and management of traffic safety programs is a systematic process with the goal of reducing the number and severity of traffic crashes. This data-driven process ensures that all opportunities to improve highway safety are identified and considered for implementation. This process can be achieved through the following initiatives:

Traffic Records Coordinating Committee (TRCC)

The State should form a TRCC whose membership includes, among others, managers, collectors, and users of traffic records and public health and injury control data systems. The TRCC should have the authority to approve the State's Strategic Plan for Traffic Records Improvements. The TRCC should also:

- Represent all stakeholders; Each stakeholder must have support from the top management of the representative agency;
- Have the authority to review any of the State's highway safety data and traffic records systems and to review any proposed changes to such systems prior to implementation;
- Provide a forum for the discussion of highway safety data and traffic records issues and report on any such issues to the agencies and organizations in the State that create, maintain and use highway safety data and traffic records;
- Represent the interests of the agencies and organizations within the traffic records system to outside organizations; and
- Review and evaluate new technologies to keep the highway safety data and traffic records system up-to-date.

Strategic Planning

The TRS should support the traffic safety strategic planning process that helps State and local data owners identify and support their overall traffic safety program needs and addresses the changing needs for information over time.

Data Integration

States should integrate data and expand their linkage opportunities to track traffic safety events among data files. Data integration should be addressed through the following:

- Create and Maintain a System Inventory;
- Support Centralized Access to Linked Data;
- Meet Federal Reporting Requirements such as FARS, MCMIS/ SafetyNet, HPMS, and others;
- Support Electronic Data Sharing; and
- Adhere to State and Federal Privacy and Security Standards.

Highway Safety Program Guideline No. 12

Prosecutor Training and Outreach

Each State, in cooperation with its political subdivisions and tribal governments, should develop and

implement a comprehensive, culturally competent highway safety program, reflective of State demographics, to achieve a significant reduction in traffic crashes, fatalities and injuries on public roads. All programs should include a comprehensive prosecutorial training and outreach program which should support prosecutors in the competent, effective and ethical prosecution of both criminal and administrative cases. Moreover, prosecutorial training and outreach programs should be consistent with both ethical and professional requirements as well as training and technical assistance needs of prosecutors and should promote prosecutorial outreach activity to reduce traffic crashes and resulting fatalities and injuries. This guideline describes the key components that a State outreach program should include and the minimum criteria that the program components should meet. Additional information on prosecutor outreach is addressed in Highway Safety Guideline No. 8, Impaired Driving.

I. Program Management

Program planning, implementation and coordination are essential for achieving and sustaining high quality State traffic enforcement and prosecution functions. The State Highway Safety Office (SHSO), in conjunction with State prosecutor associations, Prosecutor Coordinators and Traffic Safety Resource Prosecutors (TSRP) should ensure that State traffic safety programs are comprehensive, well planned and coordinated. State SHSOs should provide leadership, training and technical assistance to their State's prosecutors. In doing so, the SHSOs should:

- Communicate and coordinate with State prosecutor coordinators and TSRPs regarding comprehensive highway safety plans for traffic enforcement so they can generate broad-based prosecutorial support for traffic safety programs;
- Assist State prosecutor coordinators and TSRPs in implementing regular traffic law and safety-related prosecutor training programs;
- Provide support and assistance to State prosecutor coordinators and TSRPs for training and technical assistance that prosecutors need to effectively prosecute impaired driving and other traffic related cases; and
- Evaluate the delivery of training and technical assistance through established qualitative and quantitative measures.

II. Resource Management

The SHSO should assist and encourage prosecutors to develop and maintain comprehensive management plans that identify and deploy those resources necessary to provide efficient traffic law-related services that include:

- Periodic assessment of traffic law-related service demands and the resources needed to serve the needs of prosecution and the public.
- Development of traffic law-related prosecutor resource management plans that address budgetary requirements, staff allocation, and facilities requirements.
- Employment of efficient accounting and data processing systems to facilitate prompt and accurate generation, retrieval, and sharing of information and records.

III. Training and Technical Assistance

Training and technical assistance are essential to support the delivery of high quality traffic law-related prosecution. To effectively serve the needs of law enforcement, victims and the public, prosecutors must receive regular, consistent training and have available to them individuals who can provide technical assistance in a competent and efficient manner. To this end, the SHSO should:

- Encourage the implementation of the TSRP program;
- Provide Prosecutor Coordinators and TSRPs with advanced education and training in area of traffic-related law and procedure so as to enhance delivery of training and technical assistance to local prosecutors, law enforcement officers, advocacy groups, and other traffic safety professionals;
- Assist and support prosecutor coordinators in providing traffic law and safety-related training programs to the State's prosecutors;
- Include development and delivery of specialized curriculum to address the needs of both experienced and inexperienced prosecutors handling complex impaired driving and other traffic prosecutions;
- Encourage consistent training and technical assistance through the prosecutor coordinators to address high turnover rates in prosecutor offices; and
- Include case management components to foster prompt and effective prosecution of traffic cases.

IV. Data and Evaluation

The SHSO, in conjunction with the prosecutor coordinator and the TSRP, should develop a comprehensive evaluation program to measure progress toward established project goals and

objectives. Utilizing comprehensive evaluation strategies, the SHSO should effectively plan and implement statewide, county, and local traffic safety training programs. Collected data should include training programs attended, technical assistance requested and received, and other workload information. The evaluation results should be used to maximize limited resources and measure the impact of such training and assistance on prosecutorial resources and the ability to effectively prosecute traffic cases. The SHSO should make sure that Prosecutor Coordinators or TSRPs:

- Include evaluation components in initial program planning to ensure that data will be available for analysis;
- Ensure that adequate resources and personnel are allocated to program planning and data collection;
- Regularly report results of program evaluations to project and program managers, and legislative decision-makers;
- Utilize results to guide future activities and assess resource allocation; and
- Evaluate the effectiveness of services provided in support of priority traffic safety programs.

Highway Safety Program Guideline No. 17

Pupil Transportation Safety

Each State, in cooperation with its political subdivisions and tribal governments, should establish a State highway safety program for pupil transportation safety including the identification, operation, and maintenance of buses used for carrying students; training of passengers, pedestrians, and bicycle riders; and administration. The purpose of this guideline is to provide strategies for minimizing, to the greatest extent possible, the danger of death or injury to school children while they are traveling to and from school and school-related events.

I. Program Management

There should be a single State agency with primary administrative responsibility for pupil transportation that employs at least one full-time professional to carry out these responsibilities. The responsible State agency should develop an operating system for collecting and reporting information needed to improve the safety of operating school buses and school-chartered buses. Each State should establish procedures to meet the following recommendations for identification and equipment of school buses. All school buses should:

- Be identified with the words "School Bus" printed in letters not less than eight inches high, located between the warning signal lamps as high as possible without impairing visibility of the lettering from both front and rear, and have no other lettering on the front or rear of the vehicle, except as required by Federal Motor Vehicle Safety Standards (FMVSS), 49 CFR Part 571;
- Be painted National School Bus Glossy Yellow, in accordance with the colorimetric specification of National Institute of Standards and Technology (NIST) Federal Standard No. 595a, Color 13432, except that the hood should be either that color or lusterless black, matching NIST Federal Standard No. 595a, Color 37038;
- Have bumpers of glossy black, matching NIST Federal Standard No. 595a, Color 17038, unless, for increased visibility, they are covered with a reflective material;
- Comply with all FMVSS applicable to school buses at the time of their manufacture;
- Be equipped with safety equipment for use in an emergency, including a charged fire extinguisher that is properly mounted near the driver's seat, with signs indicating the location of such equipment;
- Be equipped with device(s) demonstrated to enhance the safe operation of school vehicles, such as a stop signal arm;
- Be equipped with a system of signal lamps that conforms to the school bus requirements of FMVSS No. 108, 49 CFR 571.108;
- Have a system of mirrors that conforms to the school bus requirements of FMVSS No. 111, 49 CFR 571.111; and
- School-chartered buses should comply with all applicable Federal Motor Carrier Safety Regulations (FMCSR) and FMVSS.

Any school bus meeting the recommendations above that is permanently converted for uses other than transporting children to and from school should be painted a color other than National School Bus Glossy Yellow, and should have the stop arms and school bus signal lamps removed.

School buses, while being operated on a public highway and transporting primarily passengers other than school children, should have the words "School Bus" covered, removed, or otherwise concealed, and the stop arm and signal lamps should not be operated.

II. Operations

Each State should establish procedures to meet the following

recommendations for operating school buses and school-chartered buses:

- Personnel
 - Each State should develop a plan for selecting, training, and supervising persons whose primary duties involve transporting school children in order to ensure that such persons will attain a high degree of competence in, and knowledge of, their duties;
 - Every person who drives a school bus or school-chartered bus occupied by school children should, as a minimum:
 - Have a valid State driver's license to operate such a vehicle. All drivers who operate a vehicle designed to transport 16 or more persons (including the driver) are required by the Federal Motor Carrier Safety Administration's (FMCSA) Commercial Driver's License Standards (49 CFR Part 383) to have a valid commercial driver's license;
 - Meet all physical, mental, moral and other requirements established by the State agency having primary responsibility for pupil transportation, including requirements related to drug and/or alcohol misuse or abuse; and
 - Meet the physical qualification standards for drivers under the FMCSR of the FMCSA, 49 CFR Part 391, if the driver or the driver's employer is subject to those regulations.
- Vehicles
 - Each State should enact legislation that provides for uniform procedures regarding school buses stopping on public highways for loading and discharge of children. Public information campaigns should be conducted on a regular basis to ensure that the driving public fully understands the implications of school bus warning signals and requirements to stop for school buses that are loading or discharging school children. Schools should work with local law enforcement agencies to enforce laws against passing a stopped school bus that is loading or unloading students;
 - Each State should establish policies to ensure that school districts are aware of the federal statutory provision 49 U.S.C. Section 30112(a), as amended by Section 10309(b) of SAFETEA-LU (P.L. 109-59), prohibiting the purchase by schools and school systems of new non-conforming vehicles for school transportation purposes, and prohibit operation of any school bus or other vehicle used for school transportation purposes unless it meets the FMVSSs for school buses;
 - Each State should minimize highway use hazards to school bus and school-chartered bus occupants, other highway users, pedestrians, bicycle riders and property. Efforts to minimize

such hazards should include, but not be limited to:

- Planning safe routes and annually reviewing routes for safety hazards;
- Planning routes to ensure the most effective use of school buses and school-chartered buses to ensure that passengers are not standing while these vehicles are in operation;
- Providing loading and unloading zones off the main traveled part of highways, whenever it is practical to do so;
- Establishing restricted loading and unloading areas for school buses and school-chartered buses at or near schools;
- Ensuring that school bus operators, when stopping on a highway to take on or discharge children, adhere to State regulations for loading and discharging including the use of signal lamps;
- Replacing school buses manufactured before April 1, 1977, with buses that meet the current FMVSSs for school buses, and not chartering any pre-1977 school buses; and
- Prohibiting public or private schools from purchasing school buses built prior to April 1, 1977 for school transportation or school-related events.
 - Use of amber signal lamps to indicate that a school bus is preparing to stop to load or unload children is at the option of the State. Use of red warning signal lamps as specified in this guideline for any purpose or at any time other than when the school bus is stopped to load or discharge passengers should be prohibited; and
 - When school buses are equipped with stop arms, such devices should be operated only in conjunction with red warning signal lamps, when vehicles are stopped.
 - Seating
 - Children are protected in large school buses by compartmentalization, a passive occupant protection system. This provides a protective envelope consisting of strong, closely-spaced seats that have energy-absorbing padded seat backs that help to distribute and reduce crash forces. Compartmentalization is most effective when occupants are fully seated within the bus seat. Seating should be provided that will allow each occupant to sit on a school bus seat without any part of his or her body extending into the aisle;
 - There should be no auxiliary seating accommodations such as temporary or folding jump seats in school buses;
 - Standing while school buses and school-chartered buses are in motion should not be permitted. Routing and seating plans should be coordinated to eliminate passengers standing when a

school bus or school-chartered bus is in motion;

- Drivers of school buses and school-chartered buses should be required to wear occupant restraints whenever the vehicle is in motion;
- Passengers in school buses and school-chartered buses with a gross vehicle weight rating (GVWR) of 10,000 pounds or less should be required to wear occupant restraints (where provided) whenever the vehicle is in motion. Occupant restraints should comply with the requirements of FMVSS Nos. 208, 209 and 210, as they apply to multipurpose vehicles;
- Transporting pre-school age children in a school bus.
 - Each child should be transported in a Child Safety Restraint System, suitable for the child's weight and age, that meets applicable FMVSSs;
 - Each child should be properly secured in the Child Safety Restraint System; and
 - The Child Safety Restraint System should be properly secured to the school bus seat, using anchorages that meet FMVSSs.
 - Emergency exit access
 - Baggage and other items transported in the passenger compartment should be stored and secured so that the aisles are kept clear and the door(s) and emergency exit(s) remain unobstructed at all times; and
 - When school buses are equipped with interior luggage racks, the racks should be capable of retaining their contents in a crash or sudden driving maneuver.
 - Vehicle maintenance. Each State should establish procedures to meet the following recommendations for maintaining buses used to carry school children:
 - School buses should be maintained in safe operating condition through a systematic preventive maintenance program;
 - All school buses should be inspected at least semiannually. In addition, school buses and school-chartered buses subject to the FMCSR of FMCSA should be inspected and maintained in accordance with those regulations (49 CFR Parts 393 and 396); and
 - School bus drivers should be required to perform daily inspections of their vehicles, and the safety equipment thereon (especially fire extinguishers), and to report promptly and in writing any problems discovered that may affect the safety of the vehicle's operation or result in the vehicle's mechanical breakdown. Driver vehicle inspection reports for school buses and school-chartered buses subject to the FMCSR of

FMCSA should be completed in accordance with 49 CFR 396.11.

III. Other Elements of Pupil Transportation Safety

- At least once during each school semester, each pupil transported from home to school in a school bus should be instructed in safe riding practices, proper loading and unloading techniques, proper street crossing to and from school bus stops and should participate in supervised and timed emergency evacuation drills. Prior to each departure, each pupil transported on an activity or field trip in a school bus or school-chartered bus should be instructed in safe riding practices and the location and operation of emergency exits;
 - Parents and school officials should work together to identify and select safe pedestrian and bicycle routes for the use of school children; (See Guideline No. 14).
 - All school children should be instructed in safe transportation practices for walking to and from school. For those children who routinely walk to school, training should include preselected routes and the importance of adhering to those routes;
 - Children riding bicycles to and from school should receive bicycle safety education, be required to wear bicycle safety helmets, and not deviate from preselected routes;
 - Local school officials and law enforcement personnel should work together to establish crossing guard programs;
 - Local school officials should investigate programs that incorporate the practice of escorting students across streets and highways when they leave school buses. These programs may include the use of school safety patrols or adult monitors;
 - Local school officials should establish passenger vehicle loading and unloading points at schools that are separate from the school bus loading zones; and
 - Before chartering any vehicle or motor coach for school activity purposes, schools should check the safety record of charter bus companies through the FMCSA Safety and Fitness Electronic Records System. Schools should also consider using a multi-function school activity bus in place of charter buses where feasible. Schools should also consider using a multi-function school activity bus (MFSAB) in place of a charter bus. A MFSAB is not required to be equipped with traffic control devices (*i.e.*, flashing lights and stop arm). These buses are not intended

for the roadside picking up and dropping off of children during service between home and school. They are intended for use by schools and other institutions that need transportation services for school activity trips or for other coordinated transportation activities.

IV. Program Evaluation

The pupil transportation safety program should be evaluated at least annually by the State agency having primary administrative responsibility for pupil transportation.

V. Definitions

- A “bus” is a motor vehicle designed for carrying more than 10 persons (including the driver);
- A “school bus” is a “bus” that is used for purposes that include carrying students to and from school or related events on a regular basis, but does not include a transit bus or a school-chartered bus;
- A “school-chartered bus” is a “bus” that is operated under a short-term contract with State or school authorities who have acquired the exclusive use of the vehicle at a fixed charge to provide transportation for a group of students to a special school-related event;
- A “multi-function school activity bus” is a school bus whose purposes do not include transporting students to and from home or school bus stops;
- “Federal Motor Carrier Safety Regulations (FMCSR)” are the regulations of the Federal Motor Carrier Safety Administration (FMCSA) for commercial motor vehicles in interstate commerce, including buses with a gross vehicle weight rating (GVWR) or gross vehicle weight greater than 10,000 pounds; designed or used to transport more than 8 passengers (including the driver) for compensation; or designed or used to transport more than 15 passengers (including the driver), and not used to transport passengers for compensation. (The FMCSR are set forth in 49 CFR Parts 390–399.); and
- A “child safety restraint system” is any device (except a passenger system lap seat belt or lap/shoulder seat belt), designed for use in a motor vehicle to restrain, seat, or position a child who weighs less than 65 pounds.

Highway Safety Program Guideline No. 21

Roadway Safety

Each State, in cooperation with its political subdivisions and tribal governments, should develop and implement a strategic highway safety program to reduce the number and

severity of traffic crashes. The plan should include roadway safety elements for highway safety activities related to the roadway environment. Section 402 funds may be used to develop and implement systems and procedures for carrying out safety construction and operation improvements but may not be used for highway construction, maintenance, or design activities, except for the installation of regulatory and warning signs on non-Federal-aid roads.

I. Program Management

The Federal Highway Administration (FHWA) provides administrative oversight for the Roadway Safety portion of the Section 402 highway safety program in close coordination with the State Highway Safety Offices (SHSO) and the State Departments of Transportation (State DOT). An effective Roadway Safety program is based on sound analyses of crash, traffic, enforcement, medical, and roadway data information and applies engineering principles in identifying highway planning, design, operations, and maintenance strategies that will reduce the number and severity of highway crashes. The SHSO should:

- Work in consultation with the DOT staff responsible for traffic engineering, motorcycle, pedestrian and bicycle programs, highway safety improvement programs, traffic records systems, commercial motor vehicle (CMV) safety, work zone safety, railroad grade crossing, design, operations, and maintenance;
- Foster ongoing dialogue among all disciplines with a vested interest in highway safety, including engineers, planners, enforcement personnel, traffic safety specialists, driver licensing administrators, railroads, emergency services, CMV safety specialists, and data specialists;
- Promote a multi-disciplinary approach to addressing highway safety issues that focuses on comprehensive multi-disciplinary solutions;
- Assist local community leaders and safety partners in managing and/or coordinating roadway safety issues; and
- Work with the DOT and the other safety partners in the development and implementation of the State’s Strategic Highway Safety Plan.

II. Highway Safety Improvement Program

Additional information on the Highway Safety Improvement Program is available in Part 924, Title 23, Code of Federal Regulations and Section 148 of title 23 of the United States Code.

Each State, in cooperation with Federal, Tribal, county, other local

governments, and other safety partners, shall develop and implement, on a continuing basis, a highway safety improvement program that has the overall objective of reducing the number and severity of crashes and decreasing the potential for crashes on all highways. The planning component of the Highway Safety Improvement Program shall incorporate:

- A process for collecting and maintaining a record of crashes, traffic, and highway data, including, for railroad-highway grade crossings, the characteristics of both highway and train traffic;
- A process for analyzing available data to identify highway locations, sections and elements determined to be hazardous on the basis of crash experience or crash potential;
- A process for conducting engineering studies of hazardous locations, sections, and elements to develop highway safety improvement projects; and
- A process for establishing priorities for implementing highway safety improvements including the potential reduction in the number and/or severity of crashes.

The implementation component of the Highway Safety Improvement Program in each State shall include a process for scheduling and implementing safety improvement projects in accordance with the priorities developed in the planning component.

The evaluation component of the Highway Safety Improvement Program shall include a process for determining the effect that highway safety improvement projects have in reducing the number and severity of crashes and potential crashes, including:

- The cost of, and the safety benefits derived from, the various means and methods used to mitigate or eliminate hazards;
- A record of crash experience before and after the implementation of a highway safety improvement, project; and
- A comparison of crash numbers, rates, and severity observed after the implementation of a highway safety improvement project with the crash numbers, rates, and severity expected if the improvement had not been made.

III. Training

Each State should provide training and information for State, tribal, and local agencies’ engineers, technicians, and officials in the proper and appropriate use of highway, safety and traffic engineering standards, policies, guidelines, practices, studies, strategies,

and techniques. This training and information should be related to established, as well as new and emerging issues.

IV. Planning, Design, Construction And Maintenance

Every State, in coordination with Federal, tribal, county and other local agencies, should have a program of highway planning, design, construction, operations, and maintenance to improve highway safety. A model program should have the following characteristics:

- A systematic process to ensure that safety is fully integrated into the transportation planning, design, construction, and maintenance processes;
- The integration of safety into the State's standards, policies, guidelines, and practices;
- Procedures to identify and correct hazard conditions within the highway right-of-way;
- Traffic control devices and other measures to ensure the guidance, warning and regulation of all road users, including approaching and traveling through work zones, in conformance with the FHWA Manual on Uniform Traffic Control Devices;
- Roadway and roadside features and operations that provide, wherever possible, for crash prevention and crash survivability;
- Procedures for incident management and congestion mitigation; and
- Post-crash activities such as emergency signing, first-responders, and access and egress for emergency vehicles.

V. Safety And Traffic Engineering Services

Each State should have a program for a comprehensive capacity building plan to provide the necessary traffic and safety expertise and staffing levels and for applying safety and traffic engineering principles and techniques, including the application of traffic control devices in conformance with the FHWA Manual on Uniform Traffic Control Devices.

A model program should have the following characteristics:

- A comprehensive resource development plan to provide the necessary safety and traffic engineering capability, including:
 - Provisions for supplying safety and traffic engineering assistance to those jurisdictions that are unable to justify a full-time traffic engineering staff;
 - Provisions for upgrading the skills of safety and traffic engineers and technicians and for providing basic instruction in safety and traffic engineering techniques to other professionals, technicians, and officials;
 - A traffic control device management system that includes the application of traffic control devices in conformance with the FHWA Manual on Uniform Traffic Control Devices as well as necessary inventories, reviews, maintenance of traffic control devices, and where appropriate, the application and evaluation of new ideas and concepts in applying traffic control devices.
 - An implementation schedule that utilizes safety and traffic engineering resources to:
 - review road projects, using tools such as road safety audits and/or reviews, during the planning, design, and construction stages to detect and correct features that may lead to operational safety difficulties;
 - include the impact on motorcycles in the design factors of roadways;
 - install safety-related improvements as part of routine maintenance and/or repair activities;
 - correct conditions noted during routine operational surveillance of the roadway system to adjust rapidly for the changes in traffic and road characteristics as a means of reducing the frequency and severity of crashes;
 - conduct road safety audits and/or reviews of high crash locations and develop corrective measures;
 - conduct road safety audits and/or reviews of potentially hazardous locations—such as sharp curves, steep grades, and railroad grade crossings—and develop appropriate countermeasures;

- identify traffic control needs and determine short- and long-range requirements;

- evaluate the effectiveness of specific traffic control measures in reducing the frequency and severity of traffic crashes; and

- conduct safety and traffic engineering studies to establish traffic regulations, such as fixed or variable speed limits.

VII. Communication Program/Outreach

Each State should implement a proactive roadway safety outreach program to provide critical information to the public and officials on roadway safety issues and establish communication channels among engineers, planners, enforcement personnel, emergency medical services, highway safety advocacy groups, the private sector, officials, and the general public.

VII. Evaluation

Roadway Safety programs should be annually evaluated by the State, or appropriate Federal department or agency where applicable. The evaluation results are to be included in the State's annual Highway Safety Plan Evaluation Report. Copies of the report shall be provided to the FHWA. Evaluations should include measures of effectiveness in terms of crash reduction.

Notes: The 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users established reporting requirements for projects (primarily construction-related projects) implemented under the Highway Safety Improvement Program (See 23 U.S.C. § 148(g)). FHWA has provided guidance for the preparation of this report. Also, as part of their Strategic Highway Safety Plans, States must establish an evaluation process to analyze and assess the results achieved by their plans.

Marilena Amoni,

Associate Administrator, Research and Program Development, NHTSA.

[FR Doc. E7-1895 Filed 2-5-07; 8:45 am]

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Corrections

Federal Register

Vol. 72, No. 24

Tuesday, February 6, 2007

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 412 and 413

[CMS-1529-P]

RIN 0938-AO30

Medicare Program; Prospective Payment System for Long-Term Care Hospitals RY 2008: Proposed Annual Payment Rate Updates, and Policy Changes; and Proposed Hospital Direct and Indirect Graduate Medical Education Policy Changes

Correction

In proposed rule document 07-392 beginning on page 4776 in the issue of

Thursday, February 1, 2007 make the following correction:

On page 4776, in the first column, under the **DATES** heading, in the last line “April 2, 2007” should read “March 26, 2007”.

[FR Doc. C7-392 Filed 2-5-07; 8:45 am]

BILLING CODE 1505-01-D



Federal Register

**Tuesday,
February 6, 2007**

Part II

Environmental Protection Agency

40 CFR Part 60

**Standards of Performance for New
Stationary Sources and Emission
Guidelines for Existing Sources: Hospital/
Medical/Infectious Waste Incinerators;
Proposed Rule**

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA-HQ-OAR-2006-0534; FRL-8274-9]

RIN 2060-A004

Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Hospital/Medical/Infectious Waste Incinerators

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: On September 15, 1997, EPA adopted new source performance standards (NSPS) and emission guidelines for hospital/medical/infectious waste incinerators (HMIWI). The NSPS and emission guidelines were established under sections 111 and 129 of the Clean Air Act (CAA). On November 14, 1997, the Sierra Club and the Natural Resources Defense Council (Sierra Club) filed suit in the U.S. Court of Appeals for the District of Columbia Circuit (the Court) challenging EPA's methodology for adopting the regulations. On March 2, 1999, the Court issued its opinion. The Court remanded the rule to EPA for further explanation of the Agency's reasoning in determining the minimum regulatory "floors" for new and existing HMIWI. The Court did not vacate the regulations, so the NSPS and emission guidelines remained in effect during the remand and were fully implemented by September 2002. This action provides EPA's proposed response to the questions raised in the Court's remand.

Section 129(a)(5) of the CAA requires EPA to review and, if appropriate, revise the NSPS and emission guidelines every 5 years. In this action, EPA also is proposing our response to this 5-year review, which would revise the emission limits in the NSPS and emission guidelines to reflect the levels of performance actually achieved by the emission controls installed to meet the emission limits set forth in the September 15, 1997, NSPS and emission guidelines.

DATES: *Comments.* Comments must be received on or before April 9, 2007. Under the Paperwork Reduction Act, comments on the information collection provisions must be received by the Office of Management and Budget (OMB) on or before March 8, 2007. Because of the need to resolve the issues raised in this action in a timely manner, EPA will not grant requests for extensions beyond these dates.

Public Hearing. If anyone contacts EPA by February 26, 2007 requesting to speak at a public hearing, EPA will hold a public hearing on March 8, 2007. If you are interested in attending the public hearing, contact Ms. Pamela Garrett at (919) 541-7966 to verify that a hearing will be held.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2006-0534, by one of the following methods:

www.regulations.gov: Follow the on-line instructions for submitting comments.

E-mail: Send your comments via electronic mail to *a-and-r-Docket@epa.gov*, Attention Docket ID No. EPA-HQ-OAR-2006-0534.

Facsimile: Fax your comments to (202) 566-1741, Attention Docket ID No. EPA-HQ-OAR-2006-0534.

Mail: Send your comments to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Mailcode 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. EPA-HQ-OAR-2006-0534.

Hand Delivery: Deliver your comments to: EPA Docket Center (EPA/DC), EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460, Attention Docket ID No. EPA-HQ-OAR-2006-0534. Such deliveries are accepted only during the normal hours of operation (8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays), and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-HQ-OAR-2006-0534. The EPA's policy is that all comments received will be included in the public docket and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and

made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Public Hearing: If a public hearing is held, it will be held at EPA's Campus located at 109 T.W. Alexander Drive in Research Triangle Park, NC, or an alternate site nearby. Persons interested in presenting oral testimony must contact Ms. Pamela Garrett at (919) 541-7966 at least 2 days in advance of the hearing.

Docket: EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2006-0534 and Legacy Docket ID No. A-91-61. All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy form. Publicly available docket materials are available either electronically at *www.regulations.gov* or in hard copy at the EPA Docket Center EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the EPA Docket Center is (202) 566-1742.

FOR FURTHER INFORMATION CONTACT: Ms. Mary Johnson, Energy Strategies Group, Sector Policies and Programs Division (D243-01), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541-5025; fax number: (919) 541-5450; e-mail address: *johnson.mary@epa.gov*.

SUPPLEMENTARY INFORMATION:

Organization of This Document. The following outline is provided to aid in locating information in this preamble.

I. General Information

- A. Does the proposed action apply to me?
- B. What should I consider as I prepare my comments?

II. Background

III. Summary

- A. Litigation and Proposed Remand Response

- B. Proposed Amendments (CAA Section 129(a)(5) 5-Year Review)
- IV. Rationale
- A. Rationale for the Proposed Response to the Remand
- B. Rationale for the Proposed Amendments (CAA Section 129(a)(5) 5-Year Review)
- V. Impacts of the Proposed Action for Existing Units
- A. What are the primary air impacts?
- B. What are the water and solid waste impacts?
- C. What are the energy impacts?
- D. What are the secondary air impacts?
- E. What are the cost and economic impacts?

- VI. Impacts of the Proposed Action for New Units
- VII. Relationship of the Proposed Action to Section 112(c)(6) of the CAA
- VIII. Statutory and Executive Order Reviews
- A. Executive Order 12866: Regulatory Planning and Review
- B. Paperwork Reduction Act
- C. Regulatory Flexibility Act
- D. Unfunded Mandates Reform Act
- E. Executive Order 13132: Federalism
- F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
- G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

- H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use
- I. National Technology Transfer Advancement Act

I. General Information

A. Does the proposed action apply to me?

Regulated Entities. Categories and entities potentially affected by the proposed action are those which operate HMIWI. The NSPS and emission guidelines for HMIWI affect the following categories of sources:

Category	NAICS Code	Examples of potentially regulated entities
Industry	622110, 622310, 325411, 325412, 562213, 611310.	Private hospitals, other health care facilities, commercial research laboratories, commercial waste disposal companies, private universities.
Federal Government	622110, 541710, 928110	Federal hospitals, other health care facilities, public health service, armed services.
State/local/Tribal Government	622110, 562213, 611310	State/local hospitals, other health care facilities, State/local waste disposal services, State universities.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by the proposed action. To determine whether your facility would be affected by the proposed action, you should examine the applicability criteria in 40 CFR 60.50c of subpart Ec and 40 CFR 60.32e of subpart Ce. If you have any questions regarding the applicability of the proposed action to a particular entity, contact the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What should I consider as I prepare my comments?

1. Submitting CBI

Do not submit information that you consider to be CBI electronically through www.regulations.gov or e-mail. Send or deliver information identified as CBI to only the following address: Ms. Mary Johnson, c/o OAQPS Document Control Officer (Room C404-02), U.S. EPA, Research Triangle Park, NC 27711, Attention Docket ID No. EPA-HQ-OAR-2006-0534. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information marked as

CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

2. Tips for Preparing Your Comments

When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions. The EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified in the preceding section titled **DATES**.

3. Docket

The docket number for the proposed action regarding the HMIWI NSPS (40 CFR part 60, subpart Ec) and emission guidelines (40 CFR part 60, subpart Ce) is Docket ID No. EPA-HQ-OAR-2006-0534.

4. Worldwide Web (WWW)

In addition to being available in the docket, an electronic copy of this proposed action is available on the WWW through the Technology Transfer Network Web site (TTN Web). Following signature, EPA posted a copy of the proposed action on the TTN's policy and guidance page for newly proposed or promulgated rules at <http://www.epa.gov/ttn/oarpg>. The TTN provides information and technology exchange in various areas of air pollution control.

II. Background

Section 129 of the CAA, entitled "Solid Waste Combustion," requires EPA to develop and adopt NSPS and emission guidelines for solid waste incineration units pursuant to CAA sections 111 and 129. Sections 111(b) and 129(a) of the CAA (NSPS program) address emissions from new HMIWI units, and CAA sections 111(d) and 129(b) (emission guidelines program) address emissions from existing HMIWI units. The NSPS are directly enforceable Federal regulations. The emission guidelines are not directly enforceable but, rather, are implemented by State air pollution control agencies through sections 111(d)/129 State plans.

An HMIWI is defined as any device used to burn hospital waste or medical/

infectious waste. Hospital waste means discards generated at a hospital, and medical/infectious waste means any waste generated in the diagnosis, treatment, or immunization of human beings or animals, in research pertaining thereto, or in the production or testing of biologicals (e.g., vaccines, cultures, blood or blood products, human pathological waste, sharps). Hospital/medical/infectious waste does not include household waste, hazardous waste, or human and animal remains not generated as medical waste. An HMIWI typically is a small, dual-chamber incinerator that burns about 800 pounds per hour (lb/hr) of waste. Smaller units burn as little as 13 lb/hr while larger units burn as much as 3,700 lb/hr.

Incineration of hospital/medical/infectious waste causes the release of a wide array of air pollutants, some of which exist in the waste feed material and are released unchanged during combustion, and some of which are generated as a result of the combustion process itself. These pollutants include particulate matter (PM); heavy metals, including lead (Pb), cadmium (Cd), and mercury (Hg); toxic organics, including chlorinated dibenzo-p-dioxins/dibenzofurans (CDD/CDF); carbon monoxide (CO); nitrogen oxides (NO_x); and acid gases, including hydrogen chloride (HCl) and sulfur dioxide (SO₂). In addition to the use of good combustion control practices, HMIWI units are typically controlled by wet scrubbers or dry sorbent injection fabric filters (dry scrubbers).

Combustion control includes the proper design, construction, operation, and maintenance of HMIWI to destroy or prevent the formation of air pollutants prior to their release to the atmosphere. Test data indicate that as secondary chamber residence time and temperature increase, emissions decrease. Combustion control is most effective in reducing CDD/CDF, PM, and CO emissions. The 0.25-second combustion level includes a minimum secondary chamber temperature of 1700 °F and a 0.25-second secondary chamber residence time. These combustion conditions are typical of older HMIWI. The 1-second combustion level includes a minimum secondary chamber temperature of 1700 °F and residence time of 1 second. These combustion conditions are typical of newer HMIWI. Compared to 0.25-second combustion, 1-second combustion will achieve substantial reductions in CDD/CDF and CO emissions, and will provide some control of PM, but will not reduce emissions of acid gases (HCl and SO₂),

NO_x, or metals (Pb, Cd, and Hg). The 2-second combustion level includes a minimum secondary chamber temperature of 1800 °F and residence time of 2 seconds. These combustion conditions will provide additional control of CDD/CDF, CO, and PM, but will not reduce emissions of acid gases (HCl and SO₂), NO_x, or metals (Pb, Cd, and Hg). The 2-second combustion conditions are considered to be the best level of combustion control (i.e., good combustion) that is applied to HMIWI. Wet scrubbers and dry scrubbers provide control of PM, CDD/CDF, HCl, and metals, but do not influence CO, SO₂ (at the low concentrations emitted by HMIWI units), or NO_x; in fact, there are no technologies currently used by HMIWI that will consistently reduce SO₂ or NO_x emissions. (See Legacy Docket ID No. A-91-61, item II-A-111; 60 FR 10669, 10671-10677; and 61 FR 31742-31743.)

On September 15, 1997, EPA adopted NSPS (40 CFR part 60, subpart Ec) and emission guidelines (40 CFR part 60, subpart Ce) for entities which operate HMIWI. The NSPS and emission guidelines are designed to reduce air pollution emitted from new and existing HMIWI, including HCl, CO, Pb, Cd, Hg, PM, CDD/CDF (total, or 2,3,7,8-tetrachlorinated dibenzo-p-dioxin toxic equivalent (TEQ)), NO_x, SO₂, and opacity. The NSPS apply to HMIWI for which construction began after June 20, 1996, or for which modification began after March 16, 1998. The NSPS became effective on March 16, 1998, and its requirements apply as of that date or at start-up of a HMIWI unit, whichever is later. The emission guidelines apply to HMIWI for which construction began on or before June 20, 1996, and required compliance by September 2002.

CAA section 129 requires EPA to establish technology-based emission standards that reflect levels of control EPA determines are achievable for new and existing units, after considering costs, non-air quality health and environmental impacts, and energy requirements associated with the implementation of the standards.

In setting forth the methodology EPA must use to establish the technology-based performance standards and emissions guidelines, CAA section 129(a)(2) provides that standards "applicable to solid waste incineration units promulgated under section 111 and this section shall reflect the maximum degree of reduction in emissions of [certain listed air pollutants] that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and

environmental impacts and energy requirements, determines is achievable for new and existing units in each category." This level of control is referred to as a maximum achievable control technology, or MACT standard.

In promulgating a MACT standard, EPA must first calculate the minimum stringency levels for new and existing solid waste incineration units in a category, generally based on levels of emissions control achieved or required to be achieved by the subject units. The minimum level of stringency is called the MACT floor, and CAA section 129(a)(2) provides that the "degree of reduction in emissions that is deemed achievable for new units in a category shall not be less stringent than the emissions control that is achieved in practice by the best controlled similar unit, as determined by the Administrator. Emissions standards for existing units in a category may be less stringent than standards for new units in the same category but shall not be less stringent than the average emissions limitation achieved by the best performing 12 percent of units in the category."

The minimum stringency requirements form the first and least stringent regulatory option EPA must consider in the determination of MACT for a source category. EPA must also determine whether to control emissions "beyond the floor," after considering the costs, non-air quality health and environmental impacts, and energy requirements of such more stringent control. These are the two steps EPA took in the 1997 HMIWI rulemaking. Finally, every 5 years after adopting a MACT standard under section 129, CAA section 129(a)(5) requires EPA to review and, if appropriate, revise the incinerator standards. In addition to responding to the Court's remand in *Sierra Club v. EPA*, 167 F.3d 658 (D.C. Cir. 1999), this proposed action includes our first set of proposed revisions to the HMIWI standards, also known as the 5-year review.

III. Summary

A. Litigation and Proposed Remand Response

1. What was EPA's general methodology for determining MACT?

The methodology used to determine MACT is similar for source categories under sections 112 and 129 of the CAA. However, because each source category is unique and the data available to determine the performance capabilities of technology can vary from one source category to another, the basic methodology must be adapted to fit the

source category in question. As the Court pointed out in the HMIWI litigation, it “generally defer[s] to an agency’s decision to proceed on the basis of imperfect scientific information, rather than to ‘invest the resources to conduct the perfect study.’” *Sierra Club v. EPA*, 167 F.3d at 662.

In general, all MACT analyses involve an assessment of the air pollution control systems or technologies used by the better performing units in a source category. The technology assessment can be based solely on actual emissions data, on knowledge of the air pollution control in place in combination with actual emissions data, or on State regulatory requirements, which give an indication of the actual performance of the regulated units. For each source category, the assessment of the technology involves a review of actual emissions data with an appropriate accounting for emissions variability. Where there is more than one method or technology to control emissions, the analysis results in a series of potential regulations (called regulatory options), one of which is selected as MACT.

The first regulatory option considered by EPA must be at least as stringent as the CAA’s minimum stringency requirements. However, MACT is not necessarily the least stringent regulatory option. EPA must examine more stringent regulatory options to determine MACT. Unlike the minimum stringency requirements, EPA must consider various impacts of the more stringent regulatory options in determining MACT. Only if the more stringent regulatory options are considered to have unreasonable impacts does EPA select the first “floor-based” regulatory option as MACT.

As stated earlier, the CAA requires that MACT for new sources be no less stringent than the emissions control achieved in practice by the best controlled similar unit. After EPA’s assessment of technology, EPA determines the best control currently in use for a given pollutant and establishes one potential regulatory option at the emission level achievable by that control. More stringent potential regulatory options might reflect controls used on other sources that could be applied to the source category in question.

For existing sources, the CAA requires that MACT be no less stringent than the average emissions limitation achieved by the best performing 12 percent of units in a source category. EPA must determine some measure of the average emissions limitation achieved by the best performing 12 percent of units to form the least stringent regulatory

option. Sometimes, a direct calculation of the actual emissions values from the best performing 12 percent of sources provides the basis for this regulatory option. More often, EPA determines the technology used by the average source in the best performing 12 percent of sources and establishes the floor based on the technology assessment for that average source. More stringent regulatory options reflect other technologies capable of achieving better performance.

2. What was EPA’s methodology in the 1997 HMIWI rulemaking?

On February 27, 1995, EPA published a notice of proposed rulemaking regarding emissions standards for HMIWI units (60 FR 10654). The proposal was the result of several years of reviewing available information. During the public comment period for the proposal, EPA received over 700 letters, some of which contained new information or indicated that the commenters were in the process of gathering more information for EPA to consider. The new information led EPA to consider the need for numerous changes to the proposed rule, and on June 20, 1996, the Agency published a re-proposal (61 FR 31736). Following an additional public comment period, EPA published the final rule on September 15, 1997 (62 FR 48348).

During the data-gathering phase of developing the 1995 proposal, EPA found it difficult to obtain an accurate count of the thousands of HMIWI units nationwide, or to find HMIWI units with add-on air pollution control systems in place. A few HMIWI units with combustion control were tested to assess performance of combustion control in reducing emissions. One unit with a wet scrubber, and a few units with dry scrubbing systems were tested to determine performance capabilities of add-on controls. (See 61 FR 31738.)

Altogether, data were available from only 7 out of the estimated then-operating 3,700 existing HMIWI units (60 FR 10674). Because EPA was under a court-ordered deadline to propose and adopt standards for HMIWI that did not provide sufficient time to collect more actual emissions data (see consent decree entered in *Sierra Club v. EPA*, Nos. CV-92-2093 and CV-93-0284 (E.D.N.Y.)), EPA proceeded to develop the regulations with the existing data, as described below. However, EPA specifically requested comment on EPA’s MACT determinations and on EPA’s conclusions about the performance capabilities of air pollution control technologies on HMIWI in light

of the relatively small database (60 FR 10686).

a. EPA’s Methodology for New HMIWI. In determining the least stringent regulatory option allowed by the CAA for new HMIWI, EPA first examined the data available for various air pollution control technologies applied to HMIWI to determine the performance capabilities of the technologies (i.e., the achievable emission limitations) (60 FR 10671-73, 61 FR 31741-43). To determine the performance capabilities, EPA grouped all of the test data by control technology and established the numerical value for the achievable emission limitations somewhat higher than the highest test data point for each particular control technology. (See Legacy Docket ID No. A-91-61, items IV-B-46, 47, 48, and 49.) Following the determination of performance capability, EPA identified the best control technology for each air pollutant for each subcategory of HMIWI, and established the numerical values for the least stringent regulatory option at the achievable emission limitation associated with that particular control technology. (See 60 FR 10673; Legacy Docket ID No. A-91-61, item IV-B-38; 61 FR 31745-46.) Other, more stringent, regulatory options were developed reflecting the actual performance of other, more effective, control technologies (61 FR 31766-68).

As stated in the 1996 re-proposal, the least stringent regulatory option for new large HMIWI units (units with maximum waste burning capacity of more than 500 lb/hr) was based on good combustion (i.e., 2-second combustion level) and a combination of two control technologies, high-efficiency wet scrubbers and dry injection/fabric filter dry scrubbers with carbon (61 FR 31746). New medium units (units with maximum waste burning capacity of more than 200 lb/hr but less than or equal to 500 lb/hr) would need to use good combustion and a combination of two control technologies, high-efficiency wet scrubbers and dry injection/fabric filter dry scrubbers without carbon, to meet the least stringent regulatory option. *Id.* New small units (units with maximum waste burning capacity of less than or equal to 200 lb/hr) would need to use good combustion and a moderate-efficiency wet scrubber to meet the least stringent regulatory option. *Id.*

In EPA’s final standards promulgated in 1997, EPA selected an overall more stringent regulatory option for new HMIWI (62 FR 48365). The final standards were based on emission limits achievable with good combustion and a

moderate-efficiency wet scrubber for new small HMIWI, and good combustion and a combined dry/wet control system with carbon for new medium and large HMIWI. *Id.* These standards reflected the MACT floor emissions levels for new small and large HMIWI, but were more stringent than the MACT floor for new medium HMIWI. *Id.* EPA estimated that the standards would reduce emissions from these units of HCl by up to 98 percent, PM and Pb by up to 92 percent, Cd by up to 91 percent, CDD/CDF by up to 87 percent, Hg by up to 74 percent, and CO, SO₂, and NO_x by up to 52 percent (62 FR 48366).

b. EPA's Methodology for Existing HMIWI. For existing units, EPA did not have sufficient emissions data to fully characterize the actual emissions performance of the best performing 12 percent of existing HMIWI, and, based exclusively on such data, EPA did not have a clear indication of the technology used by the best 12 percent of units. As a result, EPA used emission limits included in State regulations and State-issued permits (hereinafter referred to as regulatory limits) as surrogate information to determine emissions limitations achieved by the best performing 12 percent of units in each subcategory (60 FR 10674). EPA believed this information could be expected to reliably reflect levels of performance achieved on a continuous basis by better-controlled units that must meet these limits or risk violating enforceable requirements. EPA assumed that all HMIWI were achieving their regulatory limits (60 FR 10674). Where there were regulatory limits for more than 12 percent of units in a subcategory, the regulatory limits were ranked from the most stringent to least stringent, and the average of the regulatory limits for the top 12 percent of units in the subcategory was calculated. *Id.*; 61 FR 31744–45. Where the number of units subject to specific emissions limitations did not comprise 12 percent of the population in a subcategory, EPA assumed those units with regulatory limits were the best performing units, and the remaining units in the top 12 percent were assigned an emission value associated

with "combustion control." (See 60 FR 10674; 61 FR 31745; Legacy Docket ID No. A–91–61, item IV–B–24 at 2.) In previous **Federal Register** notices regarding HMIWI (60 FR 10654, 61 FR 31736, and 62 FR 48348), this level of control was referred to as "uncontrolled," which is misleading because sources with combustion control emit lesser amounts of CDD/CDF, CO, and PM. In the latter situation described above, the average of the regulatory limits plus enough combustion-controlled emission values to account for 12 percent of units in the subcategory was calculated. (See Legacy Docket ID No. A–91–61, item IV–B–24 at 2–4.)

After calculating the averages of regulatory limits and combustion-controlled emission values, EPA examined the resulting calculated values to determine what level of air pollution control would be needed to meet the calculated average values. (See 60 FR 10675–78; 61 FR 31755–56.) For many pollutants, the calculated averages presented no clear indication of the type of air pollution control used by the best performing units. However, the calculated values for three key pollutants, PM, CO, and HCl, did provide a good indication of the type of air pollution control used on the best performing 12 percent of units. The level of air pollution control associated with the calculated average values for PM, CO, and HCl formed the technical basis of the least stringent regulatory option considered by EPA (61 FR 31756, Table 13). The emission limitations assigned to each pollutant reflected the actual performance of the technology on which they were based. Finally, EPA developed a series of regulatory options based on progressively more stringent technologies and assigned emission limitations to each regulatory option based on the actual performance capabilities of the technologies (61 FR 31757, Table 14).

As stated in the 1996 re-proposal, large existing units would need to use good combustion and a high-efficiency wet scrubber to meet the least stringent regulatory option, while medium existing units would need to use good combustion and a moderate-efficiency wet scrubber, although dry scrubbers

could also be used with good combustion at large and medium existing units (61 FR 31745). EPA further stated that its inclination was to establish emission limitations for large and medium existing units based on regulatory options representing the MACT floors (61 FR 31778). Small existing units would need only to use good combustion practices to meet the regulatory option representing the MACT floor (61 FR 31745). With respect to small existing units, EPA stated that it had no inclination with regard to which regulatory option should be used to establish emission limitations and requested comment on requiring use of good combustion and a low-efficiency wet scrubber (61 FR 31778–79).

In EPA's final standards promulgated in 1997, EPA selected an overall more stringent regulatory option for existing HMIWI (62 FR 48371). The final standards were based on emission limits achievable with good combustion and a low-efficiency wet scrubber for most existing small HMIWI, good combustion and a moderate-efficiency wet scrubber for existing medium HMIWI, and good combustion and a high-efficiency wet scrubber for existing large HMIWI (62 FR 48371). The final standards allow small HMIWI that meet certain rural criteria to meet emissions limits achievable with good combustion alone. *Id.* These standards reflected the MACT floor emissions levels for existing small HMIWI meeting rural criteria, medium HMIWI, and large HMIWI, but were more stringent than the MACT floor for most existing small HMIWI (i.e., non-rural) (62 FR 48371–72). The final standards for existing medium and large HMIWI were structured so that either a dry scrubber or a wet scrubber could be used to achieve the emission limits. EPA estimated that the final emission guidelines would reduce emissions of CDD/CDF by up to 97 percent, Hg by up to 95 percent, PM by up to 92 percent, Pb by up to 87 percent, Cd by up to 84 percent, CO by up to 82 percent, HCl by up to 98 percent, and SO₂ and NO_x by up to 30 percent (62 FR 48372). Table 1 of this preamble summarizes the emission limits for the NSPS and emission guidelines promulgated in 1997.

TABLE 1.—SUMMARY OF PROMULGATED EMISSION LIMITS

Pollutant (units)	Unit Size ¹	Limit for existing HMIWI ²	Limit for new HMIWI ²
HCl (parts per million by volume (ppmv))	L, M, S	100 or 93% reduction	15 or 99% reduction.
	SR	3,100	N/A. ³
CO (ppmv)	L, M, S	40	40
	SR	40	N/A.
Pb (milligrams per dry standard cubic meter (mg/dscm)).	L, M	1.2 or 70% reduction	0.07 or 98% reduction. ³

TABLE 1.—SUMMARY OF PROMULGATED EMISSION LIMITS—Continued

Pollutant (units)	Unit Size ¹	Limit for existing HMIWI ²	Limit for new HMIWI ²
Cd (mg/dscm)	S	1.2 or 70% reduction	1.2 or 70% reduction.
	SR	10	N/A.
	L, M	0.16 or 65% reduction	0.04 or 90% reduction.
	S	0.16 or 65% reduction	0.16 or 65% reduction.
Hg (mg/dscm)	SR	4	N/A.
	L, M, S	0.55 or 85% reduction	0.55 or 85% reduction.
	SR	7.5	N/A.
	L	0.015	0.015
PM (grains per dry standard cubic foot (gr/dscf))	M	0.03	0.015
	S	0.05	0.03.
	SR	0.086	N/A.
	L, M	125	25
CDD/CDF, total (nanograms per dry standard cubic meter (ng/dscm)).	S	125	125
	SR	800	N/A.
	L, M	2.3	0.6
	S	2.3	2.3
CDD/CDF, TEQ (ng/dscm)	SR	15	N/A.
	L, M, S	250	250
	SR	250	N/A.
	L, M, S	55	55
NO _x (ppmv)	L, M, S	250	250
	SR	250	N/A.
SO ₂ (ppmv)	L, M, S	55	55
	SR	55	N/A.

¹ L = Large; M = Medium; S = Small; SR = Small Rural² All emission limits are measured at 7 percent oxygen.³ Not applicable.

c. Compliance by HMIWI. At the time of promulgation (September 1997), EPA estimated that there were approximately 2,400 HMIWI operating in the United States. Those units combusted approximately 830 thousand tons of hospital/medical/infectious waste annually. Of those existing HMIWI, about 48 percent were small units, 29 percent were medium units, and 20 percent were large units. About 3 percent of the HMIWI were commercial units. EPA projected that no new small or medium HMIWI would be constructed, and that up to 60 new large

units and 10 new commercial units would be constructed.

After shutdown of approximately 97 percent of the 2,400 HMIWI that were operating in 1997, there are currently 72 existing HMIWI at 67 facilities. Additionally, only 4 new HMIWI at 3 facilities began operation following the 1997 rulemaking. These 76 existing and new units are estimated to combust approximately 165 thousand tons of waste annually. Of the 72 existing HMIWI subject to the emission guidelines, 44 are large units, 20 are medium units, and 8 are small units (6

of which meet the rural criteria). Twenty-one percent of the existing HMIWI are commercially owned. Of the four new HMIWI, three are large units, and one is a medium unit. Two of the new units are county-owned but accept waste from other sources, similar to commercial units. The actual emissions reductions achieved as a result of implementation of the standards exceeded the 1997 projections for all nine of the regulated pollutants. A comparison of the estimated pollutant reductions versus the actual reductions is presented in Table 2 of this preamble.

TABLE 2.—COMPARISON OF ESTIMATED POLLUTANT REDUCTIONS VERSUS ACTUAL POLLUTANT REDUCTIONS

Pollutant	Estimated emissions reduction, percent	Actual emissions reduction, percent ¹
HCl	98	99.2
CO	75 to 82	98.1
Pb	80 to 87	98.7
Cd	75 to 84	99.0
Hg	93 to 95	99.0
PM	88 to 92	98.1
CDD/CDF, total	96 to 97	99.5
CDD/CDF, TEQ	95 to 97	99.6
NO _x	0 to 30	70.6
SO ₂	0 to 30	92.6

¹ Reflects the effect of unit shutdowns as well as the effect of compliance with the promulgated standards.

3. What was the Sierra Club's challenge?

On November 14, 1997, the Sierra Club and the Natural Resources Defense Council (Sierra Club) filed suit in the U.S. Court of Appeals for the District of Columbia Circuit (the Court). The Sierra

Club claimed that EPA had violated CAA section 129 by setting emission standards for HMIWI under CAA sections 129 and 111 that are less stringent than the statutory minimum stringency required by section 129(a)(2); that EPA had violated section 129 by

not including mandatory pollution prevention or waste minimization requirements in the HMIWI standards; and that EPA had not adequately considered the non-air quality health and environmental impacts of the standards. For new units, the Sierra

Club argued that to satisfy the statutory phrase “best controlled similar unit” in CAA section 129(a)(2), EPA should have identified the single best performing unit in each subcategory and based the MACT floor for that subcategory on that particular unit’s performance, rather than consider the performance of other units using the same technology. The Sierra Club also argued that EPA erroneously based the new unit floors on the emissions of the worst performing unit using a particular technology. Regarding existing units, the Sierra Club claimed that the plain meaning of CAA section 129(a)(2)’s words, “average emissions limitation achieved by the best performing 12 percent of units,” precludes the use of regulatory data, and claimed that the legislative history of section 129(a)(2) reflects congressional intent to prohibit EPA from relying on regulatory data. Moreover, the Sierra Club claimed that, for HMIWI, using regulatory data was impossible because such data existed for fewer than 12 percent of units, and because doing so would impermissibly import an achievability requirement into the unit floor determination. Finally, the Sierra Club argued that EPA failed to require HMIWI units to undertake programs to reduce the Hg and chlorinated plastic in their waste streams, in violation of CAA section 129(a)(3), and that EPA failed to consider the fact that CDD/CDF and Hg from HMIWI can contaminate water, sediment, and soil, and can bioaccumulate in food, in violation of the CAA’s requirement that EPA consider non-air quality impacts of setting HMIWI emissions standards.

4. What was the Court’s ruling?

On March 2, 1999, the Court issued its opinion in *Sierra Club v. EPA*, 167 F.3d 658 (D.C. Cir. 1999). While the Court rejected the Sierra Club’s claims regarding pollution prevention and non-air quality impacts, and rejected the Sierra Club’s statutory arguments under CAA section 129, the Court remanded the rule to EPA for further explanation regarding how EPA derived the MACT floors for new and existing HMIWI units. Furthermore, the Court did not vacate the regulations, stating that “[i]t is possible that EPA may be able to explain [EPA’s basis for the standards]” in response to the concerns raised by the Court. *Id.*, at 664. The regulations remain in effect during the remand.

a. The Court’s Ruling on New Units. In response to the Sierra Club’s claims regarding EPA’s treatment of new units, the Court opined that “EPA would be justified in setting the floors at a level that is a reasonable estimate of the

performance of the ‘best controlled similar unit’ under the worst reasonably foreseeable circumstances [* * *]. It is reasonable to suppose that if an emissions standard is as stringent as ‘the emissions control that is achieved in practice’ by a particular unit, then that particular unit will not violate the standard. This only results if ‘achieved in practice’ is interpreted to mean ‘achieved under the worst foreseeable circumstances.’ In *National Lime Ass’n v. EPA*, 627 F.2d 416, 431 n. 46 (D.C. Cir. 1980), we said that where a statute requires that a standard be ‘achievable,’ it must be achievable ‘under most adverse circumstances which can reasonably be expected to recur.’ The same principle should apply when a standard is to be derived from the operating characteristics of a particular unit.” *Sierra Club v. EPA*, 167 F.3d at 665. Thus, the Court refused to embrace the Sierra Club’s interpretation of CAA section 129(a)(2) as requiring EPA to base the MACT floor on only the lowest emissions data points observed (i.e., the level achieved by the best performing unit for each pollutant).

Relating to the Sierra Club’s claim that EPA erred in considering the emissions of units other than the best controlled unit, the Court refused to rule that EPA’s approach was unlawful, and posited that “[p]erhaps considering all units with the same technology is justifiable because the best way to predict the worst reasonably foreseeable performance of the best unit with the available data is to look at other units’ performance. Or perhaps EPA reasonably considered all units with the same technology equally ‘well-controlled,’ so that each unit with the best technology is a ‘best-controlled unit’ even if such units vary widely in performance.” *Sierra Club v. EPA*, 167 F.3d at 665.

However, the Court concluded that the possible rationale for this treatment of new units was not presented in the rulemaking record with enough clarity for the Court to determine that EPA’s “path may reasonably be discerned.” *Id.* Moreover, the Court ruled that EPA had “not explained why the phrase best controlled similar unit encompasses all units using the same technology as the unit with the best observed performance, rather than just that unit itself. [* * *] We do not know what interpretation the agency chose, and thus cannot evaluate its choice.” *Sierra Club v. EPA*, 167 F.3d at 665. The Court further directed EPA to provide additional explanation regarding how the Agency had calculated the upper bound of the best-controlled unit’s performance through rounding. *Id.*

b. The Court’s Ruling on Existing Units. With respect to existing units, the Court first rejected the Sierra Club’s “claim that EPA’s decision to base the floors on regulatory data fails the first step of the *Chevron* test. None of the Sierra Club’s arguments establish that Congress has ‘directly addressed’ and rejected the use of regulatory data.” *Id.*, at 661. After noting that the Sierra Club’s statutory objections to EPA’s methodology appeared to be premised on “the counterintuitive proposition that an ‘achieved’ level may not be ‘achievable,’ or, as Sierra Club puts it, may be better than ‘EPA’s notions about what is achievable,’” *id.* at 662, the Court rejected the Sierra Club’s statutory objections to using regulatory data and uncontrolled (i.e., combustion-controlled) emissions values. In other words, the Court implicitly embraced EPA’s view, under the principle of *National Lime*, that the MACT floor is premised on the fundamental concept that it be “achievable,” and should not be set at a level that happens to be reflected by the lowest observed data point without consideration of variability in operating conditions. Then, after analyzing and rejecting the Sierra Club’s arguments that the plain language of the CAA and its legislative history forbid EPA’s methodology, the Court further ruled that it found “nothing inherently impermissible about construing the statute to permit the use of regulatory data—if they allow EPA to make a reasonable estimate of the performance of the top 12 percent of units. Indeed, the Sierra Club conceded at oral argument that ‘a reasonable sample’ may be used ‘to find out what the best 12 percent are doing.’ Oral Arg. Tr. at 11. To be sure, the Sierra Club did not concede that permit data may be used. But neither has it provided any basis for believing that state and local limitations are such weak indicators of performance that using them is necessarily an impossible stretch of the statutory terms. [* * *] We therefore reject the Sierra Club’s argument that the CAA forbids the use of permit and regulatory data, and hold that the use of such information is permissible as long as it allows a reasonable inference as to the performance of the top 12 percent of units. Similarly, as long as there is a reasonable basis for believing that some of the best performing 12 percent of units are uncontrolled [i.e., combustion controlled], EPA may include data points giving a reasonable representation of the performance of those units in its averaging.” *Sierra Club v. EPA*, 167 F.3d at 662, 663. Thus, the Court rejected all of the Sierra Club’s

arguments that the CAA prohibits EPA from basing MACT floor determinations on permit or regulatory data, or on uncontrolled (i.e., combustion-controlled) emissions values.

However, in addressing the manner in which EPA had specifically relied upon such data in the HMIWI rulemaking, the Court concluded that “[a]lthough EPA said that it believed the combination of regulatory and uncontrolled [i.e., combustion-controlled] data gave an accurate picture of the relevant [HMIWI]s’ performance, it never adequately said why it believes this. [* * *] First, EPA has said nothing about the possibility that [HMIWI]s might be substantially overachieving the permit limits. If this were the case, the permit limits would be of little value in estimating the top 12 percent of [HMIWI]s’ performance. [* * *] Second, EPA never gave any reason for its apparent belief that [HMIWI]s that were not subject to permit requirements did not deploy emission controls of any sort. Unless there is some finding to this effect, it is difficult to see the rationality in using ‘uncontrolled’ [i.e., combustion-controlled] data for the units that were not subject to regulatory requirements.” *Id.*, at 663–664. The Court further questioned the rationality of EPA using the highest of its test run data in cases where the regulatory data did not alone comprise the necessary 12 percent. *Id.*, at 664.

c. Subsequent Court Rulings Relevant to the Remand. Following the Court’s remand of the HMIWI MACT floors in *Sierra Club v. EPA*, the Court issued a series of rulings in other cases addressing MACT rules that bear on EPA’s proposed response regarding HMIWI. The first of these was *Nat’l Lime Ass’n v. EPA*, 233 F.3d 625 (D.C. Cir. 2000) (“*NLA II*”), which involved challenges to EPA’s MACT standards under CAA section 112(d) for portland cement manufacturing facilities. In that case, the Sierra Club argued that EPA should have based its estimate of the top performing 12 percent of sources on actual emissions data, in order to “reasonably estimate” such performance. But the Court determined that EPA’s approach of selecting “the median [performing] plant out of the best twelve percent of the plants for which it had information and set[ting]

the * * * floor at the level of the worst performing plant in its databases using th[e same] technology [as the median plant]” had not been shown by the Sierra Club to reflect a not reasonable estimate. *NLA II*, 233 F.3d at 633.

In addition, the Court partially clarified its position regarding EPA’s approach of accounting for emissions performance variability by setting floors at a level that reasonably estimates “the performance of the ‘best controlled similar unit’ under the worst reasonably foreseeable circumstances.” *Sierra Club*, 167 F.3d at 665. In *NLA II*, the Court stressed that EPA should not simply set floors at levels reflecting the worst foreseeable circumstances faced by any worst performing unit in a given source category, and that while considering all units with the same technology may be justifiable because the best way to predict the worst reasonably foreseeable performance of the best unit with available data is to look at other units’ performance, such an approach would satisfy the CAA “if pollution control technology were the only factor determining emission levels of that HAP.” *NLA II*, 233 F.3d at 633.

In *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855 (D.C. Cir. 2001) (“*CKRC*”), the Court again refined its view on when it is appropriate for EPA to base MACT floors on the performance of air pollution control technology. In that case, the Sierra Club challenged EPA’s MACT standards for hazardous waste combustors (HWC), and argued that factors other than MACT technology influenced the emissions performance of the best performing sources.

The Court agreed that since EPA’s record evidence in the HWC rulemaking showed that factors besides MACT controls significantly influenced HWC emission rates, “emissions of the worst-performing MACT source may not reflect what the best-performers actually achieve.” *CKRC*, 255 F.3d at 864. EPA had claimed that MACT floors must be achievable by all sources using MACT technology, and that to account for the best-performing sources’ operational variability we had to base floors on the worst performers’ emissions. But the Court stressed that “whether variability in the MACT control accurately estimates variability associated with the

best performing sources depends on whether factors other than MACT control contribute to emissions[.]” *id.*, and that “the relevant question here is not whether control technologies experience variability at all, but whether the variability experienced by the best-performing sources can be estimated by relying on emissions data from the worst-performing sources using the MACT control.” *Id.*, at 865.

In the specific case of the HWC rule, the Court concluded that, since record evidence showed that non-MACT factors influenced emissions performance, EPA could not base floors simply on the worst-performing MACT sources’ emissions. *Id.*, at 866. However, the Court also reiterated that “[i]f in the case of a particular source category or HAP, the Agency can demonstrate with substantial evidence—not mere assertions—that MACT technology significantly controls emissions, or that factors other than the control have a negligible effect, the MACT approach could be a reasonable means of satisfying the statute’s requirements.” *Id.*

5. Are revisions to the emission limits being proposed in response to the remand?

Yes, the proposed response to the remand would revise some of the emission limits in both the NSPS and emission guidelines. Relative to the NSPS, the emission limits for CO, Pb, Cd, Hg, PM, and CDD/CDF would be revised. Relative to the emission guidelines, the emission limits for HCl, Pb, Cd, and CDD/CDF would be revised. EPA believes that the revised emission limits being proposed as a result of its response to the remand can be achieved with the same emission control technology currently used by HMIWI. The proposed emission limits for the NSPS and emission guidelines necessary to respond to the Court’s remand are summarized in Table 3 of this preamble. Note that in several cases, further amendments to the emission limits are being proposed as a result of our 5-year review under CAA section 129(a)(5). Those proposed amendments are discussed in the following section of this preamble.

TABLE 3.—SUMMARY OF PROPOSED EMISSION LIMITS IN RESPONSE TO THE REMAND

Pollutant (units)	Unit size ¹	Proposed remand limit for existing HMIWI ²	Proposed remand limit for new HMIWI ²
HCl (ppmv)	L, M, S	78 or 93% reduction ³	15 ³ or 99% reduction ³ .
	SR	3,100 ³	N/A ⁴ .
CO (ppmv)	L, M, S	40 ³	32
	SR	40 ³	N/A ⁴ .

TABLE 3.—SUMMARY OF PROPOSED EMISSION LIMITS IN RESPONSE TO THE REMAND—Continued

Pollutant (units)	Unit size ¹	Proposed remand limit for existing HMIWI ²	Proposed remand limit for new HMIWI ²
Pb (mg/dscm)	L, M	0.78 or 71% reduction	0.060 or 98% reduction ³ .
	S	0.78 or 71% reduction	0.78 or 71% reduction.
	SR	8.9	N/A ⁴ .
Cd (mg/dscm)	L, M	0.11 or 66% reduction ³	0.030 or 93% reduction.
	S	0.11 or 66% reduction ³	0.11 or 66% reduction ³ .
	SR	4 ³	N/A ⁴ .
Hg (mg/dscm)	L, M	0.55 ³ or 87% reduction	0.45 or 87% reduction.
	S	0.55 ³ or 87% reduction	0.47 or 87% reduction.
	SR	6.6	N/A ⁴ .
PM (gr/dscf)	L	0.015 ³	0.009
	M	0.030 ³	0.009
	S	0.050 ³	0.018
	SR	0.086 ³	N/A ⁴ .
CDD/CDF, total (ng/dscm)	L, M	115	20
	S	115	111
	SR	800 ³	N/A ⁴ .
CDD/CDF, TEQ (ng/dscm)	L, M	2.2	0.53
	S	2.2	2.1
	SR	15 ³	N/A ⁴ .
NO _x (ppmv)	L, M, S	250 ³	225
	SR	250 ³	N/A ⁴ .
SO ₂ (ppmv)	L, M, S	55 ³	46
	SR	55 ³	N/A ⁴ .

¹ L = Large; M = Medium; S = Small; SR = Small Rural² All emission limits are measured at 7 percent oxygen.³ No change proposed.⁴ Not applicable.

B. Proposed Amendments (CAA Section 129(a)(5) 5-Year Review)

Section 129(a)(5) of the CAA requires EPA to conduct a review of the NSPS and emissions guidelines at 5 year intervals and, if appropriate, revise the NSPS and emission guidelines pursuant to the requirements under sections 111 and 129 of the CAA. In conducting such reviews, EPA attempts to assess the performance of and variability associated with the installed emissions control equipment (and developments in practices, processes and control technologies) and to revise as necessary and appropriate the NSPS and emission guidelines. In these reviews, EPA takes into account the currently installed equipment and its performance and operational variability. As appropriate, we also consider new technologies that have been demonstrated to reliably control emissions from the source category. In setting numerical emission limits from single, “snap shot” stack test data, EPA must exercise technical judgment to ensure the achievability of such limits over the course of anticipated operating conditions. EPA has completed the 5-year review, and the proposed amendments discussed below reflect the changes that EPA has determined are appropriate in addition to the amendments that are necessary to respond to the Court’s remand. These proposed amendments do not reflect adoption of new control technologies or

processes, but do reflect more efficient practices in operation of the control technologies that sources used in order to meet the 1997 MACT standards.

Following year 2002 compliance with the emission guidelines, EPA gathered information on the performance levels actually being achieved by HMIWI that were operating under the guidelines. After implementation of the guidelines in 1997, approximately 94 percent of HMIWI shut down, and 3 percent demonstrated eligibility for exemptions from the HMIWI regulation. Those HMIWI that remained in operation either continued operation with their existing configuration or were retrofitted with add-on air pollution control devices in order to meet the standards. The retrofits were completed on time, and the controls installed to meet the required emission limitations were highly effective in reducing emissions of all of the CAA section 129 pollutants emitted by HMIWI. For those HMIWI, relative to a 1995 baseline, the emission guidelines reduced organic emissions (CDD/CDF) by about 90 percent, metals emissions (Pb, Cd, and Hg) by more than 80 percent, and acid gas emissions (HCl and SO₂) by more than 70 percent. Including shutdowns and exemptions, nationwide HMIWI emissions of organics, metals, and acid gases each decreased by about 99 percent or more relative to a 1995 baseline. It should be noted that the original HMIWI emission

limits were based primarily on permit information and other regulatory requirements, and not on actual performance or stack test data. To this end, it was highly uncertain at promulgation what the precise performance efficiency and day-to-day operational variability associated with the promulgated regulatory requirements would yield. Thus, the 2002 compliance test information provided the first quantitative assessment of the performance of the installed control equipment’s ability to attain the NSPS and emissions guideline limits.

The goal of the current technology review is to assess the performance efficiency of the installed equipment and to ensure that the emission limits reflect the performance of the technologies required by the MACT standards. In addition, the review addresses whether new technologies and processes and improvements in practices have been demonstrated at sources subject to the emissions limitations. EPA’s intent for future technology reviews is to include similar analyses that also assess risk along with new technologies. For the current review, while new technologies have not yet been demonstrated to reliably control emissions more efficiently at reasonable cost at HMIWI units than those used to meet MACT, improvements in operational practices

do support some additional revision of the standards, in order to better reflect the best operation of the MACT controls.

These proposed amendments would revise the NSPS and emission guidelines, in some cases beyond the point needed to respond to the Court's remand, based on the performance

levels currently being achieved by HMIWI. The revisions discussed in the following text apply to both the NSPS and the emission guidelines, unless otherwise specified.

1. Are revisions to the emission limits being proposed?

Yes, the proposed amendments would revise the emission limits in both the

NSPS and emission guidelines. EPA's technology review demonstrates that the proposed emission limits can be achieved with the same emission control technology currently used by HMIWI. The proposed emission limits for the NSPS and emission guidelines are summarized in Tables 4 and 5 of this preamble.

TABLE 4.—SUMMARY OF PROPOSED 5-YEAR REVIEW EMISSION LIMITS FOR NEW HMIWI

Pollutant (units)	Unit Size ¹	Proposed Limit ²
HCl (ppmv)	L, M, S	15 ³ or 99% reduction ³ .
CO (ppmv)	L, M, S	25
Pb (mg/dscm)	L, M	0.060 or 99% reduction.
	S	0.64 or 71% reduction.
Cd (mg/dscm)	L, M	0.0050 or 99% reduction.
	S	0.060 or 74% reduction.
Hg (mg/dscm)	L, M	0.19 or 96% reduction.
	S	0.33 or 96% reduction.
PM (gr/dscf)	L, M	0.0090.
	S	0.018.
CDD/CDF, total (ng/dscm)	L, M	16
	S	111
CDD/CDF, TEQ (ng/dscm)	L, M	0.21
	S	2.0
NO _x (ppmv)	L, M, S	212
SO ₂ (ppmv)	L, M	21
	S	28

¹ L = Large; M = Medium; S = Small

² All emission limits are measured at 7 percent oxygen.

³ No change proposed.

TABLE 5.—SUMMARY OF PROPOSED 5-YEAR REVIEW EMISSION LIMITS FOR EXISTING HMIWI

Pollutant (units)	Unit Size ¹	Proposed Limit ²
HCl (ppm)	L, M, S	51 or 94% reduction.
	SR	398
CO (ppm)	All	25
Pb (mg/dscm)	L, M, S	0.64 or 71% reduction.
	SR	0.60
Cd (mg/dscm)	L, M, S	0.060 or 74% reduction.
	SR	0.050
Hg (mg/dscm)	L, M, S	0.33 or 96% reduction.
	SR	0.25 ³
PM (gr/dscf)	L	0.015
	M	0.030 ³
	S	0.030
	SR	0.030
CDD/CDF, total (ng/dscm)	L, M, S	115
	SR	800 ³
CDD/CDF, TEQ (ng/dscm)	L, M, S	2.0
	SR	15 ³
NO _x (ppmv)	All	212
SO ₂ (ppmv)	All	28

¹ L = Large; M = Medium; S = Small; SR = Small Rural

² All emission limits are measured at 7 percent oxygen.

³ No change proposed.

As indicated by Table 5 of this preamble, the proposed emission limits for Pb, Cd, and Hg for existing small rural HMIWI are more stringent than those being proposed for existing large, medium, and small HMIWI. We believe that this better emissions performance by existing small rural HMIWI is a result

of the waste stream of a small rural hospital not including certain materials that are in the waste stream of a non-rural hospital and that cause relatively higher Pb, Cd and Hg emissions.

2. Are other amendments being proposed?

The proposed amendments would also make the following changes based on information received during implementation of the HMIWI NSPS and emission guidelines and would

apply equally to the NSPS and emission guidelines, unless otherwise specified.

a. **Performance Testing and Monitoring Amendments.** The proposed amendments would allow sources to use the results of previous emissions tests to demonstrate compliance with the revised emission limits as long as the sources certify that the previous test results are representative of current operations. Only those sources whose previous emissions tests do not demonstrate compliance with one or more revised emission limits would be required to conduct another emissions test for those pollutants (note that sources are already required to test for HCl, CO, and PM on an annual basis). The proposed amendments would require, for existing HMIWI, annual inspections of scrubbers and fabric filters, and a one-time Method 22 visible emissions test of the ash handling operations to be conducted during the next compliance test. For new HMIWI, the proposed amendments would require CO continuous emissions monitoring systems (CEMS), bag leak detection systems for fabric-filter controlled units, annual inspections of scrubbers and fabric filters, and Method 22 visible emissions testing of the ash handling operations to be conducted during each compliance test. For existing HMIWI, use of CO CEMS would be an approved alternative, and specific language with requirements for CO CEMS is included in the proposed amendments. For new and existing HMIWI, use of PM, HCl, multi-metals, and Hg CEMS, and semi-continuous dioxin monitoring (continuous sampling with periodic sample analysis) also are approved alternatives, and specific language for these alternatives is included in the proposed amendments.

b. **Other Amendments.** The proposed amendments would revise the definition of "Minimum secondary chamber temperature" to read "Minimum secondary chamber temperature means 90 percent of the highest 3-hour average secondary chamber temperature (taken, at a minimum, once every minute) measured during the most recent performance test demonstrating compliance with the PM, CO, and dioxin/furan emission limits."

The proposed amendments would require sources to submit, along with each test report, a description of how operating parameters are established during the initial performance test and subsequent performance tests.

3. Is an implementation schedule being proposed?

Yes; under the proposed amendments to the emission guidelines, and

consistent with CAA section 129, revised State plans containing the revised emission limits and other requirements in the proposed amendments would be due within 1 year after promulgation of the amendments. That is, revised State plans would have to be submitted to EPA 1 year after the date on which EPA promulgates revised standards.

The proposed amendments to the emission guidelines then would allow HMIWI units up to 3 years from the date of approval of a State plan, but not later than 5 years after promulgation of the revised standards, to demonstrate compliance with the amended standards. Consistent with CAA section 129, EPA expects States to require compliance as expeditiously as practicable. HMIWI units have already installed the emission control equipment necessary to meet the proposed revised limits, and EPA, therefore, anticipates that most State plans will include compliance dates sooner than 5 years following promulgation of the amendments. In most cases, the only changes necessary are to review the revisions and adjust the emission monitoring and reporting accordingly.

In revising the emission limits in a State plan, a State has two options. First, it could include both the current and the new emission limits in its revised State plan, which allows a phased approach in applying the new limits. That is, the State plan would make it clear that the current emission limits remain in force and apply until the date the new emission limits are effective (as defined in the State plan). States whose HMIWI units do not find it necessary to improve their performance in order to meet the new emission limits may want to consider a second approach where the State would insert the new emission limits in place of the current emission limits, follow procedures in 40 CFR part 60, subpart B, and submit a revised State plan to EPA for approval. If the revised State plan contains only the new emission limits (i.e., the current emission limits are not retained), then the new emission limits must become effective immediately since the current limits would be removed from the State plan.

4. Has EPA changed the applicability date of the 1997 NSPS?

No; however, HMIWI may be treated differently under the amended standards than they were under the 1997 standards in terms of whether they are "existing" or "new" sources, and there will be new dates defining what are "new" sources and imposing

compliance deadlines regarding any amended standards. The applicability date for the NSPS units, with respect to the standards as promulgated in 1997, remains June 20, 1996; however, units for which construction is commenced after the date of this proposal, or modification is commenced on or after the date 6 months after promulgation of the amended standards, would be subject to more stringent NSPS emission limits than units for which construction or modification was completed prior to those dates. Under the proposed amendments, units that commenced construction after June 20, 1996, and on or before February 6, 2007, or that are modified before the date 6 months after the date of promulgation of any revised final standards, would continue to be or would become subject to the NSPS emission limits that were promulgated in 1997 and that remain in the 40 CFR part 60, subpart Ec NSPS, except where the revised emission guidelines would be more stringent. In that case, HMIWI that are NSPS units under the 1997 rule would also need to comply with the revised emission guidelines for existing sources, by the applicable compliance date for such existing sources. Similarly, emission guidelines units under the 1997 rule would need to meet the revised emission guidelines by the applicable compliance date for the revised guidelines. HMIWI that commence construction after February 6, 2007 or that are modified 6 months or more after the date of promulgation of any revised standards would have to meet the revised NSPS emission limits being added to the subpart Ec NSPS and any remaining NSPS limits from the 1997 rule, as applicable, within 6 months after the promulgation date of the amendments or upon startup, whichever is later.

IV. Rationale

A. Rationale for the Proposed Response to the Remand

This action responds to the Court's remand by (1) further explaining the reasoning processes by which EPA determined the MACT floors and the MACT standards for new and existing HMIWI for the portions of those processes that are being retained under our remand response, and (2) explaining revisions to the processes, the MACT floors, and the MACT standards for new and existing HMIWI that result from our response to the remand.

1. New HMIWI

The Court raised three issues with regard to EPA's treatment of the MACT floor for new units and the achievable

emission limitations. First, the Court asked EPA to explain why the floor was based on the highest emissions levels of the “worst-performing” unit employing the MACT technology rather than on the lowest observed emissions levels of the best performing unit using the MACT technology. (See *Sierra Club v. EPA*, 167 F.3d at 665.) Second, the Court requested further explanation of why EPA considered multiple units employing the MACT technology, rather than identify the single best-performing unit and basing the floor on that particular unit’s performance with that technology. *Id.* Third, the Court requested further explanation of EPA’s procedure for determining the achievable emission limitation from the available data, where EPA selected a numerical value somewhat higher than the highest observed data point. The Court stated that EPA’s procedure “[m]ay be justifiable as a means of reasonably estimating the upper bound of the best-controlled unit’s performance, but in the absence of agency explanation of both the decision to increase the levels and the choice of method for determining the increases, we are in no position to decide.” *Id.*

As discussed in detail below, for the first two issues, the Court described potential rationale for EPA’s method. However, because the Court concluded that this rationale was not adequately presented in the rulemaking record, the Court asked for further clarification by EPA. In subsequent cases the Court further addressed these potential rationales, and discussed under what circumstances they would and would not be persuasive. In fact, the Court’s potential rationale for EPA’s method reflects the principles used by EPA in determining the MACT floor for new units and the achievable emission limitations for this source category, and is the method that has been used by EPA throughout most of the Agency’s 30-year history in developing achievable technology-based emission limitations for source categories in cases where the application of control technology has been the only means by which sources have limited emissions, and the variability of technology performance is a critical factor in determining an emission limitation’s achievability. (See, e.g., *American Iron and Steel Inst. v. EPA*, 115 F.3d 979, 1000 (D.C. Cir. 1997); *BP Exploration & Oil, Inc., v. EPA*, 66 F.3d 784, 794 (6th Cir. 1995); *NRDC v. EPA*, 790 F.2d 289, 299 (3d Cir. 1986); *National Ass’n of Metal Finishers v. EPA*, 719 F.2d 624, 659 (3d Cir. 1983); *rev’d on other grounds sub nom, Chemical Mfrs. Ass’n v. NRDC*, 470 U.S.

116 (1985); *American Petroleum Inst. v. EPA*, 661 F.2d 340, 347 n. 23 (5th Cir. 1981); *Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1302 (9th Cir. 1977); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1266–67 (9th Cir. 1977); *FMC v. Train*, 639 F.2d 973, 985–86 (4th Cir. 1976).) As discussed elsewhere in this preamble, in *CKRC* the Court stressed that where record evidence suggests that factors other than application of control technology influence emissions, EPA will not be able to demonstrate “that floors based on the worst-performing MACT sources’ emissions represent ‘a reasonable estimate of the performance of the [best-performing] units.’” *CKRC*, 255 F.3d at 866, quoting *Sierra Club*, 167 F.3d at 662. However, the Court reiterated that where EPA’s record demonstrates that MACT technology significantly controls emissions, or that factors other than the control have a negligible effect, the approach of accounting for variability by basing the floor on the highest emissions resulting from a source using MACT technology “could be a reasonable means of satisfying the statute’s requirements.” *CKRC*, at 866.

a. Applicability of *National Lime* to CAA Section 129. CAA section 129(a)(3) states that “[s]tandards under section 111 and this section applicable to solid waste incineration units shall be based on methods and technologies for removal or destruction of pollutants before, during, or after combustion [* * *].” This language requires that such a standard be based on the degree of reduction in air pollutant emissions that can be achieved through application of a particular method of pollution control, and any other factors that record evidence shows significantly affect emissions performance. Much like the language in CAA sections 111 and 129 governing the HMIWI standards, Congress has used similar language in other statutes to direct adoption of technology-based standards. (See, e.g., CAA section 169(3) defining “best available control technology”; Clean Water Act section 301(b)(2)(A), for “best available technology economically achievable” or “BAT” standards; Clean Water Act section 304(b)(1) for “best practicable technology” or “BPT” standards.)

As the Court has stated, “[t]echnology-based provisions [in the CAA] require EPA to promulgate standards only after finding that the requisite technology exists or may be feasibly developed. Absolute standards, on the other hand, require compliance with statutorily prescribed standards and time tables, irrespective of present technologies.” (See *NRDC v. Reilly*, 983 F.2d 259, 268 (D.C. Cir. 1993) (holding

that elimination of feasibility requirements and specification of particular control systems indicated that congressional amendment of CAA section 202(a)(6) resulted in an “absolute” standard).) MACT standards under CAA sections 111 and 129 are “technology-based,” rather than “absolute” standards. The legislative history to the 1990 CAA Amendments clearly shows that Congress intended the MACT standards to be technology-based. (See *I A Legislative History*, at 863 (Senator Durenberger referring to “the MACT technology-based standards” in debates on the bill reported by the Conference Committee); *id.*, at 1128 (Senator Dole explaining that changes made to CAA section 129 in the Conference Committee “make the technology test more closely approximate the role of the NSPS”); S. Rep. No. 101–228, at 133–134 (1989) (referring to CAA section 112 MACT standards as “technology-based standards” and noting that technology-based effluent standards under the Clean Water Act served as a model for the new MACT standards).)

CAA section 129 does not specify a type of control technology for HMIWI, but instead requires EPA to develop floor levels already achieved in practice by one or more units, and then issue standards that EPA determines are “achievable” for units in that source category. As the Court stated in *National Lime Ass’n v. EPA* (627 F.2d 416, 431 n. 46 (D.C. Cir. 1980)) (“*NLA I*”), and restated in *Sierra Club*, “where a statute requires a standard to be achievable, it must be achievable ‘under most adverse circumstances which can reasonably be expected to recur.’” (See *Sierra Club*, 167 F.3d at 665.) In other words, “EPA would be justified in setting floors at a level that is a reasonable estimate of the performance of the ‘best controlled similar unit’ under the worst reasonably foreseeable circumstances[.]” *Id.* This concept of “worst reasonably foreseeable circumstances” is fundamental in developing achievable technology-based emission limitations, since, once the standard is in force, sources will be expected to comply with it at all times by relying on the technology that formed the basis for EPA’s determination that the promulgated emissions limitation is achievable. As the Court stated in *Sierra Club*, “[i]t is reasonable to suppose that if an emissions standard is as stringent as ‘the emissions control that is achieved in practice’ by a particular unit, then that particular unit will not violate the standard. This only results if ‘achieved in practice’ is interpreted to

mean 'achieved under the worst foreseeable circumstances.'" *Id.*

EPA agrees with the Court that, in order to satisfy the requirements of *NLA I*, "[t]he same principle should apply when a standard is to be derived from the operating characteristics of a particular unit[.]" as is the case under CAA section 129(a)(2). *Id.* CAA section 129(a)(2) requires that the new unit MACT floor be "not less stringent than the emissions control that is achieved in practice by the best controlled similar unit, as determined by the Administrator." It would have been unreasonable for EPA to base the MACT floors solely on the lowest levels of emissions observed without an assessment of whether those observed levels could be met on a continuous basis, and the CAA and its legislative history provide no support in deviating from the general practice EPA has followed in the wake of *NLA I*. In a report on H.R. 3030, the House Committee on Energy and Commerce explained that "MACT is not intended to require unsafe control measures, or to drive sources to the brink of shutdown." (See H.R. Rep. No. 101-490, pt. 1, at 328 (1990).) This view is consistent with *NLA I*, which involved challenges to standards EPA promulgated under section 111 of the CAA and is particularly applicable to the HMIWI rulemaking under CAA section 129, since this rule has its basis in authority in both section 129 and section 111. (See CAA section 129(a)(1)(A) and (C).)

Moreover, interpreting CAA section 129 as subject to the principles of *NLA I* appropriately notes the critical distinction between a level of emissions that has been continuously achieved through performance using control technology, and one that has been observed at a single point in time. A level that has been continuously achieved is capable of being met under most conditions which can reasonably be expected to recur because variability in operating conditions is taken into account. Such a level best effectuates Congress' intent because it ensures that the MACT floor will result in reduced emissions without forcing sources to shut down. A lowest observed emission level, however, is not representative of a unit's performance under most conditions which can reasonably be expected, and may be impossible to achieve on a regular, let alone continuous, basis. While an observed lowest emissions level may be appropriate for use in determining whether a source is in compliance with an emission standard that must be continuously met, it is not an appropriate level upon which to base

the minimum stringency level of such a standard.

In addition, Congress' use of the phrases "as determined by the Administrator" and "achieved in practice" in CAA section 129(a)(2) in the directive to establish MACT floors shows that Congress expected EPA to consider variability in operating conditions and other relevant factors in the Agency's determinations. The term "practice" is defined as "[r]epeated or customary action; habitual performance; a succession of acts of a similar kind; custom; usage." (See Black's Law Dictionary 1172 (6th ed. 1990).) Thus, achieved in "practice" means achieved on a repeated, customary, or habitual basis. Under the statutory mandate that the level "achieved in practice" be "determined by the Administrator," EPA must exercise its judgment, based on an evaluation of the relevant factors and available data, to determine the level of emissions control that can be customarily achieved using the relied-upon technology under variable conditions. Merely locating the lowest emissions data point and setting the MACT standard at that level would not constitute a considered "determination by the Administrator" as to what has been "achieved in practice." (See, e.g., Senate Debate on Conference Report, 10-26-90, reprinted in *I A Legislative History of CAA Amendments of 1990*, 103d Cong., 1st Sess. at 1128-1129 (Comm. Print 1993) (exchange between Senators Dole and Durenberger confirming that the phrase "achieved in practice" accounts for the distinction between research-type pollution control systems and systems that are "economically viable for widespread use," and stressing that MACT floors should rely upon technologies that can "stand the rigors of day to day operations").)

Ultimately, *NLA I* is controlling because the case addressed how standards must be set in the face of variable operating conditions, and involved one of the same provisions of the CAA, section 111, under which the HMIWI rule was promulgated. *NLA I* held that EPA is required to use data that is representative of emissions that could be achieved in the industry as a whole. (See 627 F.2d at 433.) In developing the standards at issue in that case, EPA relied upon tests of the emissions from particular units to determine the level of emissions control that was achievable across the entire industry. The Court directed EPA to identify "variable conditions that may contribute substantially to the amount of emissions, or otherwise affect the efficiency of the emissions control

systems." *Id.* The Court then stated that "where test results are relied upon, it should involve the selection or use of test results in a manner which provides some assurance of the achievability of the standard for the industry as a whole, given the range of variable factors found relevant to the standards' achievability." *Id.* This does not mean that EPA must test every plant, but it does mean that "due consideration must be given to the possible impact on emissions of recognized variations in operations and some rationale offered for the achievability of the promulgated standards given the tests conducted and the relevant variables identified." *Id.*, at 434. Thus, applying *NLA I* to the HMIWI rule adopted under CAA sections 111 and 129, it is really a misnomer to characterize EPA as basing the MACT floor on the emissions of the "worst performing" unit using the technology in question, since that unit's level of emissions necessarily more closely represents the level "achieved in practice" by the given technology than would the lowest emissions level observed at a source using that "best" technology.

b. Variability Between Facilities or Units. In remanding the NSPS at issue in *NLA I*, the Court noted that its decisions under CAA section 111 "evinced a concern that variables be accounted for, that the representativeness of test conditions be [sic] ascertained, that the validity of tests be assured and the statistical significance of results be determined." (See *NLA I*, 627 F.2d at 452-53.) (See, also, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 396 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).) When floors and standards are developed based on emissions data, EPA accounts for several types of variability to avoid adopting unachievable standards. The first type of variability is that concerning operational distinctions between facilities or units. As the *Sierra Club* Court stated in reviewing the HMIWI rule, "[p]erhaps considering all units with the same technology is justifiable because the best way to predict the worst reasonably foreseeable performance of the best unit with the available data is to look at other units' performance. Or perhaps EPA reasonably considered all units with the same technology equally 'well-controlled,' so that each unit with the best technology is a 'best-controlled unit' even if such units vary widely in performance." (See 167 F.3d at 665.) These are two ways of saying essentially the same thing, and these concepts have

been used by EPA throughout most of the Agency's history in determining achievable technology-based emission limitations, in cases where application of control technology significantly controls emissions and no record evidence indicates that factors other than the control have more than a negligible effect. Examining multiple units using the same technology gives the best picture of the performance capability of that particular technology, since it provides EPA with a more complete set of data by which to evaluate what levels of emissions control a technology can achieve as it is applied to varying sources. Such an analysis is necessary especially when adopting standards that all sources in a category will have to be able to meet by using the identified technology. Since MACT floors and standards are generally expressed as numerical emissions limits, it is necessary to account for this variability in order to adopt a regulation that is 'achievable' by the industry as a whole." (See *NLA I*, 627 F.2d at 437.)

Section 129(a)(2) of the CAA requires that EPA determine the emissions control achieved by the "best controlled similar unit" when establishing the MACT floors for new units. A solid waste incineration "unit" is defined as "a distinct operating unit of any facility which combusts any solid waste material" (CAA section 129(g)(1)). To achieve the best level of pollution control, that unit will utilize a particular method of pollution control (and possibly use other means that affect its emissions performance). The emissions control achieved by that method (and by any additional means) is the emissions control achieved by the "best controlled similar unit." Thus, the MACT floor for new units is based on the "emissions control" that is attained by the specific method of pollution control and any other means used to limit emissions at the best similar unit, rather than merely on the emissions measured at a particular unit.

In this way, by basing the MACT floor on the capability of a particular method of pollution control used at "similar" "best" "units," instead of on the emissions measured at a single unit, EPA ensures that the floors would not only be achievable by the single best performing unit, but are also achievable by other units using the same technology and/or emissions limiting means as the best similar unit, and that it is reasonable to require the best similar unit and all future new units to meet this floor on a continuous basis. In contrast, identifying the "emissions control" of the "best controlled similar

unit" as being a single data point from a single source provides merely a snapshot of emissions performance that may not be replicable by either that single source or by other sources using the same control technology, and, therefore, does not provide a basis for enforceably requiring all sources to perform to that level.

Thus, the most reasonable way to interpret the statutory phrase "best controlled similar unit" in CAA section 129 is as encompassing all units using the same technology and emissions limiting means as the single unit with the best observed performance, rather than just that single best performing unit itself. A contrary interpretation would seem to directly conflict with the Court's directive in *NLA I*, and is not compelled by the Court rulings in *Sierra Club*, *NLA II*, and *CKRC*. Applying this approach to evaluating "best technologies" at "best controlled similar units," where different design characteristics are identified (e.g., low-efficiency versus moderate-efficiency versus high-efficiency wet scrubbers), the data are grouped such that each data set reflects the performance of an "identical" control device, providing the best indication of the true performance of each control device and enabling the Agency to adopt a numerical standard that can be met with the subject technology at all units employing this technology, and can be enforced. Again, where the record evidence indicates that the only means of control of emissions at units is application of control technology, and there is no record evidence showing that other means of emissions limitation significantly affect emissions performance, basing the MACT floor on this approach is fully consistent with the Court's rulings in the MACT cases.

c. Variability Between and Within Tests at Facilities. Another type of variability that EPA accounts for in order to ensure the achievability of technology-based standards that rely upon application of pollution controls concerns operational distinctions between and within tests at the same unit. Regarding "between-test variability," even where conditions appear to be the same when two or more tests are conducted, variations in emissions are often caused by different settings for emissions testing equipment and differences in sample handling. Varying results may also be caused by use of different field teams to conduct the testing, or different laboratories to analyze the results. All these variations are typical.

An achievable standard needs to account for these differences between

tests, in order for "a uniform standard [to] be capable of being met under most adverse conditions which can reasonably be expected to recur[.]" (See *NLA I*, 627 F.2d at 431, n. 46.) (See also *Portland Cement Ass'n*, 486 F.2d at 396 (noting industry point that "a single test offered a weak basis" for inferring that plants could meet the standards).) Without accounting for variation among different emissions tests, it can be determined with a significant degree of statistical confidence that even a single unit will not be able to meet the standard over a reasonable period of time, when one can expect adverse conditions to recur. The Courts have recognized this basic principle in reviewing technology-based effluent standards under the Clean Water Act. As the U.S. Court of Appeals for the 5th Circuit stressed regarding "best practicable technology" or "BPT" standards under section 304(b)(1) of the Clean Water Act, "[t]he same plant using the same treatment method to remove the same toxic does not always achieve the same result. Tests conducted one day may show a different concentration of the same toxic than are shown by the same test on the next day. This variability may be due to the inherent inaccuracy of analytical testing, i.e., 'analytical variability,' or to routine fluctuations in a plant's treatment performance." (See *Chemical Mfrs Ass'n v. EPA*, 870 F.2d 177, 228 (5th Cir. 1989).) (See also *American Petroleum Institute v. EPA*, 540 F.2d 1023, 1035-36 (10th Cir. 1976) ("Even in the best treatment systems, changes occur in ability to treat wastes. [* * *] [V]ariability factors present[] a practical effort to accommodate for variations in plant operations"); *FMC Corp. v. Train*, 539 F.2d 973, 985 (4th Cir. 1976) (variability factors account for "the fact that even in the best treatment systems changes continually occur in the treatability of wastes").)

The same types of differences leading to between-test variability also cause variations in results between various runs comprising a single test, or "within-test variability." A single test at a unit usually includes at least three separate test runs. (See 40 CFR 63.7(e)(3) (for MACT standards under section 112 of the CAA), and 40 CFR 60.8(f) (for NSPS under CAA section 111).) (See also *Portland Cement Ass'n*, 486 F.2d at 397 (noting differences in conditions among several test runs).)

d. Application of *NLA I*, *Sierra Club*, *NLA II*, and *CKRC* Principles in HMIWI Rulemaking. Based on the record for the 1997 rulemaking, the best way to determine the worst reasonably foreseeable circumstances for the

particular technologies used to control emissions at HMIWI was to first examine the highest data point actually observed from HMIWI equipped with each particular technology. If an emission value has been observed and there is no reason to believe it represents poor performance (i.e., there is nothing that can be done to prevent its recurring), it is likely to occur again in the future and, therefore, reflects a foreseeable circumstance. It is incorrect to characterize the highest data point as the "worst performance" of the best performing unit, or to characterize one control device's performance as "better" than another's based solely on the results of a single emission test. This is because such focuses relate to essentially random single data occurrences, rather than to estimating what a particular technology can be expected to continuously achieve. Rather, each data point, whether from one unit or from several identical units using the same technology, should be viewed as a snapshot of the actual performance of the technology in use. Along with an understanding of the factors affecting the performance of the technology, each of these snapshots gives information about the normal, and unavoidable, variation in emissions that would be expected to recur over time when using the identified technology. Conversely, when there is evidence that an emission data point reflects poor performance (design, operation, or both), such a data point should not be considered in determining the achievable emission limitation associated with the technology.

Furthermore, a distinction must be made between an emission level that has been "observed" and an emission limitation that can be continuously "achieved." The purpose of the MACT program is to compel sources to replicate emission reduction strategies used by the best-performing sources. Thus, MACT floors are based on the control strategies used by the best-performing sources to reduce emissions, not based on a snapshot level of emissions from sources without regard to whether this level reflects application of any replicable emission control strategies. CAA section 129(a)(2) does not direct EPA to assess relative emission "levels" in determining MACT floors; it directs EPA to assess the degree of emissions "control" or "reduction" or "limitation" "achieved" by the best-controlled or best-performing sources. The plain meaning of these words implies that a source is utilizing some method or technique to reduce emissions that is within a source

operator's power to adopt. The reference to a "degree of reduction" supports the view that the words "control" and "limitation" appearing in section 129(a)(2) require a source to have reduced emissions from uncontrolled levels through some control technique. See *NLA II*, 233 F.3d at 631–32 (rejecting position that EPA is required to set new source floors at the lowest recorded emission level for which it has data and to set existing source floors at the average of the lowest 12 percent or recorded emission level data points).

The Court has recognized that EPA may consider variability in estimating the degree of emission reduction achieved by best-performing sources and in setting MACT floors. See *Mossville Env't'l Action Now v. EPA*, 370 F.3d 1232, 1241–42 (D.C. Cir 2004) (holding EPA may consider emission variability in estimating performance achieved by best-performing sources and may set floor at level that best-performing source can expect to meet "every day and under all operating conditions"). Since an emission limitation must be complied with at all times, for it to be achievable it must be set at a level that will not force sources to violate it when operating conditions are not ideal and higher emissions levels might be observed. For example, a car which has been observed to consume 0.02 gallons of gasoline in a one-mile downhill stretch of highway cannot be said to have "achieved" a minimum 50 miles per gallon fuel efficiency rate when that same car is later certain to consume 0.04 gallons of gasoline in a one-mile uphill stretch of highway (25 miles per gallon). Rather, the minimum fuel efficiency of the car will be that which the car can meet in adverse circumstances, the uphill stretch. So it is with emissions limitations, which cannot reasonably be set at levels which would force sources to operate in violation even when properly employing the control technology upon which the standards are based.

The emission data used to develop the emission limitations in the HMIWI regulations reflect properly designed and operated air pollution control technology on properly designed and operated HMIWI, and emission data that reflected poor operation of the HMIWI unit or the air pollution control technology were excluded. (See Legacy Docket ID No. A-91-61, items II-A-111 and IV-B-14.) The incinerators selected by EPA for testing represented a range of incinerator designs and air pollution control systems in use on this source category. (See Legacy Docket ID No. A-91-61, item IV-B-46.) The incinerators

and air pollution controls were inspected thoroughly, and maintenance was performed where necessary to ensure that the incinerators and pollution controls were functioning properly. (See Legacy Docket ID No. A-91-61, items II-A-93, II-A-94, and II-A-85.) During testing, most test runs were conducted under representative conditions to minimize emissions. (See Legacy Docket ID No. A-91-61, items II-A-111, IV-B-46, and IV-B-47.) However, some test runs were purposely conducted under conditions that would represent poor operation (e.g., overcharging waste to the incinerator) to determine the effect of improper operation on emissions. (See Legacy Docket ID No. A-91-61, items II-A-111 and IV-B-46.) These test runs demonstrated that improper operation results in higher emissions. (See Legacy Docket ID No. A-91-61, items II-A-111, IV-B-46, and II-A-81.) Of course, the test runs reflecting poor operation were not used in developing the achievable emission limitations. *Id.* It is important to note that such poor operation is precluded by the good combustion requirements and the parametric monitoring requirements in the 1997 final rule. In addition to data gathered by EPA directly, vendors of air pollution control systems submitted test reports to EPA. (See Legacy Docket ID No. A-91-61, items II-I-230 through 237, II-I-243 and 244, II-I-248, IV-B-48 and 49, IV-J-11, IV-J-15 and 16, IV-J-20, IV-J-24, IV-J-27, IV-J-29 through 31, IV-J-33 and 34, IV-J-39 and 40, and IV-J-47.) The test reports were submitted primarily by wet scrubber vendors to demonstrate to EPA that wet scrubbers could achieve lower emissions than EPA had concluded from the EPA-collected data. (EPA had conducted testing on only one wet scrubber system.) (See 61 FR 31742; Legacy Docket ID No. A-91-61, item IV-B-48.) The test reports and the data collected by EPA reflect the best performance of the air pollution controls that can reasonably be expected when continuously applied on HMIWI.

MACT and other technology-based standards are necessarily derived from short-term emissions test data, but such data are not representative of the range of operating conditions that facilities face on a day-to-day basis. In statistical terms, each test produces a limited data sample, not a complete enumeration of the available data for performance of the unit over a long period of time. (See Natrella, *Experimental Statistics*, National Bureau of Standards Handbook 91, chapter 1 (revised ed., 1966).) EPA, therefore, often needs to adjust the

short-term data to account for these varying conditions, so facilities properly employing optimal controls can remain in compliance with the standards on a continuous basis.

With the relatively small data sets EPA had to work with in the 1997 HMIWI rulemaking, it is possible that EPA has not recorded the highest emissions levels that would occur under the worst reasonably foreseeable circumstances. As the Court noted, it would “generally defer to an agency’s decision to proceed on the basis of imperfect scientific information, rather than to ‘invest the resources to conduct the perfect study.’” (See *Sierra Club*, 167 F.3d at 662.) “[S]ince EPA had data on only one percent of about 3,000 [HMIWI], the data gathering costs of any non-sampling method may well have been daunting.” *Id.*, at 663. In fact, the “perfect study” cannot be conducted, regardless of the resources expended to conduct it. Every study ends with some uncertainty in the results. There is no “cookbook” methodology for determining achievable emission limitations from data. In every case, but especially in cases where data are limited as with the 1997 HMIWI rulemaking, EPA must make judgments about what constitutes the worst reasonably foreseeable circumstance and put those judgments out for public comment. In the case of the HMIWI rulemaking, the “high” data points simply reflected the normal, and unavoidable, variation in emissions that would be expected to recur over time when properly using the best control technologies and strategies we determined were being used at HMIWI units. In fact, while the highest observed value is a “foreseeable circumstance,” it may not reflect the worst reasonably foreseeable circumstance. In determining the 1997 final MACT standards, EPA chose to account for the “worst reasonably foreseeable circumstance” by adding 10 percent to the highest observed emissions levels in the data, and then rounding up those figures. Upon review of this approach in responding to the Court’s remand, we have determined that although the highest observed data point may not reflect the “worst reasonably foreseeable circumstance,” we do not have information to support accounting for the “worst reasonably foreseeable circumstance” by adding 10 percent to the highest observed emissions levels, and then rounding up those figures. We, therefore, propose to base revised MACT standards for new HMIWI units on the highest observed data points

associated with employed control strategies.

In the *CKRC* case, the Court left open the possibility that the approach of basing floors on the “worst-performing MACT sources” emissions represent ‘a reasonable estimate of the performance of the [best-performing] units.’” *CKRC* at 866, quoting *Sierra Club* at 662, provided that “in the case of a particular source category or HAP, the Agency can demonstrate with substantial evidence—not mere assertions—that MACT technology significantly controls emissions, or that factors other than the control have a negligible effect[.]” *CKRC* at 866, citing *NLA II* at 633. The Court in *Sierra Club* essentially already found this to be the situation for the HMIWI rulemaking, and it was, therefore, appropriate for EPA to base its MACT floor review in the 1997 rule strictly on the emissions reductions achieved by use of control technologies. The *Sierra Club* had claimed that EPA wrongly failed to require HMIWI units to undertake programs to reduce the Hg and chlorinated plastics in HMIWI waste streams. *Sierra Club*, at 666. While the petitioner raised this objection in its challenge to the promulgated standards, rather than its objection to the floor methodology, the Court’s response to the *Sierra Club*’s claim shows that in the case of the 1997 HMIWI rulemaking, EPA appropriately focused on the control technologies used at HMIWI units, and that, therefore, under the *CKRC* ruling it was appropriate, in this instance, to base floors on the highest emissions levels achieved by units employing the MACT technologies.

The Court observed that “EPA does not deny that the waste stream reductions the *Sierra Club* calls for would reduce pollution. The less mercury in, the less mercury out, and the less chlorinated plastic in, the less HCl out. But the EPA has consistently argued in its response to comments and here that it does not have evidence that allows quantification of the relevant output reduction. For mercury, the only quantitative evidence before EPA was that a pollution prevention program aimed at mercury could reduce mercury emissions from very high levels to typical levels. See RTC at 7–14 to 7–15. For chlorinated plastics, there was no quantitative evidence before the agency. See RTC at 7–16, 7–18. The *Sierra Club* does not contest the adequacy of EPA’s data-gathering with respect to these measures.” *Id.* (Note that the emission guidelines and NSPS require HMIWI to prepare a waste management plan under §§ 60.35e and 60.55c that would segregate from the health care waste

stream certain solid waste components contributing to toxic emissions from the incinerator (62 FR 48380, 48387).)

e. Development of the Proposed Revised Emission Limits. While we are proposing to respond to the Court’s remand regarding new units by basing floors and standards on the same control technologies that formed the basis for the 1997 standards, in some cases it is necessary to adjust the emission limits in order to correct for the concerns regarding our 1997 methodology that the Court raised. As at promulgation of the 1997 rule, EPA examined the data available for various air pollution control technologies applied to HMIWI to determine the performance capabilities of the technologies; identified the best control technology for each air pollutant for each subcategory of HMIWI (i.e., MACT floor); considered control technologies more stringent than the MACT floor; made a determination regarding the achievable emissions levels from using control technologies upon which the emission standards would be based; and then established numerical emission limits achievable with those technologies. The proposed revised standards are based on the same technologies upon which the 1997 final standards were based—good combustion and a moderate-efficiency wet scrubber for new small HMIWI, and good combustion and a combined dry/wet control system with carbon for new medium and large HMIWI—and reflect the MACT floor emissions levels for new small and large HMIWI, but are more stringent than the MACT floor for new medium HMIWI. The rationale for these determinations regarding identification of MACT can be found at 62 FR 48365.

As explained earlier in this preamble, we are proposing emission limits for each air pollutant for each subcategory of new HMIWI based on the highest observed data points associated with the control technologies upon which the emission standards are based, since we identified the “best controlled similar unit” as one using the relevant control technologies for each subcategory of new units. The proposed percent reduction limits for HCl, Pb, Cd, and Hg were established based on average combustion-controlled emissions estimates and highest observed data points associated with the control technologies upon which the emission standards for each of these pollutants for each subcategory are based. This is the same approach used at the time of promulgation with two exceptions—the proposed percent reduction limits do not include the addition of 10 percent

to the highest observed emissions levels, nor does it include the rounding up of those figures. A summary of the control technologies upon which the proposed standards for new HMIWI are based, the highest observed data points associated with those control technologies, and the proposed emission limits for new

HMIWI in response to the remand are presented in Table 6 of this preamble. Note that MACT for NO_x and SO₂ are “combustion control,” although combustion control results in no emission reductions for those pollutants because NO_x emissions are not reduced by combustion control, and NO_x add-on

controls have not been demonstrated on HMIWI; and SO₂ emissions are not reduced by combustion control, and acid gas controls are not effective in reducing SO₂ emissions from HMIWI at the low SO₂ levels associated with HMIWI.

TABLE 6.—SUMMARY OF REMAND RESPONSE FOR NEW HMIWI

Pollutant (units)	Unit Size ¹	MACT	Highest observed data point ²	Proposed emission limit ²
HCl (ppmv)	L, M, S	Wet scrubber	9.3	15 ³ or 99% reduction ³ .
CO (ppmv)	L, M, S	Good combustion	32	32.
Pb (mg/dscm)	L, M	Dry scrubber w/carbon	0.06	0.060 or 98% reduction ³ .
	S	Wet scrubber	1.1	0.78 ⁴ or 71% reduction.
Cd (mg/dscm)	L, M	Dry scrubber w/carbon	0.03	0.030 or 93% reduction.
	S	Wet scrubber	0.14	0.11 ⁴ or 66% reduction ³ .
Hg (mg/dscm)	L, M	Dry scrubber w/carbon	0.45	0.45 or 87% reduction.
	S	Wet scrubber	0.47	0.47 or 87% reduction.
PM (gr/dscf)	L, M	Dry scrubber w/carbon	0.009	0.0090.
	S	Moderate-efficiency wet scrubber	0.018	0.018.
CDD/CDF, total (ng/dscm)	L, M	Dry scrubber w/carbon	20	20.
	S	Wet scrubber	111	111.
CDD/CDF, TEQ (ng/dscm)	L, M	Dry scrubber w/carbon	0.53	0.53.
	S	Wet scrubber	2.1	2.1.
NO _x (ppmv)	L, M, S	Combustion Control ⁵	225	225.
SO ₂ (ppmv)	L, M, S	Combustion Control ⁵	46	46.

¹ L = Large; M = Medium; S = Small.

² All values are measured at 7 percent oxygen.

³ No change proposed.

⁴ Remand standards for existing small non-rural HMIWI are proposed.

⁵ Combustion control results in no emissions reduction.

Note that no change is proposed for the emission limit for HCl for new large, medium, and small HMIWI. In this situation, the highest observed emission point (i.e., 9.3 ppmv) is not used as a basis for the proposed emission limits. Public comments concerning use of EPA Method 26A when testing for HCl emissions at sources with wet scrubbers were submitted with respect to the recently promulgated standards for other solid waste incineration units (70 FR 74870, December 16, 2005). The commenter asserted that EPA Method 26A is not adequate for demonstrating compliance with an HCl standard below 20 ppmv when sampling sources with wet scrubbers. Although EPA did not concede that there is an outright problem, we acknowledged that a tester may need to take certain precautions to ensure that there is no bias when sampling streams with low HCl concentrations in certain environments and promulgated an HCl emission limit of 15 ppmv (versus the proposed limit of 3.7 ppmv). Method 26A also notes that there is a possible measurable negative bias below 20 ppmv HCl perhaps due to reaction with small amounts of moisture in the probe and filter (40 CFR part 60, appendix A). Accordingly, because many of the wet-scrubber controlled HMIWI used

Method 26A to measure HCl emissions below 20 ppmv and did not take precautions to ensure no negative bias, in this action we are proposing to retain the emission limit of 15 ppmv and also are including provisions that require sources to condition the filter before testing, and use a cyclone and post test purge if water droplets may be present. In the cases of Pb and Cd for new small HMIWI, using the highest observed data points would result in emission limits less stringent (i.e., higher) than the proposed emission limits for existing small non-rural HMIWI. Because the existing source analysis provides limits that can be achieved by existing HMIWI, there is no reason to believe that new HMIWI could not also meet the more stringent limits. This unanticipated result may be due to the small amount of Pb and Cd emissions data available for wet scrubbers at promulgation. Regardless, we are proposing emission limits for Pb and Cd for new small HMIWI that are the same as those proposed for existing small non-rural HMIWI.

2. Existing Units

The Court raised three specific concerns regarding EPA's approach for existing units in concluding that EPA had not adequately explained why the

combination of regulatory and uncontrolled (i.e., combustion-controlled) data provided a “reasonable estimate” of HMIWI performance: “First, EPA has said nothing about the possibility that [HMIWI] might be substantially overachieving the [regulatory] limits. [Footnote:] Although the agency conceded in its response to comments that ‘actual emission data routinely fall below the State permit emission limits,’ [* * *] the context makes reasonably clear that the EPA was referring to data on ‘actual emissions’ during tests; EPA implied that ‘these levels are not routinely achieved in practice.’ [* * *] [End Footnote] If this were the case, the permit limits would be of little value in estimating the top 12 percent of [HMIWI]s’ performance” (167 F.3d at 663, and at n. 3). According to the Court, “[d]ata in the record suggest that the regulatory limits are in fact much higher than emissions that units achieve in practice.” *Id.*, at 663.

“Second, EPA never gave any reason for its apparent belief that [HMIWI]s that were not subject to [regulatory limits] did not employ emission controls of any sort. Unless there is some finding to this effect, it is difficult to see the rationality in using ‘uncontrolled’ data for the units that

were not subject to regulatory requirements” (167 F.3d at 664). The Court pointed out that “[d]ata submitted by the American Hospital Association [AHA] in 1995 indicate that over 55% of [HMIWI]s in each category were controlled by wet scrubbers.” *Id.*, footnote omitted. As a result, the Court found it “difficult to see how it was rational to include any uncontrolled [i.e., combustion-controlled] units in the top 12 percent, at least with respect to pollutants that wet scrubbing controls.” *Id.*

Third, the Court held that “assuming the regulatory data was a good proxy for the better controlled units and that there were shortfalls in reaching the necessary 12 percent, EPA has never explained why it made sense to use the highest of its test run data to make up the gap.” *Id.*

Subsequent court decisions also addressed the type of information EPA may use to estimate emissions performance and establish MACT floors for existing units. In *NLA II*, the Court rejected the Sierra Club’s claim that it was unreasonable for EPA to select “the median [performing] plant out of the best twelve percent of the plants for which it had information and set the * * * floor at the level of the worst performing plant in its databases using th[e same] technology [as the median plant].” 233 F.3d at 630. As long as EPA’s estimate of the performance of the top 12 percent was reasonable, the Court held, EPA was not required to use actual emissions data. *Id.* While in *CKRC* the Court held that EPA had not justified in the HWC rulemaking basing the floor on emissions levels of the worst performing plant utilizing MACT control technology, when record evidence indicated other factors beyond MACT technology affected emissions performance, the Court reiterated that EPA could use estimates, as long as they reflected a “reasonable[] estimate [of] the performance of the * * * best-performing plants.” 255 F.3d at 862.

Specifically regarding the use of State permits to determine MACT floors, the Court in *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936 (D.C. Cir. 2004) (“*NMWDA*”), rejected EPA’s approach for small municipal waste combustion units because “as in *Sierra Club*, EPA stated only that it ‘believes’ state permit limits reasonably reflect the actual performance of the best performing units without explaining why this is so.” 358 F.3d at 954. There, EPA had asserted that the inherent variability of emission levels made other data inaccurate, but the Court concluded that EPA gave “no evidence that the [State] permit levels reflect the emission levels of the best-

performing” units, and that EPA’s stated “belief” did not rise to the level of a “reasonable estimate.” *Id.* However, in *Mossville Env’tl Action Now v. EPA* (370 F.3d 1232 (D.C. Cir. 2004)), the Court concluded that “instead of simply claiming that it believes its [relied upon] standards estimate what the best five plants actually achieve, EPA points to some evidence. In its response to comments, EPA cited its analysis of three years of data, and * * * met its burden of establishing that its standards reasonably estimate the performance of the best five performing sources. Having cited the great variability of emission levels, even within the same plants, and the inherent difficulty in other standards it considered, the EPA’s selection of the [relevant] standards as the MACT floor is reasonable because it has supported its decision with record data that shows the connection between its MACT floor and the top performing plants.” 370 F.3d at 1242.

a. The Possibility that HMIWI Sources are Substantially Overachieving their Regulatory Limits. With regard to the *Sierra Club* Court’s first concern, the Court itself noted early in its opinion that “the necessary relationship [of regulatory data serving as a reasonable proxy to indicate HMIWI performance] seems quite reasonable here. Indeed, it seems likely that any jurisdiction bothering to impose limits would not knowingly set them below what it found firms to be achieving in practice. And there seems no reason to think that underachieving firms would be overrepresented in jurisdictions making this effort.” 167 F.3d at 662. The Court also expressed support for the notion that, when faced with limited actual emissions information, a substitute “‘reasonable sample’ may be used ‘to find out what the best 12 percent are doing[.]’” (*id.*, citing Oral Arg. Tr. at 11), and that “EPA typically has wide latitude in determining the extent of data-gathering necessary to solve a problem.” *Id.* Specifically, the Court noted “that since EPA had data on only one percent of about 3000 [HMIWI]s, [* * *] the data-gathering costs of any non-sampling method may well have been daunting.” *Id.*, at 663.

There are three reasons why EPA chose to use the regulatory limits at their face value in calculating the existing source MACT floor for the 1997 rule. First, regulatory data were used because there was very little actual emissions data available and very little data available indicating the type of air pollution control used by the best performing units. (See 61 FR at 31738.) None of the available information indicated that the regulated entities

were substantially overachieving or underachieving their regulatory limits. Second, there was no information before the Agency suggesting that the State regulatory agencies erred in establishing the regulatory limits or that the States’ regulatory limits were outdated. It was thus reasonable for EPA to expect that the State regulatory limits provided a reasonable estimate of the actual performance of HMIWI units. Third, it was reasonable for EPA to expect that regulated entities take their regulatory limits into account when designing their control equipment. To some extent, control equipment can be designed to meet various levels of emissions, and regulated entities do not normally spend more money than necessary to meet a regulatory limit. As noted above, the Court observed that “there seems no reason to think that underachieving firms would be overrepresented” by regulatory limits (167 F.3d at 662). Conversely, there is no reason to generally assume that substantially overachieving firms would be overrepresented in jurisdictions imposing regulatory limits. Rather, what is most likely is that sources in regulated jurisdictions will have assessed whether steps to control emissions are needed to comply with the regulatory limits, and that, in order to account for emissions variability when applying control technologies, they will be targeting their emissions levels at some safe point below the regulatory limits. Hence, with no information in the 1997 rulemaking record to indicate otherwise, EPA generally expected that regulatory limits were being achieved, through application of emissions control methods, at emissions levels that sources deem necessary in order to minimize the risk of violating the relevant limit, and were neither substantially overachieving the limits nor underachieving them.

The Court noted that the administrative record indicated that, in some cases, sources were overachieving their regulatory limits, where the floors based on the weighted average of the regulatory limits and the “uncontrolled” (i.e., combustion-controlled) data were significantly higher than the values used for combustion-controlled data. (See 167 F.3d at 663, citing A-91-61, IV-B-024 at 2-3). Here, the Court was referring to some regulatory limits that, in fact, reflected higher emissions levels than did EPA’s uncontrolled (i.e., combustion-controlled) emission estimates, and suggested that in these cases it would be unreasonable for EPA to view the best performing 12 percent

of sources as actually polluting at levels so much higher than the test units for which EPA assumed no emissions controls were in place. *Id.*, at 663–664.

EPA agrees that a regulatory limit does not reflect “actual performance” when that limit is higher than the level attributed to the worst reasonably foreseeable performance of an uncontrolled (i.e., combustion-controlled) source. Since the data forming the basis for the existing source MACT floor must provide a reasonable estimation of the “actual performance” of the best performing 12 percent of HMIWI, such high regulatory limits should not have been included in the best-performing 12 percent. Therefore, in our re-visiting the MACT floor for existing HMIWI based on the 1997 record, in situations for which there is no information in the 1997 record indicating the presence of an add-on pollution control device (“APCD”) or other use of air pollution control methods but there are regulatory limits, we propose the substitution of combustion-controlled data for regulatory limits where those data reflect lower emissions levels than do regulatory limits that appear to be unrelated to actual controls. We propose to continue to use combustion-controlled data in situations for which there is no information indicating air pollution controls are in use and there are no regulatory limits.

b. Emission Control on HMIWI Not Subject to Regulatory Limits. The Court’s second concern was that EPA had not made a finding that HMIWI that were not subject to regulatory requirements did not use emissions controls of any kind. The Court viewed such a finding as a necessary prerequisite to using uncontrolled (i.e., combustion-controlled) data for units not subject to regulatory requirements. This issue can be partly resolved by correcting a misunderstanding that may have resulted from our 1997 administrative record. The Court focused on information submitted in 1995 by the AHA suggesting that “over 55% of [HMIWI]s in each category were controlled by wet scrubbers.” (See 167 F.3d at 664, citing AHA Comments, Exhibit 3.) Based on its review of the AHA comments, the Court assumed that under EPA’s estimation of the HMIWI population, more than 12 percent in each category “would as a matter of mathematical necessity have to be controlled.” *Id.*, at 664, n. 8. The Court then observed that “it is difficult to see how it was rational to include any uncontrolled [i.e., combustion-controlled] units in the top 12 percent,

at least with respect to pollutants that wet scrubbing controls.” *Id.*, at 664.

With regard to the AHA “data” identified by the Court as indicating 55 percent of HMIWI use wet scrubbers, EPA believes that the Court was led by this information into assuming that unregulated HMIWI were in fact applying add-on emissions controls, when the record does not actually substantiate such an assumption, especially for small HMIWI. The AHA asserts “almost all properly designed, operated, and controlled [HMIWI] can readily meet a particulate emission limit of 0.10 gr/dscf without an [add-on air pollution control] system” (IV–D–637, Exhibit 2, emphasis added). The AHA then concludes “[t]herefore, it is reasonable that as many as 50 percent of those [HMIWI] having such an emission limit would be uncontrolled.” *Id.* The AHA goes on to assume that 50 percent of all HMIWI with particulate emission limits of 0.10 gr/dscf or higher are controlled with wet scrubbers, while an even higher percentage of units with more stringent particulate emission limits are assumed to be controlled. *Id.* This is akin to saying that, because homeowners are generally not required to install wet scrubbers on fireplaces, it is reasonable to assume that as many as 50 percent of homes with fireplaces do not have wet scrubbers, while the other 50 percent of home fireplaces are equipped with wet scrubbers. The AHA makes a basic assumption that at least 50 percent of all HMIWI have wet scrubbers, no matter what requirements they are subject to. With no other information to support its assumption, AHA’s “data” indicating 55 percent of HMIWI are equipped with wet scrubbers is altogether unreliable. In addition, EPA’s documented difficulty in identifying sources with add-on controls during the development of the HMIWI emission testing program is in direct conflict with the large number of controlled sources suggested by the AHA “data.”

Based on information from various sources in the docket from the 1997 rulemaking, including an AHA HMIWI inventory, we now estimate that about 32 percent of large, 4 percent of medium, and 1 percent of small HMIWI at the time of the 1997 rulemaking were equipped with add-on control systems. Other sources in the 1997 record that provided an indication of whether or not HMIWI were equipped with add-on air pollution control and upon which these estimates are based include a survey of HMIWI in California and New York, air permits from State regulatory agencies, responses to information collection requests, telephone contact

summaries, HMIWI emissions test reports, and various inventories. (See Legacy Docket ID No. A–91–61, items IV–J–82, IV–B–07, II–B–94, II–D–175 through 178, II–I–151, IV–J–89, IV–E–65, IV–E–74, IV–E–86, and II–B–61; Docket EPA–HQ–OAR–2006–0534, document titled “List of Test Reports Used to Identify HMIWI Control Devices”). Our assessment that few HMIWI were equipped with add-on controls is also supported by economics in that it would not have made sense for an HMIWI to be voluntarily equipped with an air pollution control device that costs one to three or more times as much as the entire HMIWI. Further supporting our assessment is the fact that the expected outcome of the regulation (which was not refuted by any commenters), that 50 to 80 percent of existing incinerators (including 100 percent of the small units) would shut down rather than meet the regulations because those that chose to meet the regulations would have to install air pollution control to comply, was, in fact, more than realized. (See 60 FR 10665, 61 FR 31768, and 62 FR 48372.) In fact, all but 8 small units, 6 of which meet the rural criteria and did not have to install air pollution control to comply, 20 medium units, and 44 large units have shut down, rather than meet the standards that would have been achieved by use of the very controls AHA appeared to assume were in place. Consequently, EPA concludes that the 1997 record, as confirmed by recent data showing the vast reduction in sources (as opposed to sources installing controls), shows that most HMIWI were not equipped with add-on air pollution control and that the use of uncontrolled (i.e., combustion-controlled) emission estimates where there was no indication of air pollution control (and where any applicable regulatory limits allowed higher levels of emissions than our combustion-controlled emissions values reflected) was warranted. Based on the number of HMIWI shutdowns, it appears very likely that there were even fewer HMIWI with air pollution controls than we estimated based on the information discussed above (i.e., that about 32 percent of large, 4 percent of medium, and 1 percent of small HMIWI were equipped with add-on control systems).

c. EPA’s Use of the Highest Emissions Data to Reflect Uncontrolled (i.e., Combustion-Controlled) Emissions. The Court’s third concern regarded our use of the highest of the test run data to reflect uncontrolled (i.e., combustion-controlled) emissions in cases where regulatory data did not comprise the

necessary 12 percent of best performing sources. Our reason for this approach is the same as the reason described earlier regarding new units for using the highest data point from MACT-particular technology to reflect the performance of that technology and identify the “best controlled similar unit.” As the Court stated in *NLA I*, “where test results are relied upon, it should involve the selection or use of test results in a manner which provides some assurance of the achievability of the standard for the industry as a whole, given the range of variable factors found relevant to the standard’s achievability.” (See 627 F.2d at 433). EPA reads the Court’s opinion in *Sierra Club* as at least endorsing the principles of *NLA I* with respect to existing units, as the Court described as “counterintuitive” the Sierra Club’s “proposition that an ‘achieved’ level may not be ‘achievable[.]’” (See 167 F.3d at 662). In addition, we also read *CKRC* as allowing this approach, where no evidence in the record contradicts the assumption that “factors other than the control have a negligible effect [on emissions performance],” 255 F.3d at 866, and, therefore, the presence or absence of known effective MACT controls is the prime determinant of emissions performance.

Where regulatory data indicating use of emissions control was absent in the 1997 rulemaking record, EPA needed to find a surrogate emission limitation that reflected uncontrolled (i.e., combustion-controlled) emissions, expecting, when not faced with data indicating otherwise, that facilities with no regulatory limits would not be controlling their emissions with add-on controls or other control methods (beyond combustion control). In this situation, EPA used the highest test data point from a well-operated HMIWI as a surrogate for the worst reasonably foreseeable circumstances. The highest test data points reflect the normal, and unavoidable, variation in emissions that would be expected to recur over time. Table 7 of this preamble summarizes the performance values used for units for which there is no information indicating an APCD is present and there are no regulatory limits, or where regulatory limits do exist but reflect emissions levels that are higher than the values for uncontrolled (i.e., combustion-controlled) units.

TABLE 7.—UNCONTROLLED (I.E., COMBUSTION-CONTROLLED) PERFORMANCE VALUES

Pollutant (units)	Performance value ¹
HCl (ppmv)	2,770
CO (ppmv) -	¹ 584.9
Pb (micrograms per dry standard cubic meter µg/dscm)	8,629
Cd (µg/dscm)	3,520
Hg (µg/dscm)	6,543.4
PM (gr/dscf)	² 0.278
CDD/CDF, total (ng/dscm) ...	² 8,102
CDD/CDF, TEQ (ng/dscm) ...	² 236
NO _x (ppmv)	224.5
SO ₂ (ppmv)	46.39

¹ All performance values are measured at 7 percent oxygen.

² Based on 1-second combustion level

d. Determining the MACT Floor and MACT for Existing Units. As discussed above, the Sierra Club Court identified some potential errors in EPA’s methodology for determining the existing source MACT floors for HMIWI. After reviewing the 1997 HMIWI record in the context of the Court’s opinion, EPA agrees that, in determining the MACT floor, the Agency should not have used regulatory limits that reflected higher emissions levels (and that did not appear to be related to any air pollution controls) than those corresponding to EPA’s combustion-controlled emission estimates. Furthermore, as we examined the 1997 record and our estimates of the performance of HMIWI where we had some indication that add-on controls may have been used, we determined that we should not have used combustion-controlled emission estimates in the floor calculations to represent the performance of those sources. Additionally, for this rulemaking we propose that where actual emissions test data reflecting emissions performance was available in the 1997 record for use in determining the MACT floor, that data should take precedence over other types of data (i.e., regulatory limits or performance values).

EPA’s reassessment of the 1997 MACT floors and MACT decisions, based on an adjusted methodology that addresses the Court’s issues discussed above, results in proposed emission limits that in many cases are more stringent than the limits promulgated in 1997. EPA’s first step in redoing the MACT analysis based on the 1997 record for existing HMIWI was to determine the pollutant-specific values that make up the best performing 12 percent of existing units within each

size category. Actual test data, where available in the 1997 record, were the initial type of pollutant-specific values considered. Next, where the 1997 record has information indicating that a source employed some type of add-on control but there are no test data or regulatory limits for that source, an average of the maximum dry and wet control system performance was determined for each pollutant, and those values were added to the data set towards comprising the best performing 12 percent. We believe that use of these averages is an appropriate method of estimating the performance of HMIWI (1) where the 1997 record has limited information indicating the presence of some type of add-on control but no test data for the unit, and (2) where we are unsure if the control is similar to, or is as efficient as, those for which we have data, or if the unit even employed a true control device. As previously stated, we believe it very likely that there were fewer HMIWI with air pollution controls than we estimated in 1997, and to which we have assigned pollutant-specific average control device values. If, in fact, those sources were employing true control devices, common sense dictates that there wouldn’t have been the large number of unit shut downs that occurred in response to the promulgated standards. However, because we had some indication that an add-on control device was in place on those sources, we recognize that the use of uncontrolled (i.e., combustion-controlled) emission estimates (at promulgation) did not provide a reasonable estimate of their performance. Similarly, use of performance values associated with a specific type of add-on control device seems inappropriate when no details are available on the control device and there is, in fact, some doubt as to the presence of a true control device at all. Despite the doubts of the presence of a true control device, the approach we have selected assumes that the 1997 record is correct and assigns “default” performance values to the units that are based on the expected performance of the types of control devices used in the industry in 1997. These default performance values, based on the average of the maximum dry and wet control system performance, also are used where regulatory limits exist but are higher than the default performance values.

Table 8 of this preamble summarizes the performance values for HCl, Pb, Cd, Hg, CDD/CDF, and PM for units for which the 1997 record has information indicating that they employed some

type of add-on control but has no test data or regulatory limits corresponding to specific controls, or where regulatory limits exist but are higher than the values based on an average of the maximum dry and wet control system performance.

TABLE 8.—PERFORMANCE VALUES BASED ON AVERAGE OF MAXIMUM DRY AND WET CONTROL SYSTEM PERFORMANCE

Pollutant (units)	Performance value ¹
HCl (ppmv)	53.165
Pb (µg/dscm)	568.5
Cd (µg/dscm)	83.65
Hg (µg/dscm)	459.5
PM (gr/dscf)	0.0195
CDD/CDF, total (ng/dscm) ...	65.35
CDD/CDF, TEQ (ng/dscm) ...	1.296

¹ All performance values are measured at 7 percent oxygen.

The values for CO, NO_x and SO₂ are based on the performance of combustion-controlled HMIWI because, as stated at proposal and promulgation of the 1997 HMIWI standards, as well as earlier in this preamble, CO emission levels are affected by combustion practices rather than the control systems used by HMIWI; NO_x control had not been demonstrated on HMIWI; and the acid gas controls used by HMIWI were not effective in reducing SO₂ emissions from HMIWI due to the low inlet levels of SO₂ associated with hospital/medical/infectious waste. Therefore, for units (1) where the 1997 record contains information indicating that they employed some type of add-on control but for which there was no test data or regulatory limits, or (2) where regulatory limits existed but were higher than the values for CO, NO_x, or SO₂ based on combustion-controlled HMIWI, the performance values for CO (584.9 ppmv), NO_x (224.5 ppmv), and SO₂

(46.39 ppmv) are the same as those presented in Table 7 of this preamble.

The next step in the MACT analysis for existing HMIWI was to determine the average emission limitation achieved by the best-performing 12 percent of existing sources where there are 30 or more sources in the category or subcategory. Our general approach to identifying the average emission limitation has been to use a measure of central tendency, such as the arithmetic mean or the median. If the median is used when there are at least 30 sources, then the emission level that is at the bottom of the best performing 6 percent of sources (i.e., the 94th percentile) represents the MACT floor control level. We based our MACT floors for each pollutant within each size category on this approach. We then determined the technology associated with each “average of the best-performing 12 percent” value by comparing the average values to average performance data for wet scrubbers, dry injection fabric filters (also known as dry scrubbers), and combustion controls (no add-on air pollution controls). Those pollutants with average values that were higher than the relevant combustion-controlled emission estimate were identified as having a “combustion control” floor, even if the pollutant is not reduced by combustion control. The technology needed to meet the remaining average values reflects the technology used by the average unit in the top 12 percent and serves as the basis for the MACT floor. EPA then considered, on a pollutant-specific basis, technologies that were more stringent than the MACT floor technologies.

Add-on control technology-based MACT floors were identified for large HMIWI for HCl, Pb, Cd, Hg, PM, and CDD/CDF. The MACT floor technology for all size units for NO_x and SO₂ is

“combustion control” although, as previously explained in this preamble, combustion control results in no emission reductions for those pollutants. “Good combustion” (i.e., 2-second combustion) was identified as the MACT floor technology for all size units for CO. “Combustion control” floors were identified for medium HMIWI for Pb, Cd, Hg, and CDD/CDF and for small HMIWI for HCl, Pb, Cd, Hg, and CDD/CDF. However, for these pollutants for all medium and most small HMIWI, we have decided to propose limits that are more stringent than the “combustion control” floors and are consistent with the control technology-based MACT floors that were identified for large HMIWI for these pollutants (i.e., Pb, Cd, Hg, and CDD/CDF for medium HMIWI and HCl, Pb, Cd, Hg, and CDD/CDF for small HMIWI). The control technologies identified as the MACT floors for HCl and PM for medium HMIWI, and for PM for small HMIWI, provide an indication of the level of control of the other pollutants—a level of technology that is consistent with those technologies identified for large HMIWI. The rationale for not basing the proposed emission limits on other technologies that would result in even more stringent limits can be found at 62 FR 48371–72. As at the 1997 promulgation, MACT for small HMIWI that meet certain “rural criteria” was determined to be at the MACT floor level for each pollutant (i.e., no “beyond-the-floor”-based emission limits).

Table 9 of this preamble shows the average emission value, based on the ranking of emissions data, regulatory data, and performance data, of each pollutant for the top 12 percent of HMIWI in each subcategory. The values in Table 9 allow EPA to identify the technology associated with the average unit in the top 12 percent of HMIWI.

TABLE 9.— AVERAGE EMISSION VALUES FOR TOP 12 PERCENT OF HMIWI¹

Pollutant (units)	HMIWI size		
	Small	Medium	Large
HCl (ppmv)	2,770	53	50
CO (ppmv)	100	100	100
Pb (mg/dscm)	8.63	8.63	0.569
Cd (mg/dscm)	3.52	3.52	0.084
Hg (mg/dscm)	6.54	4.27	0.460
PM (gr/dscf)	0.080	0.030	0.020
CDD/CDF, total (ng/dscm)	8,102	8,102	65.4
CDD/CDF, TEQ (ng/dscm)	236	236	1.30
NO _x (ppmv)	225	225	225
SO ₂ (ppmv)	46.4	46.4	46.4

¹ All emission values are measured at 7 percent oxygen.

Table 10 of this preamble shows the technology associated with each average emission value.

TABLE 10.—MACT FLOOR TECHNOLOGY

Pollutant (units)	HMIWI Size		
	Small	Medium	Large
HCl (ppmv)	combustion control	dry scrubber	dry scrubber.
CO (ppmv)	good combustion	good combustion	good combustion.
Pb (mg/dscm)	combustion control	combustion control	wet scrubber.
Cd (mg/dscm)	combustion control	combustion control	wet scrubber.
Hg (mg/dscm)	combustion control	combustion control	dry scrubber.
PM (gr/dscf)	low-efficiency wet scrubber	moderate-efficiency wet scrubber	moderate-efficiency wet scrubber.
CDD/CDF, total (ng/dscm)	combustion control	combustion control	wet scrubber.
CDD/CDF, TEQ (ng/dscm)	combustion control	combustion control	wet scrubber.
NO _x (ppmv)	combustion control	combustion control	combustion control.
SO ₂ (ppmv)	combustion control	combustion control	combustion control.

For small units, the CO and PM values indicate that good combustion control (i.e., 2-second combustion) and a low-efficiency wet scrubber reflect the CO and PM MACT floors. For medium units, as well as large units, the CO, HCl, and PM values indicate that good combustion control used in conjunction with either a dry scrubber or moderate-efficiency wet scrubber reflects the CO, HCl, and PM MACT floors. As previously stated, EPA concluded that emission limits for small units that meet the rural criteria should reflect the MACT floor level of control for all pollutants. The average emission value and MACT floor level of control for PM vary by unit size, and we are proposing emission limits based on those levels of control. The average emission values, and associated MACT floor levels of control, for CO, NO_x, and SO₂ are the same for all size units. For most small units and all medium units, however, we concluded that emission limits for HCl, Pb, Cd, Hg, and CDD/CDF should reflect the MACT floor level of control for large units for those pollutants.

The resulting numerical emission limits were determined by combining the appropriate average emission value for each pollutant for each size HMIWI with a variability factor. We believe it is necessary to account for variability

given the limited amount of actual data available in the 1997 record and the resulting need for use of various, and often presumptive, types of information to formulate the best performing 12 percent of HMIWI. At promulgation, we recognized the need to account for variability and did so as described earlier in this preamble. Although we maintain that the methodology we used was not unreasonable given the available information at promulgation, we now have additional information (the 2002 compliance test data for all of the currently operating units) for use in calculating pollutant-specific variability factors. While these data were not available at promulgation, they are the only data available for providing a quantitative assessment of variability of emissions from well-controlled HMIWI. To determine the pollutant-specific variability factors, a statistical analysis was conducted. Specifically, the emission limit achievable for each pollutant was determined based on the combination of actual emissions test data, regulatory data, and estimated performance levels (as described earlier) and a statistics-based variability factor calculated for each pollutant. To calculate the variability factors, we used the general equation: variability factor =

t * standard deviation. This general equation has been used by EPA in similar analyses. (See, e.g., 68 FR 27650; 69 FR 55235–7; 70 FR 28615.) We selected the 90th percentile confidence level for this one-sided t-statistics test. The 90th percentile provides a variability factor appropriate for well-controlled sources that is based on data from well-controlled sources (i.e., the only sources that are still in operation).

Table 11 of this preamble presents the values determined by adding the variability factors to the average emission values for each pollutant for existing large and medium HMIWI. The table also presents the proposed revised emission limits for existing large and medium HMIWI necessary to respond to the Court's remand and the percent reduction limits for HCl, Pb, Cd, and Hg. The percent reduction limits are based on average combustion-controlled emissions estimates and maximum performance values for the MACT identified for each pollutant for each subcategory. This is the same approach used at the time of promulgation of the 1997 rule, except that the proposed percent reduction limits do not include the addition of 10 percent to the maximum performance values or the rounding up of those figures.

TABLE 11.—AVERAGE EMISSION VALUES, CONSIDERING VARIABILITY, AND EMISSION LIMITS¹—EXISTING LARGE AND MEDIUM HMIWI

Pollutant (units)	Large		Medium	
	Average + variability	Emission limit	Average + variability	Emission limit
HCl (ppmv)	78	78 or 93% reduction ²	57.9	78 ³ or 93% reduction ² .
CO (ppmv)	110	40 ²	113	40 ²
Pb (mg/dscm)	0.78	0.78 or 71% reduction	9.02	0.78 ³ or 71% reduction ³ .
Cd (mg/dscm)	0.11	0.11 or 66% reduction	3.56	0.11 ³ or 66% reduction ² .
Hg (mg/dscm)	0.64	0.55 ² or 87% reduction	4.34	0.55 ² or 87% reduction ³ .
PM (gr/dscf)	0.025	0.015 ²	0.043	0.030 ²

TABLE 11.—AVERAGE EMISSION VALUES, CONSIDERING VARIABILITY, AND EMISSION LIMITS ¹—EXISTING LARGE AND MEDIUM HMIWI—Continued

Pollutant (units)	Large		Medium	
	Average + variability	Emission limit	Average + variability	Emission limit
CDD/CDF, total (ng/dscm)	115	115	8,150	115 ³
CDD/CDF, TEQ (ng/dscm)	2.16	2.2	237	2.2 ³
NO _x (ppmv)	284	250 ²	273	250 ²
SO ₂ (ppmv)	61	55 ²	51.8	55 ²

¹ All emission values are measured at 7 percent oxygen.

² No change from current emission limit.

³ Emission limit is the same as that for large HMIWI.

Table 12 of this preamble presents the rural HMIWI and for existing small same information for existing small non- HMIWI meeting the rural criteria.

TABLE 12.— AVERAGE EMISSION VALUES, CONSIDERING VARIABILITY, AND EMISSION LIMITS ¹—EXISTING SMALL AND SMALL RURAL HMIWI

Pollutant (units)	Large		Medium	
	Average + variability	Emission limit	Average + variability	Emission limit
HCl (ppmv)	2,772	78 ³ or 93% reduction ²	3,125	² 3,100
CO (ppmv)	103	40 ²	109	² 40
Pb (mg/dscm)	8.85	0.78 ³ or 71% reduction ³	8.88	8.9
Cd (mg/dscm)	3.54	0.11 ³ or 66% reduction ²	3.54	4
Hg (mg/dscm)	6.55	0.55 ² or 87% reduction ³	6.56	6.6
PM (gr/dscf)	0.095	0.050 ²	0.089	² 0.086
CDD/CDF, total (ng/dscm)	8,335	115 ³	8,518	² 800
CDD/CDF, TEQ (ng/dscm)	239	2.2 ³	244	² 15
NO _x (ppmv)	225	250 ²	273	² 250
SO ₂ (ppmv)	46.4	55 ²	51.8	² 55

¹ All emission values are measured at 7 percent oxygen.

² No change from current emission limit.

³ Emission limit is the same as that for large HMIWI.

For pollutants where this remand analysis (based on the average of the best performing 12 percent of HMIWI plus the variability factor) resulted in emission limits less stringent (i.e., higher) than the current emission limits, we retained the current emission limits. This is because we see no reason to upwardly revise standards that the regulated industry has already demonstrated are achievable based on compliance data. In fact, now that we have received the 2002 compliance data for HMIWI units, it is apparent that EPA's estimate of the achievable emissions performance levels from use of the identified MACT technology was reasonably accurate. While we are not in this proposal attempting to justify our prior existing unit MACT floor decisions *post hoc* based on new data that we could not have relied upon in the 1997 rulemaking itself, we note that, similar to the *Mossville* case, we currently find ourselves in a situation where actual emissions data fairly confirms our prior estimates of what the

best controlled HMIWI units could achieve when using MACT controls.

The resulting emission limits being proposed for medium HMIWI for HCl and SO₂; for small HMIWI for NO_x and SO₂; and for small rural HMIWI for SO₂ are the same as those being proposed for large HMIWI because, in these instances, the medium, small, and small rural HMIWI are expected to achieve reductions similar to large HMIWI.

B. Rationale for the Proposed Amendments (CAA Section 129(a)(5) 5-Year Review)

In recent rulemakings (see, e.g., 71 FR 34422, 34436–38 (June 14, 2006) (proposed amendments to the NESHAP for Hazardous Air Pollutants for Organic Hazardous Air Pollutants from the Synthetic Organic Chemical manufacturing Industry)) EPA has addressed the similar technology review requirement under CAA section 112(d)(6). EPA stated that the statute provides the Agency with broad discretion to revise MACT standards as we determine necessary, and to account for a wide range of relevant factors,

including risk. EPA does not interpret such technology review requirements to require another analysis of MACT floors for existing and new units, but rather requires us to consider developments in pollution control in the industry and assess the costs of potentially stricter standards reflecting those developments. (See, *id.*, at 34436–47.) Moreover, as a general matter, EPA has stated that where we determine that existing standards are adequate to protect public health with an ample margin of safety and prevent adverse environmental effects, it is unlikely that EPA would revise MACT standards merely to reflect advances in air pollution control technology. *Id.*, at 34437–38.

Under CAA section 112(d)(6), the first round of technology review for MACT standards is subject to the same statutory timeframe as EPA's residual risk review under CAA section 112(f)(2), with both reviews occurring 8 years following initial promulgation of MACT. We interpret CAA section 129(a)(5)'s technology review

requirement as providing us the same degree of discretion in terms of whether to revise MACT standards, for the reasons discussed in those prior rulemakings. (See, *id.*, at 34436–38.) However, the deadline for the first round of technology review under section 129(a)(5) (5 years following MACT promulgation) does not coincide with the deadline for residual risk review under section 112(f)(2) (9 years, in the case of HMIWI standards). Therefore, this first section 129(a)(5) technology review for HMIWI does not account for or reflect our residual risk analysis. In future rounds of review under section 129(a)(5) for the HMIWI standards, we intend to follow our general policy, and for our technology reviews and conclusions to be informed by our residual risk analysis, which we will have performed by that point.

In exercising its discretion under CAA section 129(a)(5), EPA is proposing in this technology review to adopt emission limits based on the 2002 data because it believes that these limits represent the cost-effective operation of the MACT control technology. EPA is aware of the possibility that regulated units are likely to operate at a level somewhat below emission standards in order to account for operational variability. It is not our intent to preclude this practice through successive rounds of the section 129(a)(5) technology review. EPA requests comment on its proposal (as outlined below) to adopt more stringent emission limits in this instance through its section 129(a)(5) technology review.

1. How were the proposed emission limits developed?

The proposed revised emission limits resulting from our 5-year review of the HMIWI standards under section 129(a)(5) of the CAA are based on the performance of units within the industry that currently are subject to the MACT standards. One set of emission limits is proposed for existing HMIWI regulated under CAA section 111(d)/129(b) emission guidelines, and another set of emission limits is proposed for new HMIWI (units commencing construction after February 6, 2007) regulated under CAA section 111(b)/129(a) NSPS. Units that were subject to the 1997 NSPS as new units (referred to as “1997 NSPS units” for the remainder of this preamble) will remain subject to the 1997 NSPS (including revisions resulting from EPA’s response to the Court remand), but will also be subject to any requirements of the revised emission guidelines that are more stringent than the 1997 NSPS requirements. The proposed emission

limits for existing units, 1997 NSPS units, and new units were developed following the procedures discussed below.

As background, with one exception resulting from the analyses associated with our response to the Court remand, the proposed emission limits for new and existing units are based on the application of the same control technologies upon which the 1997 MACT standards were based. For new large and medium units, both the current and proposed emission limits are based upon good combustion and the application of combined control systems that include both dry scrubbers (i.e., dry injection fabric filters or spray dryer fabric filters) with carbon injection and wet scrubbers. The current and proposed emission limits for new small units are based on good combustion and the application of a moderate-efficiency wet scrubber. For large, medium, and most small existing units, the current and proposed emission limits are based on good combustion control for CO; combustion controls (i.e., no add-on controls) for NO_x and SO₂; and the application of either dry scrubbers or wet scrubbers (with various “efficiencies” depending on the size of the unit) for the remaining pollutants. The current emission limits for one additional subcategory, existing small rural units, are based solely on good combustion (i.e., the MACT floor identified in the 1997 analysis was not based on add-on control technology). With the exception of PM, the proposed emission limits for existing small rural units also are based solely on good combustion. In our remand analysis, we identified a low-efficiency wet scrubber as being the MACT floor for PM for these units. Although all small rural units currently use only good combustion, to address this difference in the MACT floors (i.e., 1997 analysis versus remand analysis), we are proposing a PM emission limit for existing small rural units based on the application of low-efficiency wet scrubbers to existing small non-rural units (i.e., MACT floor for small non-rural units in the 1997 analysis as well as the remand analysis). While this performance level is associated with the expected performance of a low-efficiency wet scrubber, the combustion controls in place on these six existing small rural units achieve this performance level, based on the initial compliance tests for these units.

In performing this 5-year review, we have not recalculated new MACT floors, but have proposed to revise the emission limits to reflect the actual performance of the MACT technologies.

We believe this approach reflects the most reasonable interpretation of the review requirement of CAA section 129(a)(5), and is consistent with how we have interpreted the similar review requirement of CAA section 112(d)(6) regarding MACT standards promulgated under section 112. (See 71 FR 27327–28; 69 FR 48350–51; and 70 FR 20008.) The language of section 129(a)(5) directs EPA to “review” our promulgated standards under CAA section 111/129, and to “revise such standards and requirements” “in accordance with this section and section 111.” It does not, however, direct EPA to conduct, at 5-year-intervals, new MACT floor and beyond-floor analyses based on each 5-years’ changing information as to what might comprise the top 12 percent of sources or constitute the best controlled similar unit. There is no indication that Congress intended for section 129(a)(5) to inexorably force existing source standards progressively lower and lower in each successive review cycle, the likely result of requiring successive floor determinations.

Following MACT compliance in September 2002, EPA obtained compliance test reports from all operating HMIWI (76 units at 70 facilities) and used those data to evaluate MACT performance. When the HMIWI regulations were first proposed in 1995, re-proposed in 1996, and promulgated in 1997, only limited information was available about HMIWI emission controls, and significant engineering judgment was necessary in selecting the emission limits. The year 2002 compliance data show that the control technologies that were installed and the practices that were implemented to meet the 1997 NSPS and emission guidelines achieved reductions somewhat superior to what we expected under the 1997 limits for many of the pollutants. EPA used the compliance test data to develop the emission limits contained in the amendments we are proposing under the 5-year review. EPA believes that the proposed emission limits more accurately reflect actual real-world HMIWI MACT performance than what we had estimated in 1997 and what we re-estimated based on the 1997 record in response to the Court’s remand (discussed previously in this preamble). We believe that it is necessary, as well as appropriate, to update the 1997 promulgated standards based on the actual performance of MACT technologies in situations where compliance test data indicate that the technologies achieve better performance levels than those we previously

estimated based on the information available at the time of promulgation.

a. Existing Units. The first step in the analysis was to assess the performance of the HMIWI currently subject to the emission guidelines with respect to each regulated pollutant. We first examined the data separately for each unit size, and the data showed, for all pollutants except PM, that the performance of units with add-on controls, regardless of size, (excluding small rural units, which do not employ add-on controls), is similar. Therefore, we combined the data, regardless of unit size, for all of the pollutants except PM, and conducted analyses on the combined data sets. In addition, for the pollutants with emission limits based on good combustion and combustion control (i.e., no add-on controls), namely CO, NO_x, and SO₂, the data for small rural units also were combined with the data for all of the other subcategories of units. Analyses were performed on each data set, and we calculated the 99 percent upper tolerance limit (UTL), which is the emission level that 99 percent of the HMIWI would be expected to achieve. A similar methodology was used for stack test-based emission limits in the 5-year review recently conducted for large municipal waste combustors (MWC). In the preamble to that final action, EPA indicated that analysis of data to estimate emission limits to be enforced by stack test methods must be done using a different approach (i.e., lower percent UTL) than where enforcement is to be based on CEMS and that the percentile must also reflect a reasonable consideration of emissions variability and compliance limitations of stack testing (See 71 FR 27329). EPA further indicated that for this type of technology review, the 99 percent UTL was appropriate to use as a tool for estimating achievable emission levels for emission limits enforced by stack testing. *Id.* In this proposed rulemaking, the 99 percent UTL was used as the starting point for selecting the revised emission limits. We compared the 99 percent UTL values to several other values, including the 1997 promulgated emission limits and the revised limits that we are proposing in response to the Court's remand ("remand limits"). For several pollutants, the value associated with the 99 percent UTL was higher than the remand limit. In these cases, we selected the remand limit, rather than the 99 percent UTL value, as the proposed emission limit. We also graphically compared the 99 percent values and remand limits, where applicable, to all of the data that were

used to calculate the percentile values. In many cases, this visual comparison revealed that the 99 percent UTL value or remand limit fell within a break in the data that indicated a level of performance that the technologies, considering variability, could readily achieve but that the "worst performing" units were not achieving during their compliance tests. Thus, our analyses indicate that the emission limits that we selected reflect the actual performance of the MACT control technologies while also serving to require modest improvements in performance from units that are not achieving the performance levels demonstrated in practice by the control technologies currently being used in the industry.

For small non-rural HMIWI, we used a different methodology for assessing PM performance because there are only two units and, therefore, statistics are not a useful tool. Both of the small non-rural units are equipped with wet scrubbers. Because existing medium units are predominantly equipped with wet scrubbers, the PM emission limit developed using the 99 percent UTL value of the data set for existing medium units also is being proposed for small non-rural units.

A different methodology also was used for assessing performance of the six small rural HMIWI. To determine the actual performance of these small combustion-controlled units while considering the inherent variability in emissions, we obtained test data for all six units (although, as allowed in the emission guidelines, not all of the pollutants were tested at every unit) and selected as the emission limit the highest individual test run from the compliance testing for HCl, Pb, Cd, Hg, and CDD/CDF. This methodology uses actual test data to provide a reasonable estimate of the performance of the small rural units for these pollutants, where statistics are not a useful tool, while accounting for variability. There are exceptions to this methodology for CO, NO_x, and SO₂. As previously mentioned in this preamble, the CO, NO_x, and SO₂ data for small rural units were combined with the CO, NO_x, and SO₂ data for the other subcategories of units. The 99 percent UTL methodology was then used as the starting point, as previously described in this preamble, to determine proposed emission limits that would apply to all of the subcategories of existing HMIWI. Another exception to this methodology is the proposed emission limit for PM. As previously explained in this preamble, we are proposing a PM emission limit for existing small rural units based on the application of low-

efficiency wet scrubbers to existing small non-rural units (i.e., we are proposing the same PM emission limit for small rural and non-rural units). While many of the resulting proposed emission limits for small rural units are significantly more stringent than the 1997 promulgated limits, the proposed limits more accurately reflect the actual performance of these units.

Finally, we examined the available data for calculating percent reduction requirements for HCl, Pb, Cd, and Hg. Percent reduction standards were included in the 1997 promulgated standards for these pollutants, and we are proposing to update these requirements to reflect the now-known actual performance of HMIWI utilizing MACT controls. For HCl, we obtained percent reduction data from five large HMIWI using dry scrubbers (i.e., the control technology upon which the emission limits for existing large, medium, and small non-rural units are based), and these data showed percent reductions from 94.2 percent to greater than 99 percent. To account for variability, we based the proposed percent reduction requirement of 94 percent on the lowest percent reduction recorded during the individual test runs (i.e., 94.2 percent). The three-run test that included the 94.2 percent value showed significant variability and demonstrates the need to account for variability. The percent reduction values for the three runs ranged from 94.2 percent to 97.8 percent while there was no identifiable change in the operation of the unit or the dry scrubber. For Pb and Cd from existing large, medium, and small non-rural HMIWI, we used the same methodology as for HCl, and the data sets showed even greater variability. For Hg, we used the only available estimate of percent reduction. The proposed percent reduction standards are 71 percent for Pb, 74 percent for Cd, and 96 percent for Hg. The 5-year review methodology used to assess performance of existing HMIWI resulted in no change to the PM standards for existing large and medium units, and CDD/CDF standards for existing small rural units. All of the other standards for existing HMIWI were adjusted based on either the 5-year review or the remand analyses.

Table 13 of this preamble summarizes the emission limits promulgated in 1997, the emission limits resulting from the proposed response to the Court remand, and the emission limits being proposed as a result of the 5-year review for existing HMIWI. Note that these proposed limits for existing HMIWI only apply to units for which construction was commenced on or before June 20,

1996, or for which modification was commenced before March 16, 1998.

TABLE 13.—SUMMARY OF 1997 PROMULGATED EMISSION LIMITS, PROPOSED REMAND RESPONSE EMISSION LIMITS, AND PROPOSED 5-YEAR REVIEW LIMITS FOR EXISTING HMIWI

Pollutant (units)	Unit size ¹	Promulgated limit ²	Proposed remand response limit ²	Proposed 5-year review limit ²
HCl (ppmv)	L, M, S	100 or 93% reduction	78 or 93% reduction	51 or 94% reduction.
	SR	3,100	3,100	398
CO (ppmv)	All	40	40	25
Pb (mg/dscm)	L, M, S	1.2 or 70% reduction	0.78 or 71% reduction	0.64 or 71% reduction.
	SR	10	8.9	0.60
Cd (mg/dscm)	L, M, S	0.16 or 65% reduction	0.11 or 66% reduction	0.060 or 74% reduction.
	SR	4	4	0.050
Hg (mg/dscm)	L, M, S	0.55 or 85% reduction	0.55 or 87% reduction	0.33 or 96% reduction.
	SR	7.5	6.6	0.25
PM (gr/dscf)	L	0.015	0.015	0.015
	M	0.03	0.030	0.030
	S	0.05	0.050	0.030
	SR	0.086	0.086	0.030
CDD/CDF, total (ng/dscm)	L, M, S	125	115	115
	SR	800	800	800
CDD/CDF, TEQ (ng/dscm)	L, M, S	2.3	2.2	2.0
	SR	15	15	15
NO _x (ppmv)	All	250	250	212
SO ₂ (ppmv)	All	55	55	28

¹ L = Large; M = Medium; S = Small; SR = Small Rural

² All emission limits are measured at 7 percent oxygen.

Table 14 of this preamble summarizes the emission limits promulgated in 1997 and the emission limits being proposed as a result of EPA's response to the Court remand for the 1997 NSPS HMIWI. Note that these proposed limits for 1997 NSPS HMIWI only apply to units for which construction was commenced after June 20, 1996, and on or before the date of this proposal, or for which modification is commenced

before the date 6 months after promulgation of the proposed limits. Also note that where the proposed 5-year review limits for existing HMIWI are more stringent than those resulting from the remand response for 1997 NSPS HMIWI, the more stringent limits for existing HMIWI are included in the table as the limits being proposed. HMIWI subject to the 1997 NSPS, however, will not find these proposed

limits, as presented in Table 14 of this preamble, in subparts Ec or Ce of 40 CFR part 60. Instead, they must consider the proposed revisions to subpart Ec of 40 CFR part 60 regarding existing HMIWI, as well as in the proposed revisions to subpart Ce of 40 CFR part 60 regarding 1997 NSPS HMIWI, and comply with the more stringent emission limit.

TABLE 14.—SUMMARY OF 1997 PROMULGATED EMISSION LIMITS AND PROPOSED LIMITS IN RESPONSE TO THE REMAND FOR 1997 NSPS HMIWI

Pollutant (units)	Unit size ¹	Promulgated limit ²	Proposed remand response limit ²
HCl (ppmv)	L, M, S	15 or 99% reduction	15 or 99% reduction.
CO (ppmv)	L, M, S	40	25 ³ .
Pb (mg/dscm)	L, M	0.07 or 98% reduction	0.060 or 98% reduction.
	S	1.2 or 70% reduction	0.64 ³ or 71% reduction.
Cd (mg/dscm)	L, M	0.04 or 90% reduction	0.030 or 93% reduction.
	S	0.16 or 65% reduction	0.060 ³ or 74% reduction ³ .
Hg (mg/dscm)	L, M, S	0.55 or 85% reduction	0.33 ³ or 96% reduction ³ .
PM (gr/dscf)	L, M	0.015	0.0090
	S	0.03	0.018
CDD/CDF, total (ng/dscm)	L, M	25	20
	S	125	111
CDD/CDF, TEQ (ng/dscm)	L, M	0.6	0.53
	S	2.3	2.0 ³ .
NO _x (ppmv)	L, M, S	250	212 ³ .
SO ₂ (ppmv)	L, M, S	55	28 ³ .

¹ L = Large; M = Medium; S = Small

² All emission limits are measured at 7 percent oxygen.

³ Because the proposed 5-year review limit for existing HMIWI is more stringent than the one resulting from the remand response for 1997 NSPS HMIWI, the more stringent limit for existing HMIWI is being proposed.

b. New Units. The first step in the analysis for new large and medium

HMIWI was to assess the performance of the units currently operating a

combined dry/wet control system, which is the control technology upon

which the 1997 NSPS for large and medium HMIWI was based. Four units currently are operating such controls, and we obtained compliance test data for each unit for use in assessing performance. We selected as the proposed emission limit the highest individual test run from the compliance testing for each pollutant. This methodology uses actual test data from the best-controlled sources in the industry to provide a reasonable estimate of the performance of these units, while accounting for variability. In several instances, the emission limit suggested by the highest run from the four combined-control sources was higher than either the emission limit for new sources that we are proposing in response to the Court remand or the 5-year review emission limit that we are proposing for existing sources. This was likely a result of the small amount of data that we used to establish the limits, and, in these instances, we are proposing the most stringent among these three limits for new sources.

Although there are no small HMIWI subject to the current NSPS, we are proposing emission limits based on the performance of moderate-efficiency wet scrubbers, which is the control technology upon which the 1997 limits for new small units was based. As an

initial step in selection of these emission limits, we used the performance values representative of control with a moderate-efficiency wet scrubber as determined for the existing medium HMIWI. We then compared these values to the values for new small units developed in response to the remand and, in each case, we selected the more stringent value as the proposed emission limit.

To determine proposed percent reduction requirements for new units for HCl, Pb, Cd, and Hg, we followed a methodology similar to that used for existing units. For HCl, we obtained percent reduction data from two units controlled with the MACT control technology for HCl for new large and medium units (wet scrubbers), and these data showed percent reductions greater than 99 percent. To account for variability, we based the percent reduction requirement of 99 percent on the lowest percent reduction recorded during the individual test runs (i.e., 99.1 percent). We used the same methodology for each of the three metals for new large and medium units, and the corresponding percent reduction standards based on the MACT control technology (dry scrubbers) are 99 percent for Pb, 99 percent for Cd, and 96 percent for Hg. For HCl from new

small HMIWI, we used the same methodology as for new large and medium units because the MACT control technology upon which the reductions are based is the same (wet scrubbers). For Pb and Cd from new small HMIWI, we used the same methodology as for new large and medium units, except that the MACT control technology upon which the reductions are based is a wet scrubber. For Hg, we used the only available estimate of percent reduction. The proposed percent reduction standards for new small units are 99 percent for HCl, 71 percent for Pb, 74 percent for Cd, and 96 percent for Hg. The 5-year review methodology used to assess performance of new units resulted in no change to the HCl standards for all new units. All of the other standards for new units were adjusted based on either the 5-year review or the remand analyses.

Table 15 of this preamble summarizes the emission limits promulgated in 1997 and the emission limits being proposed as a result of the 5-year review for new HMIWI. Note that these proposed limits for new HMIWI only apply to units for which construction is commenced after the date of this proposal, or for which modification is commenced on or after the date 6 months after promulgation of the proposed limits.

TABLE 15.—SUMMARY OF 1997 PROMULGATED EMISSION LIMITS AND PROPOSED 5-YEAR REVIEW LIMITS FOR NEW HMIWI

Pollutant (units)	Unit size ¹	Promulgated limit ²	Proposed 5-year review limit ²
HCl (ppmv)	L, M, S	15 or 99% reduction	15 or 99% reduction.
CO (ppmv)	L, M, S	40	25
Pb (mg/dscm)	L, M	0.07 or 98% reduction	0.060 or 99% reduction.
	S	1.2 or 70% reduction	0.64 or 71% reduction.
Cd (mg/dscm)	L, M	0.04 or 90% reduction	0.0050 or 99% reduction.
	S	0.16 or 65% reduction	0.060 or 74% reduction.
Hg (mg/dscm)	L, M	0.55 or 85% reduction	0.19 or 96% reduction.
	S	0.55 or 85% reduction	0.33 or 96% reduction.
PM (gr/dscf)	L, M	0.015	0.0090
	S	0.03	0.018
CDD/CDF, total (ng/dscm)	L, M	25	16
	S	125	111
CDD/CDF, TEQ (ng/dscm)	L, M	0.6	0.21
	S	2.3	2.0
NO _x (ppmv)	L, M, S	250	212
SO ₂ (ppmv)	L, M	55	21
	S	55	28

¹ L = Large; M = Medium; S = Small.

² All emission limits are measured at 7 percent oxygen.

2. How did EPA determine the proposed performance testing and monitoring requirements?

We are proposing minor adjustments to the performance testing and monitoring requirements that were promulgated in 1997. For existing HMIWI and 1997 NSPS HMIWI, we are

proposing retaining the current requirements of the rule and adding the following requirements: Annual inspections of scrubbers and fabric filters; and one-time testing of the ash handling operations at the time of the next compliance test using EPA Method 22 of appendix A of 40 CFR part 60.

These proposed requirements were selected to provide additional assurance that sources continue to operate at the levels established during their initial performance test. The proposed amendments would allow sources to use the results of previous emissions tests to demonstrate compliance with the

revised emission limits as long as the sources certify that the previous test results are representative of current operations. Only those sources whose previous emissions tests do not demonstrate compliance with one or more revised emission limits would be required to conduct another emissions test for those pollutants (note that sources are already required to test for HCl, CO, and PM on an annual basis).

Additional requirements also are proposed for new HMIWI. For new sources, we are proposing retaining the current requirements and adding the following requirements: Use of CO CEMS; annual inspections of scrubbers and fabric filters; use of bag leak detection systems on fabric filter-based control systems; and annual testing of the ash handling operations using EPA Method 22 of appendix A of 40 CFR part 60. For existing sources, in addition to the proposed changes in monitoring requirements, we also are proposing to allow for the optional use of bag leak detection systems. We also are clarifying that the rule allows for the following optional CEMS use: CO CEMS for existing sources and 1997 NSPS sources; and PM CEMS, HCl CEMS, multi-metals CEMS, Hg CEMS, and semi-continuous dioxin monitoring for existing, 1997 NSPS, and new sources. The optional use of HCl CEMS, multi-metals CEMS, and semi-continuous dioxin monitoring will be available on the date a final performance specification for these monitoring systems is published in the **Federal Register** or the date of approval of a site-specific monitoring plan. The proposed testing and monitoring provisions are discussed below.

a. Bag Leak Detection Systems. The proposed amendments would provide, as an alternative PM monitoring technique for existing sources and 1997 NSPS sources and a requirement for new sources, the use of bag leak detection systems on HMIWI controlled with fabric filters. Bag leak detection systems have been applied successfully at many industrial sources. EPA is proposing to drop the opacity testing requirements for HMIWI that use bag leak detection systems.

b. CO CEMS. The proposed amendments would require the use of CO CEMS for new sources, and allow the use of CO CEMS on existing sources and 1997 NSPS sources. Owners and operators that use CO CEMS would be able to discontinue their annual CO compliance test as well as their monitoring of the secondary chamber temperature. The continuous monitoring of CO emissions is an effective way of ensuring that the

combustion unit is operating properly. The proposed amendments incorporate the use of performance specification (PS)-4B (Specifications and Test Procedures for Carbon Monoxide and Oxygen Continuous Monitoring Systems in Stationary Sources) of appendix B of 40 CFR part 60.

The proposed CO emission limits are based on data from infrequent (normally annual) stack tests and compliance would be demonstrated by stack tests. The change to use of CO CEMS for measurement and enforcement of the same emission limits must be carefully considered in relation to an appropriate averaging period for data reduction. EPA considered this issue and concluded the use of a 24-hour block average was appropriate to address CO emissions variability, and EPA has included the use of a 24-hour block average in the proposed rule. The 24-hour block average would be calculated following procedures in EPA Method 19 of appendix A of 40 CFR part 60. Facilities electing to use CO CEMS as an optional method would be required to notify EPA 1 month before starting use of CO CEMS and 1 month before stopping use of the CO CEMS. In addition, EPA specifically requests comment on whether continuous monitoring of CO emissions should be required for all existing HMIWI and all 1997 NSPS HMIWI.

c. PM CEMS. The proposed amendments would allow the use of PM CEMS as an alternative testing and monitoring method. Owners or operators who choose to rely on PM CEMS would be able to discontinue their annual PM compliance test. In addition, because units that demonstrate compliance with the PM emission limits with a PM CEMS would clearly be meeting the opacity standard, compliance demonstration with PM CEMS would be considered a substitute for opacity testing. Owners and operators that use PM CEMS also would be able to discontinue their monitoring of minimum wet scrubber pressure drop, horsepower, or amperage. The proposed amendments incorporate the use of PS-11 (Specifications and Test Procedures for Particulate Matter Continuous Emission Monitoring Systems at Stationary Sources) of appendix B of 40 CFR part 60 for PM CEMS, and PS-11 QA Procedure 2 to ensure that PM CEMS are installed and operated properly and produce good quality monitoring data.

The proposed PM emission limits are based on data from infrequent (normally annual) stack tests and compliance would be demonstrated by stack tests. The use of PM CEMS for measurement

and enforcement of the same emission limits must be carefully considered in relation to an appropriate averaging period for data reduction. EPA considered this issue and concluded the use of a 24-hour block average was appropriate to address PM emissions variability, and EPA has included the use of a 24-hour block average in the proposed rule. The 24-hour block average would be calculated following procedures in EPA Method 19 of appendix A of 40 CFR part 60. An owner or operator of an HMIWI unit who wishes to use PM CEMS would be required to notify EPA 1 month before starting use of PM CEMS and 1 month before stopping use of the PM CEMS.

d. Other CEMS and Monitoring Systems. EPA also is proposing the optional use of HCl CEMS, multi-metals CEMS, Hg CEMS, and semi-continuous dioxin monitoring as alternatives to the existing methods for demonstrating compliance with the HCl, metals (Pb, Cd, and Hg), and CDD/CDF emissions limits. For the reasons explained above for CO CEMS and PM CEMS, EPA has concluded that the use of 24-hour block averages would be appropriate to address emissions variability, and EPA has included the use of 24-hour block averages in the proposed rule. The 24-hour block averages would be calculated following procedures in EPA Method 19 of appendix A of 40 CFR part 60. Although final performance specifications are not yet available for HCl CEMS and multi-metals CEMS, EPA is considering development of performance specifications. The proposed rule specifies that these options will be available to a facility on the date a final performance specification is published in the **Federal Register** or the date of approval of a site-specific monitoring plan.

The use of HCl CEMS would allow the discontinuation of HCl sorbent flow rate monitoring, scrubber liquor pH monitoring, and the annual testing requirements for HCl. EPA has proposed PS-13 (Specifications and Test Procedures for Hydrochloric Acid Continuous Monitoring Systems in Stationary Sources) of appendix B of 40 CFR part 60 and believes that performance specification can serve as the basis for a performance specification for HCl CEMS use at HMIWI. In addition to the procedures used in proposed PS-13 for initial accuracy determination using the relative accuracy test, a comparison against a reference method, EPA is taking comment on an alternate initial accuracy determination procedure, similar to the one in section 11 of PS-15 (Performance Specification for

Extractive FTIR Continuous Emissions Monitor Systems in Stationary Sources) of appendix B of 40 CFR part 60 using the dynamic or analyte spiking procedure.

EPA believes multi-metals CEMS can be used in many applications, including HMIWI. EPA has monitored side-by-side evaluations of multi-metals CEMS with EPA Method 29 of appendix A of 40 CFR part 60 at industrial waste incinerators and found good correlation. EPA also approved the use of multi-metals CEMS as an alternative monitoring method at a hazardous waste combustor. EPA believes it is possible to adapt proposed PS-10 (Specifications and Test Procedures for Multi-metals Continuous Monitoring Systems in Stationary Sources) of appendix B of 40 CFR part 60 or other EPA performance specifications to allow the use of multi-metals CEMS at HMIWI. In addition to the procedures used in proposed PS-10 for initial accuracy determination using the relative accuracy test, a comparison against a reference method, EPA is taking comment on an alternate initial accuracy determination procedure, similar to the one in section 11 of PS-

15 using the dynamic or analyte spiking procedure.

Relative to the use of Hg CEMS, EPA believes that PS-12A (Specifications and Test Procedures for Total Vapor Phase Mercury Continuous Emission Monitoring Systems in Stationary Sources) of appendix B of 40 CFR part 60 can provide the basis for using Hg CEMS at HMIWI. An owner or operator of an HMIWI unit who wishes to use Hg CEMS would be required to notify EPA 1 month before starting use of Hg CEMS and 1 month before stopping use of the Hg CEMS. The use of multi-metals CEMS or Hg CEMS would allow the discontinuation of wet scrubber outlet flue gas temperature monitoring. Mercury sorbent flow rate monitoring could not be eliminated in favor of a multi-metals CEMS or Hg CEMS because it also is an indicator of CDD/CDF control. Additionally, there is no annual metals test that could be eliminated.

The semi-continuous monitoring of dioxin would entail use of a continuous automated sampling system and analysis of the sample using EPA Reference Method 23 of appendix A of 40 CFR part 60. The option to use a

continuous automated sampling system would take effect on the date a final performance specification is published in the **Federal Register** or the date of approval of a site-specific monitoring plan. Semi-continuous monitoring of dioxin would allow the discontinuation of fabric filter inlet temperature monitoring. Dioxin/furan sorbent flow rate monitoring could not be eliminated in favor of semi-continuous monitoring of dioxin because it also is an indicator of Hg control. Additionally, there is no annual CDD/CDF test that could be eliminated. If semi-continuous monitoring of dioxin as well as multi-metals CEMS or Hg CEMS are used, Hg sorbent flow rate monitoring and CDD/CDF sorbent flow rate monitoring (in both cases activated carbon is the sorbent) could be eliminated. EPA requests comment on other parameter monitoring requirements that could be eliminated upon use of any or all of the optional CEMS discussed above. Table 16 of this preamble presents a summary of the HMIWI operating parameters, the pollutants influenced by each parameter, and alternative monitoring options for each parameter.

TABLE 16.—SUMMARY OF HMIWI OPERATING PARAMETERS, POLLUTANTS INFLUENCED BY EACH PARAMETER, AND ALTERNATIVE MONITORING OPTIONS FOR EACH PARAMETER

Operating parameter/monitoring requirement	Pollutants Influenced by Operating Parameter (by Control Device Type)			Alternative monitoring options
	Dry scrubber	Wet scrubber	Combined system	
Maximum charge rate	All ¹	All ¹	All ¹	None.
Minimum secondary chamber temperature	PM, CO, CDD/CDF.	PM, CO, CDD/CDF.	PM, CO, CDD/CDF.	CO CEMS ² .
Maximum fabric filter inlet temperature	CDD/CDF .....	.....	CDD/CDF	Semi-continuous dioxin monitoring system (SCDMS).
Minimum CDD/CDF sorbent flow rate	CDD/CDF .....	.....	CDD/CDF	SCDMS and multi-metals CEMS or Hg CEMS.
Minimum Hg sorbent flow rate	Hg .....	.....	Hg.	
Minimum HCl sorbent flow rate	HCl .....	.....	HCl	HCl CEMS.
Minimum scrubber pressure drop/ horsepower.	.....	PM	PM	PM CEMS.
Minimum scrubber liquor flow rate .....	.....	HCl, PM, Cd, Pb, Hg, CDD/CDF.	HCl, PM, Cd, Pb, Hg, CDD/CDF.	HCl CEMS, PM CEMS, multi-metals CEMS, and SCDMS.
Minimum scrubber liquor pH .....	.....	HCl	HCl	HCl CEMS.
Maximum flue gas temperature (wet scrubber outlet).	.....	Hg .....	.....	Hg CEMS or multi-metals CEMS.
Do not use bypass stack (except during startup, shutdown, and malfunction).	All ¹	All ¹	All ¹	None.
Air pollution control device inspections	All ¹	All ¹	All ¹	None.

¹ "All" pollutants designation does not include SO₂ and NO_x, which are regulated at combustion-controlled levels (no add-on controls) and have no associated parameter monitoring.

² Optional method for existing and 1997 NSPS sources; required for new sources.

Table 17 of this preamble presents a summary of the HMIWI test methods

and approved alternative compliance methods.

TABLE 17.—SUMMARY OF HMIWI TEST METHODS AND APPROVED ALTERNATIVE METHODS

Pollutant/parameter	Test method(s) ¹	Approved alternative method(s)	Comments
PM	Method 5, Method 29.	PM CEMS	PM CEMS are optional for all sources in lieu of annual PM test.
CO	Method 10	CO CEMS	CO CEMS are optional for existing and 1997 NSPS sources in lieu of annual CO test; CO CEMS are required for new sources.
HCl	Method 26 or Method 26A.	HCl CEMS	HCl CEMS are optional for all sources in lieu of annual HCl test.
Cd	Method 29	Multi-metals CEMS.	
Pb	Method 29	Multi-metals CEMS.	
Hg	Method 29	ASTM D6784–02, multi-metals CEMS or Hg CEMS.	
CDD/CDF	Method 23	Semi-continuous dioxin monitoring system.	
Opacity	Method 22	Bag leak detection system or PM CEMS.	Bag leak detection systems are optional for existing and 1997 NSPS sources; and are required for new sources.
Flue and exhaust gas analysis	Method 3, 3A, or 3B.	ASME PTC 19–10–1981 Part 10.	
Opacity from ash handling	Method 22	None.	

¹ EPA Reference Methods in appendix A of 40 CFR part 60.

V. Impacts of the Proposed Action for Existing Units

The emission limits for existing HMIWI that we are proposing as part of this action are based on the actual performance of the MACT control technologies. This proposed action is expected to result in modest improvements in performance being required by HMIWI that are not achieving the performance levels demonstrated in practice by the control technologies currently being used in the industry. Based on compliance test reports from all existing operating HMIWI (72 units at 67 facilities) following MACT compliance in September 2002, 18 existing large HMIWI and 4 existing medium HMIWI are likely to find it necessary to improve performance of their units in order to achieve the proposed emission limits which their compliance test data indicates they would not meet. The modest improvements anticipated include adding lime (for SO₂), increasing lime use (for HCl and SO₂), increasing natural gas use (for CO and CDD/CDF), and increasing scrubber horsepower (for Pb, Cd, and Hg). Facilities may resubmit previous compliance test data that indicates that their HMIWI meets the proposed emission limits if the facility certifies that the test results are representative of current operations. Those facilities would then not be required to test for those pollutants to prove compliance with the emission limits.

A. What are the primary air impacts?

As a result of the modest improvements estimated to be required at 22 HMIWI such that they would achieve the proposed emission limits, EPA estimates that a total of approximately 24,700 pounds per year (lb/yr) of the regulated pollutants would be reduced. Approximate reductions by pollutant follow:

- HCl—20,600 lb/yr
- CO—400 lb/yr
- Pb—35 lb/yr
- Cd—3 lb/yr
- Hg—30 lb/yr
- PM—2,700 lb/yr
- CDD/CDF—0.0007 lb/yr
- NO_x—200 lb/yr
- SO₂—700 lb/yr

B. What are the water and solid waste impacts?

EPA estimates that approximately 80 tpy of additional solid waste and 267,000 gallons per year of additional wastewater would be generated as a result of the increase of lime use by some facilities.

C. What are the energy impacts?

EPA estimates that approximately 3,600 megawatt-hours per year of additional electricity would be required to support the increase in scrubber horsepower that we estimate would be required to enable some facilities to achieve the proposed emission limits.

D. What are the secondary air impacts?

Secondary air impacts associated with this proposed action are direct impacts that result from the increase in natural gas use and/or wet scrubber horsepower

that we estimate may be required to enable some facilities to achieve the proposed emission limits. We estimate that the adjustments could result in emissions of 211 lb/yr of PM; 1,880 lb/yr of CO; 1,230 lb/yr of NO_x; and 1,450 lb/yr of SO₂ from the increased electricity and natural gas usage.

E. What are the cost and economic impacts?

EPA estimates that the national total costs for the 72 existing HMIWI and 4 1997 NSPS HMIWI to comply with this proposed action would be approximately \$488,000 in the first year of compliance. This estimate includes the costs that would be incurred by the 22 HMIWI that we anticipate needing to improve performance (i.e., costs of improvements in emissions control and emissions tests for pollutants for which the improvements are made), and the additional monitoring (i.e., annual control device inspections), testing (i.e. initial Method 22 test), and recordkeeping and reporting costs that would be incurred by all 76 HMIWI as a result of this proposed action. Approximately 50 percent of the estimated total cost in the first year is for emissions control, 11 percent is for monitoring, 32 percent is for testing, and 7 percent is for recordkeeping and reporting. National total costs for subsequent years are estimated to be approximately \$308,000 per year, with approximately 78 percent of the total cost for emissions control, 18 percent for monitoring, and 3 percent for testing. Economic impact analyses focus on changes in market prices and output

levels. If changes in market prices and output levels in the primary markets are significant enough, impacts on other markets are also examined. EPA's economic impact analysis for this proposed action assessed the magnitude of the cost of market changes resulting from the proposed amendments by comparing annualized costs to annual sales. We were able to assess the cost of market changes for 70 HMIWI (sales information was unavailable for the other 6 units). For purposes of assessing economic impacts of the proposed action, the total annualized cost of this proposed action is estimated to be \$328,000 and was determined by first annualizing at 7 percent over 15 years the difference between the first year costs and subsequent year costs for each of the 76 HMIWI, and adding to that value the subsequent year costs for each HMIWI; followed by then combining the annualized costs for the 76 HMIWI. The \$328,000 was distributed among the 76 HMIWI, resulting in cost-to-sales ratios ranging from 0.0006 percent to 0.06 percent, with an average cost-to-sales ratio of 0.003 percent. Because of the small size of these regulatory costs and estimated impacts, no additional market analysis is needed. Neither the modest national costs nor the facility level costs are anticipated to significantly impact any market.

VI. Impacts of the Proposed Action for New Units

The current NSPS apply to HMIWI for which construction began after June 20, 1996, or for which modification began after March 16, 1998. There are three new HMIWI and one modified HMIWI that are subject to the current NSPS. No additional units have become subject to the NSPS since 2002. Considering this information, EPA does not anticipate any new HMIWI, and, therefore, no impacts of the proposed standards for new units. However, in the unlikely event that a new HMIWI is constructed, we are proposing new emission limits for those units based on performance of the control technology upon which current NSPS limits are based, as well as additional monitoring requirements, including use of CO CEMS and use of bag leak detection systems for fabric filters. Because EPA does not anticipate any new HMIWI, we, therefore, do not expect there to be any air impacts, water or solid waste impacts, energy impacts, or cost or economic impacts associated with the proposed standards for new sources.

VII. Relationship of the Proposed Action to Section 112(c)(6) of the CAA

Section 112(c)(6) of the CAA requires EPA to identify categories of sources of seven specified pollutants to assure that sources accounting for not less than 90 percent of the aggregate emissions of each such pollutant are subject to standards under CAA section 112(d)(2) or 112(d)(4). EPA has identified medical waste incinerators as a source category that emits five of the seven CAA section 112(c)(6) pollutants: Polycyclic organic matter (POM), dioxins, furans, Hg, and polychlorinated biphenyls (PCBs). (The POM emitted by HMIWI is composed of 16 polycyclic aromatic hydrocarbons (PAH) and extractable organic matter (EOM).) In the **Federal Register** notice Source Category Listing for Section 112(d)(2) Rulemaking Pursuant to Section 112(c)(6) Requirements, 63 FR 17838, 17849, Table 2 (1998), EPA identified medical waste incinerators (now referred to as HMIWI) as a source category "subject to regulation" for purposes of CAA section 112(c)(6) with respect to the CAA section 112(c)(6) pollutants that HMIWI emit. HMIWI are solid waste incineration units currently regulated under CAA section 129. For purposes of CAA section 112(c)(6), EPA has determined that standards promulgated under CAA section 129 are substantively equivalent to those promulgated under CAA section 112(d). (See *Id.* at 17845; see also 62 FR 33625, 33632 (1997).) As discussed in more detail below, the CAA section 129 standards effectively control emissions of the five identified CAA section 112(c)(6) pollutants. Further, since CAA section 129(h)(2) precludes EPA from regulating these substantial sources of the five identified CAA section 112(c)(6) pollutants under CAA section 112(d), EPA cannot further regulate these emissions under that CAA section. As a result, EPA considers emissions of these five pollutants from HMIWI units "subject to standards" for purposes of CAA section 112(c)(6).

As required by the statute, the CAA section 129 HMIWI standards include numeric emission limitations for the nine pollutants specified in that section. The combination of good combustion practices and add-on air pollution control equipment (dry sorbent injection fabric filters, wet scrubbers, or combined fabric filter and wet scrubber systems) effectively reduces emissions of the pollutants for which emission limits are required under CAA section 129: Hg, CDD/CDF, Cd, Pb, PM, SO₂, HCl, CO, and NO_x. Thus, the NSPS and emissions guidelines specifically require reduction in emissions of three

of the CAA section 112(c)(6) pollutants: Dioxins, furans, and Hg. As explained below, the air pollution controls necessary to comply with the requirements of the HMIWI NSPS and emission guidelines also effectively reduce emissions of the following CAA section 112(c)(6) pollutants that are emitted from HMIWI units: POM and PCBs. Although the CAA section 129 HMIWI standards do not have separate, specific emissions standards for PCBs and POM, emissions of these two CAA section 112(c)(6) pollutants are effectively controlled by the same control measures used to comply with the numerical emissions limits for the enumerated CAA section 129 pollutants. Specifically, as byproducts of combustion, the formation of PCBs and POM is effectively reduced by the combustion and post-combustion practices required to comply with the CAA section 129 standards. Any PCBs and POM that do form during combustion are further controlled by the various post-combustion HMIWI controls. The add-on PM control systems (either fabric filter or wet scrubber) and activated carbon injection in the fabric filter-based systems further reduce emissions of these organic pollutants, as well as reducing Hg emissions. The post-MACT compliance tests at currently operating HMIWI show that the HMIWI MACT regulations reduced Hg emissions by greater than 80 percent and CDD/CDF emissions by about 90 percent from pre-MACT levels. In light of the fact that similar controls have been demonstrated to effectively reduce emissions of POM and PCBs from another incineration source category (municipal solid waste combustors), it is, therefore, reasonable to conclude that POM and PCB emissions are substantially reduced at all 76 HMIWI. Thus, while the proposed rule does not identify specific limits for POM and PCB, they are, for the reasons noted above, nonetheless "subject to regulation" for purposes of section 112(c)(6) of the CAA.

VIII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735; October 4, 1993), this proposed action is a "significant regulatory action" because it is likely to raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Accordingly, EPA submitted this proposed action to the Office of Management and Budget (OMB) for

review under Executive Order 12866, and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

The information collection requirements associated with this proposed action are included in the information collection requirements addressing the HMIWI standards in their entirety, which have been submitted for approval to the OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) documents prepared by EPA have been assigned EPA ICR number 1899.04 for subpart Ce and 1730.05 for subpart Ec.

The requirements in this proposed action result in industry recordkeeping and reporting burden associated with review of the amendments for all HMIWI, initial EPA Method 22 testing for all HMIWI, annual inspections of scrubbers and fabric filters for all HMIWI, and stack testing and development of new parameter limits for HMIWI that need to make performance improvements. The total nationwide recordkeeping and reporting burden of this proposed action is estimated at 722 hours at a cost of approximately \$32,800. This burden and cost would only be applicable once. After that, the total nationwide recordkeeping and reporting burden and costs would be \$0 (above and beyond current burden and costs).

The annual average burden associated with the emission guidelines over the first 3 years following promulgation of this proposed action is estimated to be 49,878 hours at a total annual labor cost of \$2,433,045. The total annualized capital/startup costs and operation and maintenance (O&M) costs associated with the monitoring requirements, EPA Method 22 testing, storage of data and reports, and photocopying and postage over the 3-year period of the ICR are estimated at \$407,953 and \$333,258 per year, respectively. (The annual inspection costs are included under the recordkeeping and reporting labor costs.) The annual average burden associated with the NSPS over the first 3 years following promulgation of this proposed action is estimated to be 2,004 hours at a total annual labor cost of \$91,011. The total annualized capital/startup costs are estimated at \$13,046, with total operation and maintenance costs of \$36,310 per year.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a

Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated collection techniques, EPA has established a public docket for this action, which includes these ICR documents, under Docket ID No. EPA-HQ-OAR-2006-0534. Submit any comments related to the ICR documents for this proposed action to EPA and OMB. See **ADDRESSES** section at the beginning of this notice for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after February 6, 2007, a comment to OMB is best assured of having its full effect if OMB receives it by March 8, 2007. The final action will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the agency certifies that the proposed action will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small government organizations, and small government jurisdictions.

For purposes of assessing the impacts of this proposed action on small

entities, small entity is defined as follows: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Because none of the HMIWI facilities are expected to be significantly impacted by this proposed action, that also means that none of the four small entity-owned facilities would be expected to be significantly impacted. None of the 22 HMIWI that we estimate would need to make improvements in order to meet the proposed emission limits are owned by small entities. The only estimated economic impacts on small entities would result from the additional monitoring requirements (annual control device inspections), testing requirements (one-time EPA Method 22 testing), and associated recordkeeping and reporting requirements of this proposed action.

We continue to be interested in the potential impacts of this proposed action on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act (UMRA) of 1995, Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the proposed rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to

adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if EPA publishes with the final rule an explanation why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, EPA must develop a small government agency plan under section 203 of the UMRA. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA's regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this proposed action does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any 1 year. Thus, this proposed action is not subject to the requirements of section 202 and 205 of the UMRA. In addition, EPA has determined that this proposed action contains no regulatory requirements that might significantly or uniquely affect small governments. Therefore, this proposed action is not subject to the requirements of section 203 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132 (64 FR 43255; August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." This proposed action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This proposed action will not impose substantial direct compliance costs on State or local governments, and will not preempt

State law. Thus, Executive Order 13132 does not apply to this proposed action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed action from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, (65 FR 67249; November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications."

This proposed action does not have Tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on Tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. EPA is not aware of any HMIWI owned or operated by Indian Tribal governments. Thus, Executive Order 13175 does not apply to this proposed action.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045 (62 FR 19885; April 23, 1997), applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, EPA must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives EPA considered.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulation. This proposed action is not subject to Executive Order 13045 because it is based on technology performance and not on health and safety risks.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use

This proposed action is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355; May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. EPA estimates that the requirements in this proposed action would cause some HMIWI to increase the horsepower of their wet scrubbers, resulting in approximately 3,600 megawatt-hours per year of additional electricity being used.

Given the negligible change in energy consumption resulting from this proposed action, EPA does not expect any price increase for any energy type. The cost of energy distribution should not be affected by this proposed action at all since the action would not affect energy distribution facilities. We also expect that there would be no impact on the import of foreign energy supplies, and no other adverse outcomes are expected to occur with regard to energy supplies.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) of 1995 (Pub. L. 104-113, Section 12(d), 15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. The VCS are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency does not use available and applicable VCS.

This proposed action involves technical standards. EPA cites the following standards: EPA Methods 1, 3, 3A, 3B, 5, 9, 10, 10B, 22, 23, 26, 26A, and 29 in 40 CFR part 60, appendix A. Consistent with the NTTAA, EPA conducted searches to identify voluntary consensus standards in addition to these EPA methods. No applicable voluntary consensus standards were identified for EPA Methods 9 and 22. The search and review results are in the docket for this proposed action.

Two voluntary consensus standards were identified as acceptable

alternatives to EPA test methods for the purposes of this proposed action. The voluntary consensus standard ASME PTC 19–10–1981–Part 10, “Flue and Exhaust Gas Analyses,” is cited in the proposed action for its manual method for measuring the oxygen content of exhaust gas. This part of ASME PTC 19–10–1981–Part 10 is an acceptable alternative to EPA Method 3B.

The voluntary consensus standard ASTM D6784–02, “Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method),” is an acceptable alternative to EPA Method 29 (portion for mercury only) as a method for measuring Hg.

The search for emissions measurement procedures identified 16 other voluntary consensus standards. EPA determined that these 16 standards identified for measuring emissions of the pollutants subject to emission standards in this proposed action were impractical alternatives to EPA test methods for the purposes of this action. Therefore, EPA does not intend to adopt these standards for this purpose. A document that discusses the determinations for these 16 methods is located in the docket to this proposed action.

Section 60.56c of subpart Ec of 40 CFR part 60 and § 60.37e of subpart Ce of 40 CFR part 60 list the testing methods included in the proposed action. Under 40 CFR 60.8(b) and 60.13(i) of subpart A (General Provisions), a source may apply to EPA for permission to use alternative test methods or alternative monitoring requirements in place of any required testing methods, performance specifications, or procedures.

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: January 26, 2007.

Stephen L. Johnson,
Administrator.

For the reasons stated in the preamble, title 40, chapter I, part 60 of the Code of Federal Regulations is proposed to be amended as follows:

PART 60—[AMENDED]

1. The authority citation for part 60 continues to read as follows:

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

Subpart Ce—[Amended]

2. Section 60.32e is amended by revising paragraphs (a) and (i) to read as follows:

§ 60.32e Designated facilities.

(a) Except as provided in paragraphs (b) through (h) of this section, the designated facility to which the guidelines apply is each individual HMIWI for which construction was commenced on or before June 20, 1996 and each individual HMIWI currently subject to subpart Ec as promulgated in 1997 (for which construction was commenced after June 20, 1996 but no later than February 6, 2007 or for which modification commenced after March 16, 1998 but no later than 6 months after the date of promulgation of this subpart).

* * * * *

(i) Beginning 3 years after the date of promulgation of this subpart, or on the effective date of an EPA approved operating permit program under Clean Air Act title V and the implementing regulations under 40 CFR part 70 in the State in which the unit is located, whichever date is later, designated facilities subject to this subpart shall operate pursuant to a permit issued under the EPA-approved operating permit program.

3. Section 60.33e is amended by revising paragraph (b) to read as follows:

§ 60.33e Emission guidelines.

* * * * *

(b) For approval, a State plan shall include the requirements for emission limits at least as protective as those requirements listed in Table 2 of this subpart for any small HMIWI constructed on or before June 20, 1996 which is located more than 50 miles from the boundary of the nearest Standard Metropolitan Statistical Area (defined in § 60.31e) and which burns less than 2,000 pounds per week of hospital waste and medical/infectious waste. The 2,000 lb/week limitation does not apply during performance tests.

* * * * *

4. Section 60.36e is amended by adding paragraphs (c) and (d) to read as follows:

§ 60.36e Inspection guidelines.

* * * * *

(c) For approval, a State plan shall require that each HMIWI subject to the emission limits under § 60.33e(a) undergo an initial air pollution control device inspection that is at least as protective as the following within 1 year following approval of the State plan:

(1) At a minimum, an inspection shall include the following:

(i) Inspect air pollution control device(s) for proper operation, if applicable;

(ii) Ensure proper calibration of thermocouples, sorbent feed systems, and any other monitoring equipment; and

(iii) Generally observe that the equipment is maintained in good operating condition.

(2) Within 10 operating days following an air pollution control device inspection, all necessary repairs shall be completed unless the owner or operator obtains written approval from the State agency establishing a date whereby all necessary repairs of the designated facility shall be completed.

(d) For approval, a State plan shall require that each HMIWI subject to the emission limits under § 60.33e(a) undergo an air pollution control device inspection annually (no more than 12 months following the previous annual air pollution control device inspection), as outlined in paragraphs (c)(1) and (2) of this section.

5. Section 60.37e is amended by revising paragraphs (a) and (b)(1) and adding paragraph (e) to read as follows:

§ 60.37e Compliance, performance testing, and monitoring guidelines.

(a) Except as provided in paragraph (b) of this section, for approval, a State plan shall include the requirements for compliance and performance testing listed in § 60.56c of subpart Ec of this part, excluding the fugitive emissions annual testing requirement under § 60.56c(c)(3), the CO CEMS requirements under § 60.56c(c)(5), and the bag leak detection system requirements under § 60.57c(g). Sources may, however, elect to use CO CEMS as specified under § 60.56c(c)(5) or bag leak detection systems as specified under § 60.57c(g).

(b) * * *

(1) Conduct the performance testing requirements in § 60.56c(a), (b)(1) through (b)(9), (b)(11) (Hg only), (b)(12), and (c)(1) of subpart Ec of this part. The 2,000 lb/week limitation under § 60.33e(b) does not apply during performance tests.

* * * * *

(e) The owner or operator of a designated facility may use the results of previous emissions tests to demonstrate compliance with the emission limits, provided that the conditions in paragraphs (e)(1) through (e)(3) of this section are met:

(1) The previous emissions tests must have been conducted using the applicable procedures and test methods

listed in § 60.56c(b)(1) through (b)(9), (b)(11) (Hg only), and (b)(12). Previous emissions test results obtained using EPA-accepted voluntary consensus standards are also acceptable.

(2) The HMIWI at the affected facility shall be operated in a manner (e.g., with charge rate, secondary chamber temperature, etc.) that would be expected to result in the same or lower emissions than observed during the previous emissions test(s), and the HMIWI may not have been modified such that emissions would be expected to exceed (notwithstanding normal test-to-test variability) the results from previous emissions test(s).

(3) The previous emissions test(s) must have been conducted in 1997 or later.

6. Section 60.38e is amended by revising paragraph (a) and adding paragraph (c) to read as follows:

§ 60.38e Reporting and recordkeeping guidelines.

(a) For approval, a State plan shall include the reporting and recordkeeping requirements listed in § 60.58c(b), (c), (d), (e), and (f) of subpart Ec of this part, excluding § 60.58c(b)(7) (siting).

* * * * *

(c) For approval, a State plan shall require the owner or operator of each HMIWI subject to the emission limits under § 60.33e(a) to:

(1) Maintain records of the annual air pollution control device inspections, any required maintenance, and any repairs not completed within 10 days of an inspection or the timeframe established by the State regulatory agency; and

(2) Submit an annual report containing information recorded under paragraph (c)(1) of this section no later than 60 days following the year in which data were collected. Subsequent reports shall be sent no later than 12 calendar months following the previous report (once the unit is subject to permitting requirements under title V of the Act, the owner or operator shall submit these reports semiannually). The report shall be signed by the facilities manager.

7. Section 60.39e is amended as follows:

- a. By revising paragraph (a);
- b. By revising paragraph (c) introductory text;
- c. By revising paragraph (d)(3); and
- d. By revising paragraph (f).

§ 60.39e Compliance times.

(a) Not later than 1 year after the date of promulgation of this subpart, each State in which a designated facility is operating shall submit to the Administrator a plan to implement and enforce the emission guidelines.

* * * * *

(c) State plans that specify measurable and enforceable incremental steps of progress towards compliance for designated facilities planning to install the necessary air pollution control equipment may allow compliance on or before the date 3 years after EPA approval of the State plan (but not later than 5 years after the date of promulgation of this subpart). Suggested measurable and enforceable activities to be included in State plans are:

* * * * *

(d) * * *

(3) If an extension is granted, require compliance with the emission guidelines on or before the date 3 years after EPA approval of the State plan (but not later than 5 years after the date of promulgation of this subpart).

* * * * *

(f) The Administrator shall develop, implement, and enforce a plan for existing HMIWI located in any State that has not submitted an approvable plan within 2 years after the date of promulgation of this subpart. Such plans shall ensure that each designated facility is in compliance with the provisions of this subpart no later than 5 years after the date of promulgation of this subpart.

8. Table 1 to subpart Ce is revised to read as follows:

TABLE 1 TO SUBPART CE.—EMISSION LIMITS FOR SMALL, MEDIUM, AND LARGE HMIWI

Pollutant	Units (7 percent oxygen, dry basis)	Emission limits HMIWI size		
		Small	Medium	Large
Particulate matter	Milligrams per dry standard cubic meter (mg/dscm) (grains per dry standard cubic foot (gr/dscf)).	69 (0.030)	69 (0.030)	34 (0.015).
Carbon monoxide	Parts per million by volume (ppmv)	25	25	25.
Dioxins/furans	Nanograms per dry standard cubic meter total dioxins/furans (ng/dscm) (grains per billion dry standard cubic feet (gr/10 ⁹ dscf) or ng/dscm TEQ (gr/10 ⁹ dscf)).	115 (50) or 2.0 (0.87)	115 (50) or 2.0 (0.87)	115 (50) or 2.0 (0.87).
Hydrogen chloride	ppmv or percent reduction	51 or 94%	51 or 94%	51 or 94%
Sulfur dioxide	P _{pmv}	28	28	28.
Nitrogen oxides	P _{pmv}	212	212	212.
Lead	mg/dscm (grains per thousand dry standard cubic feet (gr/10 ³ dscf) or percent reduction.	0.64 (0.28) or 71%	0.64 (0.28) or 71%	0.64 (0.28) or 71%.
Cadmium	mg/dscm (gr/10 ³ dscf) or percent reduction ..	0.060 (0.026) or 74%	0.060 (0.026) or 74%	0.060 (0.026) or 74%.
Mercury	mg/dscm (gr/10 ³ dscf) or percent reduction ..	0.33 (0.14) or 96%	0.33 (0.14) or 96%	0.33 (0.14) or 96%.

9. Table 2 of subpart Ce is revised to read as follows:

TABLE 2 TO SUBPART CE.—EMISSION LIMITS FOR SMALL HMIWI WHICH MEET THE CRITERIA UNDER § 60.33E(B)

Pollutant	Units (7 percent oxygen, dry basis)	HMIWI emission limits
Particulate matter	mg/dscm (gr/dscf)	69 (0.030).
Carbon monoxide	P _{pmv}	25.

TABLE 2 TO SUBPART CE.—EMISSION LIMITS FOR SMALL HMIWI WHICH MEET THE CRITERIA UNDER § 60.33E(B)—Continued

Pollutant	Units (7 percent oxygen, dry basis)	HMIWI emission limits
Dioxins/furans	ng/dscm total dioxins/furans (gr/10 ⁹ dscf) or ng/dscm TEQ (gr/10 ⁹ dscf)	800 (350) or 15 (6.6).
Hydrogen chloride	ppmv or percent reduction	398.
Sulfur dioxide	P _{pmv}	28.
Nitrogen oxides	P _{pmv}	212.
Lead	mg/dscm (gr/10 ³ dscf) or percent reduction	0.60 (0.26).
Cadmium	mg/dscm (gr/10 ³ dscf) or percent reduction	0.050 (0.022).
Mercury	mg/dscm (gr/10 ³ dscf) or percent reduction	0.25 (0.11).

Subpart Ec—[Amended]

10. Section 60.50c is amended by revising paragraphs (a), (k) and (l) to read as follows:

§ 60.50c Applicability and delegation of authority.

(a) Except as provided in paragraphs (b) through (h) of this section, the affected facility to which this subpart applies is each individual hospital/medical/infectious waste incinerator (HMIWI):

(1) For which construction is commenced after June 20, 1996 but no later than February 6, 2007;

(2) For which modification is commenced after March 16, 1998 but no later than 6 months after the date of promulgation of this subpart;

(3) For which construction is commenced after February 6, 2007; or

(4) For which modification is commenced after 6 months after the date of promulgation of this subpart.

* * * * *

(k) The requirements of this subpart shall become effective 6 months after the date of promulgation of this subpart.

(l) Beginning 3 years after the date of promulgation of this subpart, or on the effective date of an EPA-approved operating permit program under Clean Air Act title V and the implementing regulations under 40 CFR part 70 in the State in which the unit is located, whichever date is later, affected facilities subject to this subpart shall operate pursuant to a permit issued under the EPA approved State operating permit program.

11. Section 60.51c is amended by adding a definition for “Bag leak detection system” in alphabetical order and revising the definition for “Minimum secondary chamber temperature” to read as follows:

§ 60.51c Definitions.

Bag leak detection system means an instrument that is capable of monitoring PM loadings in the exhaust of a fabric filter in order to detect bag failures. A bag leak detection system includes, but

is not limited to, an instrument that operates on triboelectric, light-scattering, light-transmittance, or other effects to monitor relative PM loadings.

* * * * *

Minimum secondary chamber temperature means 90 percent of the highest 3-hour average secondary chamber temperature (taken, at a minimum, once every minute) measured during the most recent performance test demonstrating compliance with the PM, CO, and dioxin/furan emission limits.

* * * * *

12. Section 60.52c is amended by revising paragraph (c) to read as follows:

§ 60.52c Emission limits.

* * * * *

(c) On and after the date on which the initial performance test is completed or is required to be completed under § 60.8, whichever date comes first, no owner or operator of an affected facility shall cause to be discharged into the atmosphere visible emissions of combustion ash from an ash conveying system (including conveyor transfer points) in excess of 5 percent of the observation period (i.e., 9 minutes per 3-hour period), as determined by EPA Reference Method 22 of appendix A of this part, except as provided in paragraphs (d) and (e) of this section.

* * * * *

13. Section 60.56c is amended as follows:

a. By revising paragraph (b) introductory text;

b. By revising paragraphs (b)(4) and (b)(6) through (b)(8), (b)(9) introductory text, and (b)(10);

c. By revising paragraph (b)(11);

d. By revising paragraphs (c)(2) through (4);

e. By adding paragraphs (c)(5), and (c)(6);

f. By revising paragraph (d) introductory text;

g. By adding paragraphs (e)(6) and (7);

h. By adding paragraphs (f)(7) through (9);

i. By adding paragraphs (g)(6) through (9); and

j. By adding paragraph (k).

§ 60.56c Compliance and performance testing.

* * * * *

(b) Except as provided in paragraph (k) of this section, the owner or operator of an affected facility shall conduct an initial performance test as required under § 60.8 to determine compliance with the emission limits using the procedures and test methods listed in paragraphs (b)(1) through (b)(12) of this section. The use of the bypass stack during a performance test shall invalidate the performance test.

* * * * *

(4) EPA Reference Method 3, 3A, or 3B of appendix A of this part shall be used for gas composition analysis, including measurement of oxygen concentration. EPA Reference Method 3, 3A, or 3B of appendix A of this part shall be used simultaneously with each of the other EPA reference methods. As an alternative, ASME PTC-19-10-1981-Part 10 may be used.

* * * * *

(6) EPA Reference Method 5 or 29 of appendix A of this part shall be used to measure the particulate matter emissions. As an alternative, PM CEMS may be used as specified in paragraph (c)(4) of this section.

(7) EPA Reference Method 9 of appendix A of this part shall be used to measure stack opacity. As an alternative, demonstration of compliance with the PM standards using bag leak detection systems as specified in § 60.57c(g) or PM CEMS as specified in paragraph (c)(4) of this section is considered demonstrative of compliance with the opacity requirements.

(8) For affected facilities under § 60.50c(a)(1) and (a)(2), EPA Reference Method 10 or 10B of appendix A of this part shall be used to measure the CO emissions. As an alternative, CO CEMS may be used as specified in paragraph (c)(4) of this section.

(9) EPA Reference Method 23 of appendix A of this part shall be used to

measure total dioxin/furan emissions. As an alternative, an owner or operator may elect to sample dioxins/furans by installing, calibrating, maintaining, and operating a continuous automated sampling system for monitoring dioxin/furan emissions as specified in paragraph (c)(6) of this section. For Method 23 sampling, the minimum sample time shall be 4 hours per test run. If the affected facility has selected the toxic equivalency standards for dioxins/furans, under § 60.52c, the following procedures shall be used to determine compliance:

* * * *

(10) EPA Reference Method 26 or 26A of appendix A of this part shall be used to measure HCl emissions, with the additional requirements for Method 26A specified in paragraphs (b)(10)(i) through (iii) of this section. As an alternative, HCl CEMS may be used as specified in paragraph (c)(4) of this section. If the affected facility has selected the percentage reduction standards for HCl under § 60.52c, the percentage reduction in HCl emission (%R_{HCl}) is computed using the following formula:

$$(\%R_{HCl}) = (E_i - E_o)/E_i \times 100$$

Where:

%R_{HCl}=percentage reduction of HCl emissions achieved;

E_i=HCl emission concentration measured at the control device inlet, corrected to 7 percent oxygen (dry basis); and

E_o=HCl emission concentration measured at the control device outlet, corrected to 7 percent oxygen (dry basis).

(i) The probe and filter shall be conditioned prior to sampling using the procedure described in paragraphs (b)(10)(i)(A) through (C) of this section.

(A) Assemble the sampling train(s) and conduct a conditioning run by collecting between 14 liters per minute (L/min) (0.5 cubic feet per minute (ft³/min)) and 30 L/min (1.0 ft³/min) of gas over a 1-hour period. Follow the sampling procedures outlined in section 8.1.5 of Method 26A of appendix A of this part. For the conditioning run, water may be used as the impinger solution.

(B) Remove the impingers from the sampling train and replace with a fresh impinger train for the sampling run, leaving the probe and filter (and cyclone, if used) in position. Do not recover the filter or rinse the probe before the first run. Thoroughly rinse the impingers used in the preconditioning run with deionized water and discard these rinses.

(C) The probe and filter assembly shall be conditioned by the stack gas

and shall not be recovered or cleaned until the end of testing.

(ii) For the duration of sampling, a temperature around the probe and filter (and cyclone, if used) between 120 °C (248 °F) and 134 °C (273 °F) shall be maintained.

(iii) If water droplets are present in the sample gas stream, the requirements specified in paragraphs (b)(10)(iii)(A) and (B) of this section shall be met.

(A) The cyclone described in section 6.1.4 of EPA Reference Method 26A of appendix A of this part shall be used.

(B) The post-test moisture removal procedure described in section 8.1.6 of EPA Reference Method 26A of appendix A of this part shall be used.

(11) EPA Reference Method 29 of appendix A of this part shall be used to measure Pb, Cd, and Hg emissions. As an alternative, Hg emissions may be measured using ASTM D6784-02. As an alternative for Pb, Cd, and Hg, multi-metals CEMS, or Hg CEMS, may be used as specified in paragraph (c)(4) of this section. If the affected facility has selected the percentage reduction standards for metals under § 60.52c, the percentage reduction in emissions (%R_{metal}) is computed using the following formula:

$$(\%R_{metal}) = (E_i - E_o)/E_i \times 100$$

Where:

%R_{metal}=percentage reduction of metal emission (Pb, Cd, or Hg) achieved;

E_i=metal emission concentration (Pb, Cd, or Hg) measured at the control device inlet, corrected to 7 percent oxygen (dry basis); and

E_o=metal emission concentration (Pb, Cd, or Hg) measured at the control device outlet, corrected to 7 percent oxygen (dry basis).

* * * *

(c) * * *

(2) Except as provided in paragraphs (c)(4) and (c)(5) of this section, determine compliance with the PM, CO, and HCl emission limits by conducting an annual performance test (no more than 12 months following the previous performance test) using the applicable procedures and test methods listed in paragraph (b) of this section. If all three performance tests over a 3-year period indicate compliance with the emission limit for a pollutant (PM, CO, or HCl), the owner or operator may forego a performance test for that pollutant for the subsequent 2 years. At a minimum, a performance test for PM, CO, and HCl shall be conducted every third year (no more than 36 months following the previous performance test). If a performance test conducted every third year indicates compliance with the emission limit for a pollutant (PM, CO, or HCl), the owner or operator may

forego a performance test for that pollutant for an additional 2 years. If any performance test indicates noncompliance with the respective emission limit, a performance test for that pollutant shall be conducted annually until all annual performance tests over a 3-year period indicate compliance with the emission limit. The use of the bypass stack during a performance test shall invalidate the performance test.

(3) For large HMIWI under § 60.50c(a)(1) and (a)(2) and for all HMIWI under § 60.50c(a)(3) and (a)(4), determine compliance with the visible emission limits for fugitive emissions from flyash/bottom ash storage and handling by conducting a performance test using EPA Reference Method 22 on an annual basis (no more than 12 months following the previous performance test).

(4) Facilities using optional CEMS to demonstrate compliance with the PM, CO, HCl, Pb, Cd, and/or Hg emission limits under § 60.52c shall:

(i) Determine compliance with the appropriate emission limit(s) using a 24-hour block average, calculated as specified in section 12.4.1 of EPA Reference Method 19 of appendix A of this part.

(ii) Operate all CEMS in accordance with the applicable procedures under appendices B and F of this part. For those CEMS for which performance specifications have not yet been promulgated (HCl, multi-metals), this option takes effect on the date a final performance specification is published in the **Federal Register** or the date of approval of a site-specific monitoring plan.

(iii) Be allowed to substitute use of an HCl CEMS for the HCl annual performance test, minimum HCl sorbent flow rate, and minimum scrubber liquor pH to demonstrate compliance with the HCl emission limit.

(iv) Be allowed to substitute use of a PM CEMS for the PM annual performance test and minimum pressure drop across the wet scrubber, if applicable, to demonstrate compliance with the PM emission limit.

(v) Be allowed to substitute use of a CO CEMS for the CO annual performance test and minimum secondary chamber temperature to demonstrate compliance with the CO emission limit.

(5) For affected facilities under § 60.50c(a)(3) and (a)(4), determine compliance with the CO emission limit using a CO CEMS according to paragraphs (c)(5)(i) and (c)(5)(ii) of this section:

(i) Determine compliance with the CO emission limit using a 24-hour block average, calculated as specified in section 12.4.1 of EPA Reference Method 19 of appendix A of this part.

(ii) Operate the CO CEMS in accordance with the applicable procedures under appendices B and F of this part.

(iii) Use of a CO CEMS may be substituted for the CO annual performance test and minimum secondary chamber temperature to demonstrate compliance with the CO emission limit.

(6) Facilities using a continuous automated sampling system to demonstrate compliance with the dioxin/furan emission limits under § 60.52c shall record the output of the system and analyze the sample using EPA Reference Method 23 of appendix A of this part. This option to use a continuous automated sampling system takes effect on the date a final performance specification applicable to dioxin/furan from monitors is published in the **Federal Register** or the date of approval of a site-specific monitoring plan. The owner or operator of an affected facility who elects to continuously sample dioxin/furan emissions instead of sampling and testing using EPA Reference Method 23 shall install, calibrate, maintain, and operate a continuous automated sampling system and shall comply with the requirements specified in § 60.58b(p) and (q) of subpart Eb of this part.

(d) Except as provided in paragraphs (c)(4), (c)(5), and (c)(6) of this section, the owner or operator of an affected facility equipped with a dry scrubber followed by a fabric filter, a wet scrubber, or a dry scrubber followed by a fabric filter and wet scrubber shall:

* * * * *

(e) * * *

(6) For HMIWI under § 60.50c(a)(3) and (a)(4), operation of the affected facility above the CO emission limit as measured by the CO CEMS shall constitute a violation of the CO emission limit.

(7) For HMIWI under § 60.50c(a)(3) and (a)(4), failure to initiate corrective action within 1 hour of a bag leak detection system alarm; or failure to operate and maintain the fabric filter such that the alarm is not engaged for more than 5 percent of the total operating time in a 6-month block reporting period shall constitute a violation of the PM emission limit. If inspection of the fabric filter demonstrates that no corrective action is required, no alarm time is counted. If

corrective action is required, each alarm is counted as a minimum of 1 hour. If it takes longer than 1 hour to initiate corrective action, the alarm time is counted as the actual amount of time taken to initiate corrective action. If the bag leak detection system is used to demonstrate compliance with the opacity limit, this would also constitute a violation of the opacity emission limit.

(f) * * *

(7) For HMIWI under § 60.50c(a)(3) and (a)(4), operation of the affected facility above the CO emission limit as measured by the CO CEMS shall constitute a violation of the CO emission limit.

(8) For all HMIWI, operation of the affected facility above the PM, CO, HCl, Pb, Cd, and/or Hg emission limit as measured by the CEMS specified in paragraph (c)(4) of this section shall constitute a violation of the applicable emission limit.

(9) For all HMIWI, operation of the affected facility above the CDD/CDF emission limit as measured by the continuous automated sampling system specified in paragraph (c)(6) of this section shall constitute a violation of the CDD/CDF emission limit.

(g) * * *

(6) For HMIWI under § 60.50c(a)(3) and (a)(4), operation of the affected facility above the CO emission limit as measured by the CO CEMS shall constitute a violation of the CO emission limit.

(7) For HMIWI under § 60.50c(a)(3) and (a)(4), failure to initiate corrective action within 1 hour of a bag leak detection system alarm; or failure to operate and maintain the fabric filter such that the alarm is not engaged for more than 5 percent of the total operating time in a 6-month block reporting period shall constitute a violation of the PM emission limit. If inspection of the fabric filter demonstrates that no corrective action is required, no alarm time is counted. If corrective action is required, each alarm is counted as a minimum of 1 hour. If it takes longer than 1 hour to initiate corrective action, the alarm time is counted as the actual amount of time taken to initiate corrective action. If the bag leak detection system is used to demonstrate compliance with the opacity limit, this would also constitute a violation of the opacity emission limit.

(8) For all HMIWI, operation of the affected facility above the PM, CO, HCl, Pb, Cd, and/or Hg emission limit as measured by the CEMS specified in paragraph (c)(4) of this section shall constitute a violation of the applicable emission limit.

(9) For all HMIWI, operation of the affected facility above the CDD/CDF emission limit as measured by the continuous automated sampling system specified in paragraph (c)(6) of this section shall constitute a violation of the CDD/CDF emission limit.

* * * * *

(k) The owner or operator of an affected facility may use the results of previous emissions tests to demonstrate compliance with the emission limits, provided that the conditions in paragraphs (k)(1) through (k)(3) of this section are met:

(1) The previous emissions tests shall have been conducted using the applicable procedures and test methods listed in paragraph (b) of this section. Previous emissions test results obtained using EPA-accepted voluntary consensus standards are also acceptable.

(2) The HMIWI at the affected facility shall be operated in a manner (e.g., with charge rate, secondary chamber temperature, etc.) that would be expected to result in the same or lower emissions than observed during the previous emissions test(s) and the HMIWI may not have been modified such that emissions would be expected to exceed (notwithstanding normal test-to-test variability) the results from previous emissions test(s).

(3) The previous emissions test(s) shall have been conducted in 1997 or later.

14. Section 60.57c is amended as follows:

- a. By revising paragraph (a);
- b. By adding paragraph (e);
- c. By adding paragraph (f); and
- d. By adding paragraph (g).

§ 60.57c Monitoring requirements

(a) Except as provided in § 60.56c(c)(4) through (c)(6), the owner or operator of an affected facility shall install, calibrate (to manufacturers' specifications), maintain, and operate devices (or establish methods) for monitoring the applicable maximum and minimum operating parameters listed in Table 3 to this subpart (unless optional CEMS are used as a substitute for certain parameters as specified) such that these devices (or methods) measure and record values for these operating parameters at the frequencies indicated in Table 3 at all times except during periods of startup and shutdown.

* * * * *

(e) The owner or operator of an affected facility shall ensure that each HMIWI subject to the emission limits in § 60.52c undergoes an initial air pollution control device inspection that is at least as protective as the following:

(1) At a minimum, an inspection shall include the following:

(i) Inspect air pollution control device(s) for proper operation, if applicable;

(ii) Ensure proper calibration of thermocouples, sorbent feed systems, and any other monitoring equipment; and

(iii) Generally observe that the equipment is maintained in good operating condition.

(2) Within 10 operating days following an air pollution control device inspection, all necessary repairs shall be completed unless the owner or operator obtains written approval from the Administrator establishing a date whereby all necessary repairs of the designated facility shall be completed.

(f) The owner or operator of an affected facility shall ensure that each HMIWI subject to the emission limits under § 60.52c undergoes an air pollution control device inspection annually (no more than 12 months following the previous annual air pollution control device inspection), as outlined in paragraphs (e)(1) and (e)(2) of this section.

(g) For affected facilities under § 60.50c(a)(3) and (a)(4) using an air pollution control device that includes a fabric filter and not using PM CEMS, determine compliance with the PM emission limit using a bag leak detection system and meet the requirements in paragraphs (g)(1) through (g)(12) of this section for each bag leak detection system. Affected facilities under § 60.50c(a)(1) and (a)(2) may elect to demonstrate continuous compliance with the PM emission limit using a bag leak detection system and meet the requirements in paragraphs (g)(1) through (g)(12) of this section.

(1) Each triboelectric bag leak detection system shall be installed, calibrated, operated, and maintained according to the "Fabric Filter Bag Leak Detection Guidance," (EPA 454/R-98-015, September 1997). This document is available from the U.S. Environmental Protection Agency (U.S. EPA); Office of Air Quality Planning and Standards; Sector Policies and Programs Division; Measurement Policy Group (D-243-02), Research Triangle Park, NC 27711. This document is also available on the Technology Transfer Network (TTN) under Emission Measurement Center Continuous Emission Monitoring. Other types of bag leak detection systems shall be installed, operated, calibrated, and maintained in a manner consistent with the manufacturer's written specifications and recommendations.

(2) The bag leak detection system shall be certified by the manufacturer to

be capable of detecting PM emissions at concentrations of 10 milligrams per actual cubic meter (0.0044 grains per actual cubic foot) or less.

(3) The bag leak detection system sensor shall provide an output of relative PM loadings.

(4) The bag leak detection system shall be equipped with a device to continuously record the output signal from the sensor.

(5) The bag leak detection system shall be equipped with an audible alarm system that will sound automatically when an increase in relative PM emissions over a preset level is detected. The alarm shall be located where it is easily heard by plant operating personnel.

(6) For positive pressure fabric filter systems, a bag leak detector shall be installed in each baghouse compartment or cell.

(7) For negative pressure or induced air fabric filters, the bag leak detector shall be installed downstream of the fabric filter.

(8) Where multiple detectors are required, the system's instrumentation and alarm may be shared among detectors.

(9) The baseline output shall be established by adjusting the range and the averaging period of the device and establishing the alarm set points and the alarm delay time according to section 5.0 of the "Fabric Filter Bag Leak Detection Guidance."

(10) Following initial adjustment of the system, the sensitivity or range, averaging period, alarm set points, or alarm delay time may not be adjusted. In no case may the sensitivity be increased by more than 100 percent or decreased more than 50 percent over a 365-day period unless such adjustment follows a complete fabric filter inspection that demonstrates that the fabric filter is in good operating condition. Each adjustment shall be recorded.

(11) Record the results of each inspection, calibration, and validation check.

(12) Initiate corrective action within 1 hour of a bag leak detection system alarm; operate and maintain the fabric filter such that the alarm is not engaged for more than 5 percent of the total operating time in a 6-month block reporting period. If inspection of the fabric filter demonstrates that no corrective action is required, no alarm time is counted. If corrective action is required, each alarm is counted as a minimum of 1 hour. If it takes longer than 1 hour to initiate corrective action, the alarm time is counted as the actual

amount of time taken to initiate corrective action.

15. Section 60.58c is amended as follows:

a. By adding paragraphs (b)(2)(xvi) through (xviii);

b. By revising paragraph (b)(6);

c. By revising paragraph (c) introductory text;

d. By revising paragraph (c)(2);

e. By adding paragraph (c)(4);

f. By revising paragraph (d) introductory text;

g. By adding paragraphs (d)(9) through (11); and

h. By adding paragraph (g).

§ 60.58c Reporting and recordkeeping requirements.

* * * * *

(b) * * *

(2) * * *

(xvi) Records of the annual air pollution control device inspections, any required maintenance, and any repairs not completed within 10 days of an inspection or the timeframe established by the Administrator.

(xvii) For affected facilities using a bag leak detection system, records of each alarm, the time of the alarm, the time corrective action was initiated and completed, and a brief description of the cause of the alarm and the corrective action taken.

(xviii) For affected facilities under § 60.50c(a)(3) and (a)(4), concentrations of CO as determined by the continuous emission monitoring system.

* * * * *

(6) The results of the initial, annual, and any subsequent performance tests conducted to determine compliance with the emission limits and/or to establish or re-establish operating parameters, as applicable, and a description of how the operating parameters were established or re-established, if applicable.

* * * * *

(c) The owner or operator of an affected facility shall submit the information specified in paragraphs (c)(1) through (c)(4) of this section no later than 60 days following the initial performance test. All reports shall be signed by the facilities manager.

* * * * *

(2) The values for the site-specific operating parameters established pursuant to § 60.56c(d) or § 60.56c(i), as applicable, and a description of how the operating parameters were established during the initial performance test.

* * * * *

(4) For each affected facility that uses a bag leak detection system, analysis and supporting documentation

demonstrating conformance with EPA guidance and specifications for bag leak detection systems in § 60.57c(g).

(d) An annual report shall be submitted 1 year following the submission of the information in paragraph (c) of this section and subsequent reports shall be submitted no more than 12 months following the previous report (once the unit is subject to permitting requirements under title V of the Clean Air Act, the owner or operator of an affected facility must submit these reports semiannually). The annual report shall include the information specified in paragraphs (d)(1) through (9) of this section. All reports shall be signed by the facilities manager.

* * * * *

(9) Records of the annual air pollution control device inspection, any required

maintenance, and any repairs not completed within 10 days of an inspection or the timeframe established by the Administrator.

(10) For affected facilities using a bag leak detection system, records of each alarm, the time of the alarm, the time corrective action was initiated and completed, and a brief description of the cause of the alarm and the corrective action taken.

(11) For affected facilities under § 60.50c(a)(3) and (a)(4), concentrations of CO as determined by the continuous emission monitoring system.

* * * * *

(g) The owner or operator of an affected facility that uses the results of previous emissions tests to demonstrate compliance with the emission limits shall submit the information specified in paragraphs (g)(1) through (g)(4) of this

section no later than [DATE 30 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE]. All reports shall have been signed by the facility's manager.

(1) The previous emissions test results as recorded using the methods and procedures in § 60.56c(b)(1) through (12), as applicable. Previous emissions test results recorded using EPA-accepted voluntary consensus standards are also acceptable.

(2) Certification that the test results are representative of current operations.

(3) The values for the site-specific operating parameters established pursuant to § 60.56c(d) or (i), as applicable.

(4) The waste management plan as specified in § 60.55c.

16. Table 1 to subpart Ec is revised to read as follows:

TABLE 1 TO SUBPART EC OF PART 60.—EMISSION LIMITS FOR SMALL, MEDIUM, AND LARGE HMIWI

Pollutant	Units (7 percent oxygen dry basis)	Emission limits HMIWI size		
		Small	Medium	Large
1. Units for which construction is commenced after June 20, 1996 but no later than February 6, 2007 or for which modification is commenced on or after March 16, 1998 but no later than [THE DATE 6 MONTHS AFTER PROMULGATION OF THE FINAL RULE]				
Particulate matter	Milligrams per dry standard cubic meter (grains per dry standard cubic foot).	41 (0.018)	21 (0.0090)	21 (0.0090).
Carbon monoxide	Parts per million by volume	32 ¹	32 ¹	32 ¹ .
Dioxins/furans	Nanograms per dry standard cubic meter total dioxins/furans (grains per billion dry standard cubic feet) or nanograms per dry standard cubic meter TEQ (grains per billion dry standard cubic feet).	111 (49) or 2.1 (0.92)	20 (8.7) or 0.53 (0.23)	20 (8.7) or 0.53 (0.23).
Hydrogen chloride	Parts per million by volume or percent reduction.	15 or 99%	15 or 99%	15 or 99%.
Sulfur dioxide	Parts per million by volume	46 ¹	46 ¹	46 ¹ .
Nitrogen oxides	Parts per million by volume	225 ¹	225 ¹	225 ¹ .
Lead	Milligrams per dry standard cubic meter (grains per thousand dry standard cubic feet) or percent reduction.	0.78 ¹ (0.34) or 71% ..	0.060 (0.026) or 98%	0.060 (0.026) or 98%.
Cadmium	Milligrams per dry standard cubic meter (grains per thousand dry standard cubic feet) or percent reduction.	0.11 ¹ (0.048) or 66%	0.030 (0.013) or 93%	0.030 (0.013) or 93%.
Mercury	Milligrams per dry standard cubic meter (grains per thousand dry standard cubic feet) or percent reduction.	0.47 ¹ (0.21) or 87% ..	0.45 ¹ (0.20) or 87% ..	0.45 ¹ (0.20) or 87%.

2. Units for which construction is commenced after February 6, 2007 or for which modification is commenced after [THE DATE 6 MONTHS AFTER PROMULGATION OF THE FINAL RULE]

Particulate matter	Milligrams per dry standard cubic meter (grains per dry standard cubic foot).	41 (0.018)	21 (0.0090)	21 (0.0090).
Carbon monoxide	Parts per million by volume	25	25	25.
Dioxins/furans	Nanograms per dry standard cubic meter total dioxins/furans (grains per billion dry standard cubic feet) or nanograms per dry standard cubic meter TEQ (grains per billion dry standard cubic feet).	111 (49) or 2.0 (0.87)	16 (7.0) or 0.21 (0.092).	16 (7.0) or 0.21 (0.092).
Hydrogen chloride	Parts per million by volume or percent reduction.	15 or 99%	15 or 99%	15 or 99%.
Sulfur dioxide	Parts per million by volume	28	21	21.
Nitrogen oxides	Parts per million by volume	212	212	212.
Lead	Milligrams per dry standard cubic meter (grains per thousand dry standard cubic feet) or percent reduction.	0.64 (0.28) or 71%	0.060 (0.026) or 99%	0.060 (0.026) or 99%.

TABLE 1 TO SUBPART EC OF PART 60.—EMISSION LIMITS FOR SMALL, MEDIUM, AND LARGE HMIWI—Continued

Pollutant	Units (7 percent oxygen dry basis)	Emission limits HMIWI size		
		Small	Medium	Large
Cadmium	Milligrams per dry standard cubic meter (grains per thousand dry standard cubic feet) or percent reduction.	0.060 (0.026) or 74%	0.0050 (0.0022) or 99%.	0.0050 (0.0022) or 99%.
Mercury	Milligrams per dry standard cubic meter (grains per thousand dry standard cubic feet) or percent reduction.	0.33 (0.14) or 96%	0.19 (0.083) or 96% ...	0.19 (0.083) or 96%.

¹ Emission limit is less stringent than the corresponding limit for existing sources contained in subpart Ce. Sources that would be subject to the emission limits in this table also would be subject to regulation under State plans or Federal plans that would implement subpart Ce and would be subject to limits at least as stringent as those in subpart Ce.

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Federal Register

**Tuesday,
February 6, 2007**

Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

**Endangered and Threatened Wildlife and
Plants; Designation of Critical Habitat for
Berberis nevinii (Nevin's barberry);
Proposed Rule**

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR Part 17****RIN 1018-AU84****Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Berberis nevinii* (Nevin's barberry)****AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for *Berberis nevinii* (Nevin's barberry) under the Endangered Species Act of 1973, as amended (Act). The proposal includes approximately 417 acres (ac) (169 hectares (ha)) of land in Riverside County, California, that meet the definition of critical habitat for *B. nevinii*. Of this, we propose to exclude 385 ac (156 ha) of non-Federal land from the final designation under section 4(b)(2) of the Act, leaving a proposed final designation of 32 ac (13 ha) of Federal land.

DATES: We will accept comments from all interested parties until April 9, 2007. We must receive requests for public hearings, in writing, at the address shown in the **ADDRESSES** section by March 23, 2007.

ADDRESSES: If you wish to comment on the proposed rule, you may submit your comments and materials identified by RIN 1018-AU84, by any of the following methods:

(1) You may send comments by electronic mail (e-mail) to

fw8cfwocomments@fws.gov. Include "RIN 1018-AU84" in the subject line.

(2) You may fax your comments to Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office at 760-431-9624.

(3) You may mail or hand-deliver your written comments and information to Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011.

(4) You may submit your comments at the Federal eRulemaking Portal, <http://www.regulations.gov>. Follow the instructions for submitting comments.

Comments and materials received, as well as supporting documentation used in the preparation of this proposed rule, will be available for public inspection, by appointment, during normal business hours at the Carlsbad Fish and Wildlife Office at the above address (telephone 760-431-9440).

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, Carlsbad Fish

and Wildlife Office at the address or telephone number listed under

ADDRESSES. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339, 7 days a week, 24 hours a day.

SUPPLEMENTARY INFORMATION:**Public Comments Solicited**

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. Comments particularly are sought concerning:

(1) The reasons any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether the benefit of designation will outweigh any threats to the species due to designation;

(2) Specific information on the amount and distribution of *Berberis nevinii* habitat; what habitat or habitat features are essential to the conservation of this species and why; and which areas occupied at the time of listing containing these features should be included in the critical habitat designation, and which areas not occupied at the time of listing but currently occupied should be included in the final designation, and why;

(3) The geographical extent, number of plants, and/or reproductive status of native *Berberis nevinii* occurrences, particularly those in the Loma Linda Hills area (vicinity of San Timoteo Canyon and Scott Canyon) in San Bernardino County and those in western Riverside County (including in the vicinity of Vail Lake, the Agua Tibia Mountain foothills (Cleveland National Forest), in the Soboba Badlands east of the San Jacinto Wildlife Area, the Jurupa Hills area, and near Temecula);

(4) Specific information on three historical *Berberis nevinii* records from Los Angeles County, two from the Arroyo Seco near Pasadena (CNDDDB element occurrence 8 and 9) and one from the Big Tejuja Wash near San Fernando (CNDDDB element occurrence 10), such as whether the species still exists in this area and where;

(5) Whether any areas not currently known to be occupied by *Berberis nevinii*, but essential to the conservation of the species, should be included in the designation;

(6) Land use designations and current or planned activities in the subject areas

and their possible impacts on proposed critical habitat;

(7) Information that demonstrates a species-specific pollinator-plant relationship for *Berberis nevinii*; information on seed dispersal mechanisms and dispersal distance for *Berberis nevinii*; whether seed banks exist for this species and, if so, for how long and under what conditions; and whether such information should be applied to or considered a primary constituent element for the species;

(8) Our proposed exclusion of *Berberis nevinii* habitat covered under the approved Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP) and whether the benefits of excluding these areas outweigh the benefits of their inclusion under section 4(b)(2) of the Act (see *Relationship of Critical Habitat to Approved Habitat Conservation Plans (HCPs)—Exclusion Under Section 4(b)(2) of the Act* for details on the Western Riverside County MSHCP). If the Secretary determines the benefits of including these lands outweigh the benefits of excluding them, they will not be excluded from final critical habitat;

(9) Additional information regarding management plans covering lands managed by the Bureau of Land Management (BLM) on Oak Mountain and by the United States Forest Service (USFS) on Cleveland National Forest, and whether these plans provide specific management for *Berberis nevinii* such that consideration of exclusion of these lands under section 4(b)(2) of the Act would be appropriate;

(10) Any foreseeable economic, national security, or other potential impacts resulting from the proposed designation and, in particular, any impacts on small entities; and

(11) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods (see **ADDRESSES** section). Please include "Attn: RIN 1018-AU84" in your e-mail subject line and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly by calling our Carlsbad Fish and Wildlife Office at phone number 760-431-9440. Please note that comments must be received by the date specified in the **DATES** section in order to be considered.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their names and home addresses, etc., but if you wish us to consider withholding this information, you must state this prominently at the beginning of your comments. In addition, you must present rationale for withholding this information. This rationale must demonstrate that disclosure would constitute a clearly unwarranted invasion of privacy. Unsupported assertions will not meet this burden. In the absence of exceptional, documentable circumstances, this information will be released. We will always make submissions from organizations or businesses, and from individuals identifying themselves as representatives of or officials of organizations or businesses, available for public inspection in their entirety.

Role of Critical Habitat in Actual Practice of Administering and Implementing the Act

Attention to and protection of habitat is paramount to successful conservation actions. The role that designation of critical habitat plays in protecting habitat of listed species, however, is often misunderstood. As discussed in more detail below in the discussion of exclusions under section 4(b)(2) of the Act, there are significant limitations on the regulatory effect of designation under section 7(a)(2) of the Act. In brief, (1) Designation provides additional protection to habitat only where there is a federal nexus; (2) the protection is relevant only when, in the absence of designation, destruction, or adverse modification of the critical habitat would in fact take place (in other words, other statutory or regulatory protections, policies, or other factors relevant to agency decision-making would not prevent the destruction or adverse modification); and (3) designation of critical habitat triggers the prohibition of destruction or adverse modification of that habitat, but it does not require specific actions to restore or improve habitat.

Currently, 483 species, or 37 percent of the 1,311 listed species in the United States under the jurisdiction of the Service, have designated critical habitat. We address the habitat needs of all 1,311 listed species through conservation mechanisms such as listing, section 7 consultations, the section 4 recovery planning process, the section 9 protective prohibitions of unauthorized take, section 6 funding to

the States, the section 10 incidental take permit process, and cooperative, nonregulatory efforts with private landowners. The Service believes that these measures may make the difference between extinction and survival for many species.

In considering exclusions of areas proposed for designation, we evaluate the benefits of designation in light of *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir 2004) (hereinafter *Gifford Pinchot*). In that case, the Ninth Circuit court invalidated the Service's regulation defining "destruction or adverse modification of critical habitat." In response, on December 9, 2004, the Director issued guidance to be considered in making section 7 adverse modification determinations. This proposed critical habitat designation does not use the invalidated regulation in our consideration of the benefits of including areas. The Service will carefully manage future consultations that analyze impacts to designated critical habitat, particularly those that appear to be resulting in an adverse modification determination. Such consultations will be reviewed by the Regional Office prior to finalizing to ensure that an adequate analysis has been conducted that is informed by the Director's guidance.

On the other hand, to the extent that designation of critical habitat provides protection, that protection can come at significant social and economic cost. In addition, the mere administrative process of designating critical habitat is expensive, time-consuming, and controversial. The current statutory framework of critical habitat, combined with past judicial interpretations of the statute, make critical habitat the subject of excessive litigation. As a result, critical habitat designations are driven by litigation and courts rather than biology, and made at a time and under a timeframe that limits our ability to obtain and evaluate the scientific and other information required to make the designation most meaningful.

In light of these circumstances, the Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

Procedural and Resource Difficulties in Designating Critical Habitat

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the

Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, the Service's own proposals to list critically imperiled species, and final listing determinations on existing proposals are all significantly delayed.

The accelerated schedules of court-ordered designations have left the Service with limited ability to provide for public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals, due to the risks associated with noncompliance with judicially imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, and is very expensive, thus diverting resources from conservation actions that may provide relatively more benefit to imperiled species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects and the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*). These costs, which are not required for many other conservation actions, directly reduce the funds available for direct and tangible conservation actions.

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat in this proposed rule. For more information on the biology and ecology of *Berberis nevinii*, refer to the final listing rule published in the **Federal Register** on October 13, 1998 (63 FR 54956).

Species Description

Berberis nevinii is a 3 to 13 foot (ft) (1 to 4 meter (m)) tall rhizomatous,

evergreen shrub in the barberry family (Berberidaceae) that is endemic to southern California. This species naturally occurs in scattered locations, ranging from the foothills of the San Gabriel Mountains in northern Los Angeles County, south and east to the Loma Linda Hills in southern San Bernardino County, and south to near the foothills of the Peninsular Ranges of southwestern Riverside County (63 FR 54958; California Natural Diversity Database (CNDDB) 2006). *Berberis nevinii* generally occurs between 900 and 2,000 ft (300 and 650 m) in elevation (63 FR 54958), with scattered occurrences found outside this elevation range (California Native Plant Society (CNPS) 2001, p. 96; CNDDB 2006). This species generally grows on sandy soils in low-gradient washes, alluvial terraces, and canyon bottoms, along gravelly wash margins, or on coarse soils on steep, generally north-facing slopes in association with the following plant communities: alluvial scrub, cismontane (e.g., chamise) chaparral,

coastal sage scrub, oak woodland, and/or riparian scrub or woodland (Boyd 1987, pp. 2, 7; Boyd 1989, pp. 6–8; 63 FR 54958; CNPS, 2001, p. 96; CNDDB 2006). While it is typically found growing on soils of sedimentary origin (Boyd 1987, p. 3), *B. nevinii* is also found on clay soils originating from gabbro bedrock and in association with metasedimentary substrates and springs or seeps (Soza 2003).

Species Distribution

Berberis nevinii appears never to have been common, even within its limited range (Neihaus 1977, p. 2; Mistretta and Brown 1989, p. 7). Its historic distribution probably consisted of fewer than 30 scattered occurrences in Los Angeles, San Bernardino, and Riverside Counties (63 FR 54958), and possibly San Diego County (Neihaus 1977, p. 1; Reiser 2001, unpaginated; CNDDB 2006). This species was first discovered in 1882 in the San Fernando Valley near Los Angeles (Gray 1895, p. 69; Wolf 1940, unpaginated). This was likely one

of the most extensive occurrences of the species consisting of approximately 100 plants scattered over 1 to 2 miles (1.6 to 3.2 kilometers (km)) of gravel washes southeast of the City of San Fernando (Wolf 1940, unpaginated). However, the species is presumed extirpated from this location (Boyd 1987, p. 3).

Berberis nevinii was introduced into horticulture around 1920 (Wolf 1940, unpaginated) and was subsequently planted at numerous sites throughout the species' range (Boyd 1987, p. 2; Boyd and Banks 1995, unpaginated; Reiser 2001, unpaginated). The availability of *B. nevinii* in the nursery trade and the introduction of cultivated specimens into native habitats have contributed to confusion regarding the species' native range. Table 1 summarizes our current understanding of *B. nevinii*'s occurrence, origin, and status, by county, for records in the CNDDB (2006). Additional occurrence records not in the CNDDB, and therefore not included in Table 1, are discussed below.

TABLE 1.—KNOWN OCCURRENCES OF *Berberis nevinii* IN THE CALIFORNIA NATURAL DIVERSITY DATABASE (2006) AND STATUS BY COUNTY ¹

County	Extant, ² native	Extant, cul- tivated origin	Extant, un- known origin	Extirpated ³	Unknown Status ⁴	Other ⁵
Los Angeles	1	4	1	4	3	1
San Bernardino	2	0	0	2	0	0
Riverside	16	1	1	0	0	1
San Diego	0	1	0	0	0	1
Total	19	6	2	6	3	3

¹ Other records that are not in the California Natural Diversity Database (CNDDB) are discussed below.

² Extant = still existing.

³ Extirpated = no longer existing.

⁴ Possibly extirpated or unknown status.

⁵ Location questionable and/or may be the same as another CNDDB record.

As stated in the final listing rule (63 FR 54956, October 13, 1998), the majority of native *Berberis nevinii* occurrences were located in two geographic areas: In the vicinity of Vail Lake and Oak Mountain in western Riverside County (16 occurrences collectively consisting of 200 to 250 individuals) and in San Francisquito Canyon on the Angeles National Forest in Los Angeles County (130 to 250 individuals) (63 FR 54957 and 54958). The majority of *B. nevinii* plants in the Vail Lake/Oak Mountain area were located on private lands, with a few plants on BLM lands north of Vail Lake and on the Cleveland National Forest southeast of Vail Lake (63 FR 54958). At the time of listing, two other native occurrences were known from private lands in the Loma Linda Hills area in southern San Bernardino County, one

consisting of single large individual and the other consisting of seven individuals (Boyd 1987, pp. 5, 7; CNDDB 1997); in addition, a single naturally-occurring plant was known from Lopez Canyon in the foothills of the San Gabriel Mountains on the Angeles National Forest in Los Angeles County (63 FR 54958). Other *B. nevinii* occurrences were known or suspected to be of cultivated origin, and were located primarily on private lands.

We are aware of several occurrences of *Berberis nevinii* that have been identified since the final listing rule (63 FR 54956, October 13, 1998). One occurrence is at the mouth of Cobal Canyon at the south base of the San Gabriel Mountains in Los Angeles County; it consists of three plants adjacent to a fire road in the Claremont Hills Wilderness Park (CNDDB 2006).

The location of these individuals and the presence of other introduced plant species nearby has led to speculation that *B. nevinii* was planted here (Soza and Boyd 2000, p. 4). We are also aware of several occurrences in western Riverside County from the vicinity of Vail Lake/Oak Mountain, the Soboba Badlands, Jurupa Hills, and the Temecula area that have been identified since the species was federally listed. Of these, two occurrences in the Jurupa Hills and two occurrences in the Temecula area have presumably been extirpated due to residential or agricultural development. The Soboba Badlands occurrence, east of the San Jacinto Wildlife Area, is presumed extant, as are those in the vicinity of Vail Lake and Oak Mountain (Service 2004, p. 331).

In total, we are aware of 32 records of *Berberis nevinii* in the vicinity of Vail Lake and Oak Mountain that were documented by multiple observers between 1987 and 1990 (Service 2004, p. 331). These records were compiled in association with the Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP) (MSHCP records). According to location descriptions, some MSHCP records appear to be duplicates of CNDDDB records, although they are not always mapped the same (Service GIS data 2006). Many of the MSHCP records overlap spatially and others are recorded in close proximity to each other, making it difficult to determine if each record is a distinct occurrence of the species or separate observations of a single occurrence (Service 2004, pp. 330–331). Accompanying data, such as number of plants, origin (native versus cultivated), and habitat information, is generally lacking, making it difficult to accurately quantify the number of distinct occurrences or plants in the Vail Lake area. We are seeking additional information to clarify and verify these occurrences, as well as those mentioned in the preceding paragraph (see *Public Comments Solicited* section).

At least six extant occurrences in Los Angeles, Riverside, and San Diego Counties are of cultivated origin or are thought to be outplanted individuals originating from another part of the species' range (CNDDDB 2006; Table 1). The largest of these is in San Francisquito Canyon on the Angeles National Forest. This location is in the Liebre Mountains, a northwestern extension of the San Gabriel Mountains, which extends the species' overall range to the north and west in Los Angeles County. At the time of the final listing rule (63 FR 54956, October 13, 1998), we believed *Berberis nevinii* to be naturally occurring in San Francisquito Canyon. We are now aware that this species was planted in the bottom of the canyon in 1929 following a flood. Moreover, one of the individuals used in the planting originated as a seedling in the San Fernando Valley in Los Angeles County (Payne 1945) where the species is thought to no longer occur (Niehaus 1977, p. 1; Boyd 1987, p. 3; CNDDDB 2006). *Berberis nevinii* appears to have naturalized (established as a part of the flora of a locale other than their place of origin; i.e., nonnative) within San Francisquito Canyon, spreading beyond the canyon floor where it was planted (Payne 1945) to the canyon slopes (Soza and Boyd 2000, p. 2; Soza and Fraga 2003, p. 1). We are

unaware of any evidence indicating that this species naturally occurred in San Francisquito Canyon prior to it being planted there in 1929. However, Boyd (Soza and Boyd 2000, p. 3) noted that oaks in the canyon appear to pre-date the flood, which indicates that not all vegetation was scoured from the site by floodwaters and if *B. nevinii* naturally occurred in the canyon prior to this event, some individuals may have survived. The San Francisquito Canyon occurrence has been estimated at 130 to 200 plants in the past (Soza and Boyd 2000, p. 2; CNDDDB 2006), but recent surveys estimate the population at 91 plants after a fire burned through the entire occurrence in 2002 (Soza and Fraga 2003, p. 2).

No native occurrences of *Berberis nevinii* have been located in San Diego County (Reiser 2001, unpaginated). A report of this species in the desert foothills of Anza-Borrego near Ranchita (San Felipe Wash) in Eastern San Diego County remains unconfirmed (Niehaus 1977, p. 1; Reiser 2001, unpaginated; CNDDDB 2006). Isolated plants or small stands (groupings of individuals) of *B. nevinii* may occur in the little explored foothills at the northern edge of the Agua Tibia Wilderness Area, potentially into San Diego County (Reiser 2001, unpaginated), as it occurs nearby in southern Riverside County (Boyd and Banks 1995, unpaginated; CNDDDB 2006). At least two occurrences of *B. nevinii* in San Diego County are likely of cultivated origin: Torrey Pines State Park (Reiser 2001, unpaginated) and near the base of Mount Palomar on the La Jolla Indian Reservation (Boyd 1987, p. 3; Reiser 2001, unpaginated; CNDDDB 2006).

At least seven occurrences of *Berberis nevinii* have been extirpated (63 FR 54958), including six records in the 2006 CNDDDB (Table 1) and potentially others from the eastern San Fernando Valley that were not included in the CNDDDB because of inadequate data (63 FR 54961). *Berberis nevinii* has been extirpated from several historic locations in Los Angeles and San Bernardino Counties, including the San Fernando Valley and Pacoima Wash area (CNDDDB 2006), the confluence of San Francisquito Canyon and Santa Clara River (Boyd 1987, p. 2), and north of the City of Claremont (CNDDDB 2006). We are unable to ascertain whether two of the three historic records from the Arroyo Seco near Pasadena and one 1904 record from Big Tejuanga Wash are extant and/or accurately mapped. A historic record of *B. nevinii* from south of Rim Forest in the San Bernardino Mountains in San Bernardino County is suspected to be of cultivated origin and

is apparently extirpated (Boyd 1987, p. 2). In the Loma Linda Hills area of southern San Bernardino County, two historic occurrences of *B. nevinii* from side canyons off San Timoteo Canyon appear to have been impacted by fire-related and/or landowner activities within the last 10 years (Latch 1997; Sanders 2006). One occurrence, which consisted of a single large clonal individual, has been extirpated (Sanders 2006). The other occurrence has been reduced from seven individuals to perhaps only one or two (Latch 1997; Sanders 2006); we are unsure if the remaining plant(s) are located in southern San Bernardino County or extreme northern Riverside County. We are seeking additional information to clarify and verify these occurrences (see *Public Comments Solicited* section).

The total number of *Berberis nevinii* may be fewer than 500 from all known sites; about half are naturally occurring individuals and over half are on private lands (CNDDDB 2006; 63 FR 54958). The majority of occurrences consist of five or fewer plants, with many consisting of only one or two large (old) individuals (CNDDDB 2006). Potential habitat within the species' range has been fairly extensively botanically explored and/or surveyed (Boyd 1987, p. 3), including surveys of potential habitat on the San Bernardino National Forest in 1988 and 1989, which yielded no new occurrences (Mistretta 1989, unpaginated). Additional survey efforts for *B. nevinii* likely will not yield new large occurrences of the species. However, the discovery of new occurrences within the last 15 to 20 years (e.g., from Lopez Canyon in Los Angeles County and from western Riverside County) suggests that individual plants and small stands remain to be found (Boyd 1987, p. 3; Boyd and Banks 1995, unpaginated; Soza and Boyd 2000, p. 4). Potential habitat for *B. nevinii* may occur on the Angeles National Forest on the south slope of the San Gabriel and Liebre Mountains (Soza and Boyd 2000, p. 4), potentially from Pacoima to Lopez Canyon, within the vicinity of San Antonio Wash, and within Cajon Canyon (Soza 2003, based on expertise of Boyd, Rancho Santa Ana Botanic Garden); on the San Bernardino National Forest in the Crafton Hills area and on the west side of the San Jacinto Mountains (Soza 2003); on the Cleveland National Forest in the front range of the Agua Tibia/Palomar Mountains, including the northern edge of the Agua Tibia Wilderness (Boyd and Banks 1995, unpaginated; Reiser 2001, unpaginated; Soza 2003); and south and

east of Vail Lake (e.g., Temecula Creek drainage, the hills between Temecula Creek and Wilson Creek), and the canyons draining Big Oak Mountain north of Vail Lake (Boyd *et al.* 1989, p. 16; Soza 2003).

To summarize, native, extant occurrences of *Berberis nevinii* include a single individual in Lopez Canyon in the San Gabriel Mountains on the Angeles National Forest in Los Angeles County (CNDDDB 2006); a single individual on private land in Scott Canyon in the Loma Linda Hills south of Redlands in San Bernardino County (Boyd 1987, pp. 5, 7); one or two individuals on private land in a side canyon off San Timoteo Canyon near the San Bernardino/Riverside County line (referred to herein as the San Timoteo Canyon occurrence) (Boyd 1987, pp. 5, 7; Latch 1997; Sanders 2006); an unknown number of individuals in the Soboba Badlands east of the San Jacinto Wildlife Area (Service 2004, p. 331); and other scattered occurrences in Riverside County, including the largest remaining and most significant group of native occurrences in the Vail Lake/Oak Mountain area in southern Riverside County (Service 2004, p. 331; CNDDDB 2006). This latter site has many scattered stands of *B. nevinii*, each with one or more individuals, collectively consisting of about 200 to 250 plants (Boyd *et al.* 1989, p. 14; 63 FR 54958). The majority of the individuals in the Vail Lake/Oak Mountain area are located on private land to the south of the lake, with the largest stand on the Vail Lake peninsula (formerly a ridge separating Kolb Creek and Temecula Creek prior to the flooding of Vail Lake). Two plants on Big Oak Mountain north of Vail Lake are on BLM lands, and five plants occur southeast of Vail Lake on the Cleveland National Forest, close to the Agua Tibia Wilderness Area (herein referred to as the Cleveland National Forest occurrence) (63 FR 54956; CNDDDB 2006).

Species Reproduction

There appears to be little to no regeneration by seed occurring at most *Berberis nevinii* sites, and low seed set (including plants bearing fruit without seed) and lack of viable seed has been noted over the years by both botanists and horticulturalists trying to obtain seed for propagation, even from within larger occurrences (Wolf 1940; Boyd 1987, pp. 3, 44, 56; Mistretta and Brown 1989, pp. 4–5; Mistretta 1994, p. 186). According to Mistretta (1994, p. 187) and O'Brien (2001, p. 19), unpublished molecular studies from the early 1990s revealed almost no genetic diversity

within *B. nevinii*, with one exception at Vail Lake, suggesting that the species has been subjected to a series of population bottlenecks that may have led to severe inbreeding depression and reproductive failure (Mistretta 1994, p. 187). However, Mistretta (2006) cautioned against drawing conclusions from this study because the techniques used, which were state-of-the-art at the time, require far more conjecture in determining relationships, especially at the population level, than newly-developed techniques. On the other hand, cultivators of *B. nevinii* have long observed an apparent lack of morphological differences between individual plants, even young seedlings (O'Brien 2001, p. 19), which may also indicate low genetic variation within the species.

We know of only a few native occurrences where regeneration by seed may have occurred in the recent past. As noted by Nishida in Boyd (1987, p. 62), the largest stand of *Berberis nevinii* located on the Vail Lake peninsula consists of approximately 111 individuals of various sizes, including a seedling, which suggests a range of ages and past reproduction. Another occurrence on the peak located north of Vail Lake (referred to as "Big" Oak Mountain; Boyd *et al.* 1989, p. 1) consists of two plants: a very old one and a substantially smaller one at some distance to the northeast (Wallace 2006) (hereinafter, we also refer to this peak as "Big Oak Mountain," whereas "Oak Mountain" refers to the general area to the north and west of Vail Lake). Additionally, fruit with seed was noted at the *B. nevinii* occurrence on Cleveland National Forest to the southeast of Vail Lake in 2006 (Wallace 2006). The San Timoteo Canyon occurrence also contained individuals of several size (age) classes (Boyd 1987, pp. 51–52); however, regeneration by seed probably has not occurred at this site in many decades, and this occurrence has been at least partially destroyed (Sanders 2006).

Regeneration by seed has been noted at a few naturalized (i.e., nonnative) stands of *Berberis nevinii*. The San Francisquito Canyon site appears to have one of the most vigorous naturally regenerating occurrences of the species, as indicated by a wide range of ages of mature individuals, the presence of numerous seedlings and immature plants (Boyd 1987, p. 7; Mistretta and Brown 1989, p. 10; Soza and Boyd 2000, p. 2), and fruits containing seed (Boyd 1987, p. 7). Reproduction has also been observed at the Palomar site in San Diego County, a site presumed to be of cultivated origin (Boyd 1987, pp. 3, 73).

The role that naturalized occurrences will have in conservation of the species is not known at this time. The San Francisquito Canyon occurrence may at some point be determined to play a recovery role because it is one of only three occurrences for the species that we know has more than 20 individuals (CNDDDB 2006), it is one of only a few occurrences with any evidence of reproduction by seed, and it may contain the only verifiable remnant of the extirpated San Fernando Valley population.

According to the California Department of Fish and Game (CDFG) (2005, p. 272), "the lack of reproduction and recruitment at most sites, and the very low number of individuals at most populations [of *Berberis nevinii*] in the absence of fire are indicative of fire responsive species." Fire is a normal occurrence in chaparral communities, and chaparral species, including *B. nevinii*, which is known to stump sprout (i.e., generate new growth from burnt stumps) following fire (Soza and Fraga 2003, p. 2; Sanders 2006), are resilient and/or adapted to such perturbations (Keeley 1991, p. 84; Tyler 1996, p. 2182). However, the specific response of *B. nevinii* to changes to the natural fire regime (fire frequency, intensity, and/or timing), such as has occurred or may occur in southern California's chaparral/shrublands due to increased urbanization, are not fully understood (63 FR 54964, 54965).

The final listing rule (63 FR 54956, October 13, 1998) identified urbanization, off-road vehicle use, brush fires, recreation, and roadway projects (e.g., widening) as factors contributing to the imperilment and/or extirpation of *Berberis nevinii* from within parts of its native range (63 FR 54961). The alluvial scrub communities within the San Fernando and San Gabriel valleys have been greatly modified, damaged, or destroyed, including several sites where *B. nevinii* presumably had occurred. Other threats to the long-term survival of the species, as identified in the final listing rule, include the introduction of invasive, nonnative plants that compete with native species and contribute to combustible fuel loads, and fire management strategies that alter natural fire processes (63 FR 54961).

Previous Federal Actions

Berberis nevinii was listed as endangered by the State of California in January 1987, and federally listed as endangered on October 13, 1998 (63 FR 54956). In the final listing rule, we determined that the designation of critical habitat was not prudent because the designation would not be beneficial

to the conservation of the species. On August 10, 2004, the Center for Biological Diversity and the CNPS filed a lawsuit in U.S. Federal Court, Northern District of California against the Secretary of the Interior challenging the not prudent determination of critical habitat for *B. nevinii* and four other plant species that occur in southern California (*Center for Biological Diversity et al. v. Gale Norton, Secretary of the Department of the Interior*, C-04-3240 JL). On December 21, 2004, a U.S. District Court Judge signed an order granting a stipulated settlement agreement between the parties. The Service agreed to propose critical habitat for *B. nevinii*, if prudent, on or before January 30, 2007, and finalize the designation on or before January 30, 2008. We are hereby withdrawing our previous not prudent determination of critical habitat for *B. nevinii*. We have reconsidered our not prudent finding, and now believe that identification of primary constituent elements and essential areas (critical habitat designation) may provide educational information to individuals, local and State governments, and other entities. We also do not have any documentation that over-collection has increased significantly since the species was listed. We now believe that the benefits of identifying essential habitat for *B. nevinii* outweigh the potential risk of over-collection and thus we are now proposing critical habitat for this species.

A recovery plan for *Berberis nevinii* has not yet been completed. For more information on previous Federal actions concerning *B. nevinii*, refer to the final listing rule published in the **Federal Register** on October 13, 1998 (63 FR 54956).

Critical Habitat

Critical habitat is defined in section 3 of the Act as (i) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) Essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act

are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7(a)(2) of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7(a)(2) requires consultation on Federal actions that are likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow government or public access to private lands. Section 7(a)(2) is a purely protective measure and does not require implementation of restoration, recovery, or enhancement measures.

To be included in a critical habitat designation, the habitat within the area occupied by the species must first have features that are essential to the conservation of the species. Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species (*i.e.*, areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Habitat occupied at the time of listing may be included in critical habitat only if the essential features thereon may require special management considerations or protection. Areas outside of the geographic area occupied by the species at the time of listing may only be included in critical habitat if they are essential for the conservation of the species. Accordingly, when the best available scientific data do not demonstrate that the conservation needs of the species require additional areas, we will not designate critical habitat in areas outside the geographical area occupied by the species at the time of listing. An area currently occupied by the species that was not known to be occupied at the time of listing will likely, but not always, be essential to the conservation of the species and, therefore, typically included in the critical habitat designation.

The Service's Policy on Information Standards Under the Endangered

Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Service represent the best scientific data available. They require Service biologists to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information is generally the listing package for the species. Additional information sources include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge. All information is used in accordance with the provisions of Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the

direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Methods

As required by section 4(b)(2) of the Act, we used the best scientific data available in determining areas that contain the features essential to the conservation of *Berberis nevinii*. This included information from the following sources: (1) Final listing rule (63 FR 54956, October 13, 1998); (2) CNDDDB (2006); (3) California Native Species Field Survey Forms submitted to the CDFG; (4) herbarium collection records from the Consortium of California Herbaria and Rancho Santa Ana Botanic Garden; (5) Western Riverside County MSHCP; (6) botanical assessments and inventories of southern California; (7) management documents and survey/monitoring reports for *B. nevinii* on U.S. Forest Service land; (8) technical reports prepared by the Rancho Santa Ana Botanic Garden; (9) communications from species experts; (10) aerial photography; and (11) regional Geographic Information System (GIS) layers for land ownership, soils, and vegetation (California Wildlife Habitat Relationships (CWHR) System). We also used information collected by Service biologists who conducted site visits to Big Oak Mountain (CNDDDB element occurrence 38) and the Cleveland National Forest (CNDDDB element occurrence 31).

We have also reviewed available information that pertains to the habitat requirements of *Berberis nevinii*. There is limited information on habitat requirements for this species, but the primary sources are: (1) CNDDDB (2006); (2) California Native Species Field Survey Forms submitted to CDFG; (3) habitat parameters compiled by Boyd (Rancho Santa Ana Botanic Garden) based on the results of a field survey by Nishida (Rancho Santa Ana Botanic Garden technical report No. 3 (1987, p. 7)); (4) botanical assessment of the Vail Lake property for the Riverside County Planning Department (1989) and of Cleveland National Forest (1995); (5) monitoring data and reports for the Angeles National Forest (Soza and Boyd 2000 and Soza and Fraga 2003); (6) information from regional GIS layers for soils, vegetation, and percent slope values; and (7) information received from local species experts, including descriptions of suitable habitat by the USFS (Soza 2003) that were based on the expertise and extensive field experience of Boyd (Rancho Santa Ana

Botanic Garden). A variety of other peer-reviewed and non-peer-reviewed articles were reviewed for background information on plant ecology, natural history, and biology, as well as plant response to fire and other disturbances in California shrubland (e.g., chaparral) communities.

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we consider those physical or biological features (PCEs) that are essential to the conservation of the species, and within areas occupied by the species at the time of listing, that may require special management considerations or protection. These include, but are not limited to: Space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The specific primary constituent elements required for *Berberis nevinii* are derived from the biological needs of the species as described in the final listing rule (63 FR 54956, October 13, 1998), as well as information contained in this proposed rule.

Space for Growth and Reproduction

Berberis nevinii has a limited natural distribution; it typically occurs in small stands (less than 20 individuals, and often only one or two) in scattered locations in Los Angeles, San Bernardino, and Riverside Counties, with the largest native occurrence (as defined by CNDDDB) consisting of several stands and totaling about 134 individuals to the south of Vail Lake in Riverside County (Boyd 1987; CNDDDB 2006). Within these areas, *B. nevinii* requires appropriate soils, topography, cover, and drainage within the landscape to provide space, food, water, air, light, minerals, or other nutritional or physiological requirements for individual and population growth and reproduction.

Characterizing *Berberis nevinii* habitat is difficult due to the varied soils, bedrock substrates, and topography on which this species naturally occurs. Additionally, this species is known to tolerate a wide range of environmental conditions in cultivation (Mistretta and Brown 1989, p. 6). *Berberis nevinii* typically occurs at elevations from 900

to 2,000 ft (300 to 650 m) (63 FR 54958), but most native occurrences and the naturalized San Francisquito population are between 1,400 and 1,700 ft (427 to 518 m) in elevation (Boyd 1987, p. 2; CNDDDB 2006). One native occurrence on the Big Oak Mountain summit north of Vail Lake in Riverside County is at approximately 2,700 ft (823 m) elevation, and scattered naturalized occurrences are found outside the 900 to 2,000-foot (300 to 650 m) elevation range (Boyd 1987, pp. 42, 75; CNDDDB 2006). *Berberis nevinii* has been found in varied topography from nearly flat sandy washes, terraces, benches, and canyon floors to gravelly wash margins, steeply-sloped banks of drainages, steep rocky slopes, ridges, and mountain summits (CNDDDB 2006).

Based on 1987 field surveys by Nishida, native *Berberis nevinii* occurring on slopes in Scott Canyon and south of Vail Lake were found in areas with slopes of 35 to 70 percent slope (Boyd 1987, pp. 7, 45, 62, 65, 68). Other *B. nevinii* plants occurring on slopes in the Vail Lake/Oak Mountain area generally occupy areas of less than 70 percent slope, based on Service GIS data (2006). Naturalized (i.e., nonnative) occurrences are known to grow on steeper slopes (e.g., 85 to 120 percent slope) in San Francisquito Canyon (Boyd 1987, p. 7, based on field surveys by Nishida). *Berberis nevinii* generally occurs on north, northeast, or northwest-facing slopes; however, exceptions to this have been noted, including several occurrences, both native and naturalized, found on south and west-facing slopes (Boyd 1987, pp. 7, 40, 77; Boyd *et al.* 1989, p. 24; Soza and Boyd 2000, p. 22; CNDDDB 2006).

Berberis nevinii is found on a variety of soils and bedrock substrates. Native occurrences appear to be strongly associated with alluvial soils or soils derived from nonmarine sedimentary based substrates, especially sandy arkose (sandstone derived from granitic material) (Boyd 1987, p. 7; Boyd and Banks 1995, unpaginated; Soza and Boyd 2000, p. 25). Most of the plants at Vail Lake are found in small stands on Temecula arkose soils around the southern end of the lake, with scattered individuals in the "badlands" to the southeast and southwest (Boyd and Banks 1995, unpaginated). Several small, isolated stands on the south flank of Big Oak Mountain are associated with metasedimentary substrates and springs or seeps (Boyd *et al.* 1989, p. 14; Soza 2003), and two plants at the Big Oak Mountain summit occur on heavy adobe/gabbro type soils with high water-holding capacity formed from metavolcanic geology (Mesozoic basic

intrusive rock) (Soza 2003). The Cleveland National Forest occurrence is found at the contact between sedimentary (arkose) and metasedimentary substrates (Boyd and Banks 1995, unpaginated). *Berberis nevinii* has also been found growing on Pelona schist outcrops and granitic knolls (Boyd 1987, p. 7; Soza and Boyd 2000, p. 22).

Overlying occurrence polygons with NRCS soils data, native *Berberis nevinii* occurrences appear to be associated with the following soil series: Riverwash at the Lopez Canyon site in Los Angeles County; sandy loam of the Saugus series in Scott Canyon and coarse sandy loam of the Metz series from the San Timoteo Canyon location in San Bernardino County; and at least 17 different soil series in the Vail Lake/Oak Mountain area in Riverside County, including Monserate sandy loams; Hanford coarse sandy loams; fine sandy loams of the Arlington and Greenfield, Pachappa, and Cajalco series; Cajalco rocky fine sandy loams; rocky loams of the Lodi and Las Posas series; and loams of the Las Posas, San Timoteo, and San Emigdio series (Service GIS data 2006). Additional soil series found within mapped *B. nevinii* occurrences include gullied land and riverwash primarily south of Vail Lake, and badland to the north and southeast of Vail Lake. Occurrences north of Vail Lake on the south slopes of Big Oak Mountain and its summit are mapped primarily as Auld clay, 8 to 15 percent slopes, Cajalco rocky fine sandy loam, 15 to 50 percent slopes, eroded, and Las Posas loam and rocky loam, 8 to 15 percent slopes, eroded. The *B. nevinii* site on the Cleveland National Forest south of Vail Lake is mapped as gullied land and coarse sandy loam of the Hanford series, 8 to 15 percent slopes, eroded (Service GIS data 2006).

Native occurrences of *Berberis nevinii* are generally found growing in well-drained soils, and are known from xeric slopes and rock outcrops. According to Lenz and Dourley (1981, as cited in Mistretta and Brown 1989, p. 5), *B. nevinii* is considered a drought-tolerant species, but it will also accept large amounts of water in cultivation without apparent damage. Observations of native occurrences suggest that, within its general habitat, *B. nevinii* may be associated with more mesic microhabitats. Niehaus (1977, p. 2) noted that *B. nevinii* occurs mostly at the margins of dry washes in or below the foothill zone, but is not present in the driest portion of a wash. At some sites, *B. nevinii* is associated with species such as *Lepidospartum squamatum* and *Prunus ilicifolia* that

require groundwater (Niehaus 1977, p. 2). Many of the plants in the Vail Lake area are growing on mesic north or northwest facing slopes. Several stands are in canyons draining the south flank of Big Oak Mountain and are associated with springs or seepages (Boyd *et al.* 1989, p. 14). The two plants on the summit of Big Oak Mountain are on clay soils with a high water-holding capacity. In the late spring and early summer, this site may receive greater moisture in the form of condensation from intrusion of marine air (Soza 2003).

Berberis nevinii occurs in association with the following plant communities: alluvial scrub, cismontane (e.g., chamise) chaparral, coastal sage scrub, oak woodland, and/or riparian scrub or woodland (Boyd 1987, pp. 2, 7; Boyd 1989, pp. 6–8; 63 FR 54958; CNPS 2001, p. 96; CNDDDB 2006). Native *B. nevinii* in Lopez Canyon, Scott Canyon, and San Timoteo Canyon, as well as many of those found in the Vail Lake/Oak Mountain area, occur within the California Wildlife Habitat Relationships (CWHR) landcover described as coastal scrub or mixed chaparral (Service GIS data 2006). *Berberis nevinii* is occasionally found in coastal oak woodland in the Vail Lake/Oak Mountain area, characterized by open to dense stands of the large evergreen coast live oak (*Quercus agrifolia*) in close association with surrounding scrub vegetation (Boyd *et al.* 1989, p. 7). In the Vail Lake area, this woodland type is found primarily in sandy washes, benches, and canyons on north-facing slopes, near ephemeral stream channels, and/or associated with springs (Boyd *et al.* 1989, pp. 7–8). The San Francisquito site, where *B. nevinii* has apparently naturalized, also has some coastal oak woodland, and *Q. agrifolia* is locally common south of *B. nevinii* in the canyon bottom at the Lopez Canyon site (Soza and Boyd 2000, pp. 23, 26). Several stands in the Vail Lake area occur within the CWHR landcover described as valley foothill riparian, and several occurrences are also partly characterized as annual grassland (Service GIS data 2006). The Scott Canyon site is described as having an abundance of annual grasses (Boyd 1987, pp. 44–48, CNDDDB 2006).

Extant, native occurrences of *Berberis nevinii* are often found in association with one or more of the following chaparral and coastal sage scrub species: *Eriogonum fasciculatum*, *Artemisia californica*, *Adenostoma fasciculatum*, *Rhus ovata*, *R. trilobata*, or *R. integrifolia*, *Salvia mellifera*, *Sambucus mexicana*, *Prunus ilicifolia*, *Rhamnus crocea*, and *Quercus berberidifolia*

(Boyd 1987, p. 2; CNDDDB 2006). Several native occurrences are associated with coastal oak woodland or riparian/alluvial scrub vegetation, such as *Quercus agrifolia*, *Populus fremontii*, *Salix laevigata*, *Platanus racemosa*, *Baccharis glutinosa*, and/or *Lepidospartum squamatum* (CNDDDB 2006). Boyd (1987, p. 2) has noted that certain desert floral elements such as *Encelia farinosa*, *Chrysothamnus nauseosus*, *Artemisia tridentata*, *Chilopsis linearis*, *Yucca schidigera*, *Opuntia parryi*, and *Atriplex canescens* are often characteristic of the general area and many of the specific sites where *B. nevinii* occurs in the vicinity of Vail Lake. The presence of typically desert floral elements likely reflects the transitional nature of these sites between the cismontane area to the west and the Colorado Desert to the east (Boyd *et al.* 1989, p. 4).

Several observers have noted that seedlings and immature *Berberis nevinii* tend to occur in areas with some measure of protection, either in the shade or cover of another plant (Boyd 1987, pp. 77–78, based on field surveys by Nishida; Mistretta and Brown 1989, p. 10). This suggests the need for some fire-free period to allow for canopy growth. However, Nishida (Boyd *et al.* 1987, p. 77) noted that mature individuals were located in areas where they were exposed to full sunlight, and Reiser (2001, unpaginated) noted that this species frequently towers above associated subshrubs. Based on observations in the field, Nishida suggested that seedlings may be shade tolerant, but that as *B. nevinii* matures, it may require more sunlight (Mistretta and Brown 1989, Attachment: "Report on the Population and Ecological Data of *Mahonia nevinii*" by Joy Nishida, p. 1). A similar shade/sunlight requirement has been noted for several other resprouting chaparral shrub species, where seedlings and saplings are found mostly in the shade of other plants and seldom in the open, but recruitment into the shrub population appears to require the later development of a canopy gap, such as may be created by a fire event (Keeley 1992, p. 1206).

We have little information about pollinators, seed dispersal mechanisms, or the reproductive biology of this species. *Berberis nevinii* has perfect (hermaphroditic) yellow flowers clustered in loose racemes that bloom from March through April, and fleshy, yellowish-red to red berries with plump, brown seeds that are present from May to July (Wolf 1940, unpaginated; Munz 1974, p. 245; Niehaus 1977, p. 1; Morris 2006). Species-specific information on pollinators is lacking, but *B. nevinii* may

be pollinated by bee species. According to Mussen (2002), California's native *Berberis* species are "visited (and probably pollinated) by honey bees" (*Apis mellifera*), and according to the U.S. Department of Agriculture (2006), native *Berberis* species "provide significant forage for native bees." We also do not know if *B. nevinii* is able to self-fertilize, as the genus *Berberis* contains species that are both self-compatible and self-incompatible (Anderson *et al.* 2001, p. 227). Seed dispersal by both birds and mammals is widespread within the genus *Berberis* (Young and Young 1992, p. 52; Vines 1960, pp. 271–273), and thus is likely within *B. nevinii*. Wolf (1940, unpaginated) noted that the abundant fruits of *B. nevinii* are eaten by various bird species. Seasonal rains flowing through washes and channel drainages may also disperse seed of *B. nevinii* located in these areas (Roof 1968, p. 22; Mistretta and Brown 1989, p. 6; Soza and Boyd 2000, p. 3). However, due to the lack of specific information on habitat requirements for *B. nevinii* related to pollination and seed dispersal, we were unable to fully incorporate these potential areas into our identification of essential habitat for the species.

Berberis nevinii does not appear to reproduce by vegetative means (root sprout) to any great extent (Mistretta and Brown 1989, p. 5; Boyd 2006); in other words, it does not regularly produce clones (genetically identical direct descendants) that are well separated from the parent individual through the process of rooting at nodes in the rhizome, as is the case with some other members of the genus *Berberis*. One potential exception is an (extirpated) occurrence south of Redlands in San Bernardino County, which appeared to be reproducing only by vegetative spread (Sanders 2006). Because vegetative reproduction appears to be uncommon, Mistretta and Brown (1989, p. 5) concluded that perpetuation of the species is likely dependent on its occasional production of viable seed.

Landscape Ecology and Population Demographics of Berberis nevinii

Many extant occurrences of *Berberis nevinii* are associated with chaparral or coastal sage scrub. Fire is a natural occurrence in southern California shrublands, and plants occurring in these vegetation communities are resilient and/or adapted to these types of disturbances (Keeley 1991, p. 84; Tyler 1996, p. 2182). Postfire regeneration mechanisms among California shrubland species can

generally be described as obligate seeding, obligate sprouting, or facultative sprouting (Kelly and Parker 1990, p. 114). Obligate seeders are typically killed by fire and rely entirely on seeds for regeneration. Most have locally dispersed seeds that persist in the soil seed bank until dormancy is broken by an environmental stimulus, such as intense heat (Keeley 1991, p. 82). Obligate sprouters, on the other hand, are rarely killed by fire, but rather resprout from roots, lignotubers, or epicormic buds (Kelly and Parker 1990, p. 114). These species have seeds that do not require fire for germination, but require fire-free periods for recruiting new seedlings (Keeley 1991, p. 82). In some species, postfire regeneration occurs by both sprouts and seeds, and fire-caused mortality is variable (facultative sprouters) (Kelly and Parker 1990, p. 114).

Berberis nevinii is known to regenerate by stump sprouting following fire (Soza and Fraga 2003, p. 2; Sanders 2006; Mistretta and Brown 1989, p. 5). Mature individuals often possess a basal burl (Mistretta and Brown 1989, p. 5), a swelling at the junction of roots and stems that allows a plant to sprout from the base and regenerate after a fire that kills above-ground vegetation. The germination response of *B. nevinii* to fire is not known. According to Soza and Boyd (2003, p. 2), Soza (2006), and the USFS (2005, p. 237), post-fire surveys on the Angeles and Cleveland National Forests found recruitment from both resprouting and seeding. This suggests that this species may also regenerate by seed following fire. *Berberis nevinii*'s response to altered fire regimes (e.g., changes to fire frequency, timing, and/or intensity) is also unknown (63 FR 54961), such as resprouting response and soil seedbank persistence under conditions of high fire frequency. Because southern California shrublands are adapted to a natural fire regime, plants within these communities likely require such conditions for long-term survival (63 FR 54961).

Comparison of the contemporary fire regime in southern California to that of the natural regime (i.e., pre-fire suppression) shows that in the lower coastal valley and foothill zone, fire frequency has increased, and that high fire frequencies tend to occur in those areas where high human densities interface with relatively undeveloped landscape (Keeley *et al.* 1999, p. 1831; Keeley and Fotheringham 2001, p. 1545; Wells *et al.* 2004, p. 147; Keeley 2006, p. 382). However, fire suppression has kept fires in check so that most stands burn within the range of natural

variation (Keeley 2006, p. 382). Additionally, while coastal sage scrub and chaparral have the largest amount of area that has burned multiple times over the past century and have the highest potential fire frequencies of all vegetation community types, only the former clearly shows an increasing trend in area burned over this time period (Wells *et al.* 2004, pp. 148, 151).

Too frequent fire on the landscape could potentially kill mature, resprouting *Berberis nevinii* as well as young plants before they have reached their reproductive potential and before the soil seed bank is replenished (Boyd 1991, pp. 7, 9). Repeated burnings over short intervals could eventually lead to type conversion of chaparral/shrublands to nonnative annual grassland (Boyd 1991, p. 9; Keeley *et al.* 1999, p. 1831), as has been observed in areas surrounding urban centers (Keeley 2006, p. 382). Therefore, conservation of rare plants in southern California, such as *B. nevinii*, that are associated with chaparral, coastal sage scrub, or other shrubland vegetation communities may require preservation of enough land around known occurrences to allow for maintenance of natural fire regimes (Boyd 1991, pp. 10–11). However, we do not have sufficient information to quantify the extent of the area necessary to do so for particular *B. nevinii* occurrences. Therefore, we are unable to fully incorporate these potential areas into our identification of essential habitat for *B. nevinii*.

Life history characteristics and population demographics of *Berberis nevinii* are largely unknown and unstudied. *Berberis nevinii* is a long-lived species (>50 years) (Mistretta and Brown 1989, p. 5) with low reproductive rates in the wild due to sporadic production of fertile seed (Mistretta and Brown 1989, p. 5). It has been suggested that *B. nevinii* may be a paleoendemic relic (Reiser 2001, unpaginated), which could explain its limited (small and widely scattered) distribution and low reproductive rates in the wild (Soza 2003).

The ability of *Berberis nevinii* to stump sprout following disturbance (e.g., fire), as well as its great longevity, may play an important role in persistence of the species. As discussed in Garcia and Zamora (2003, p. 921), there may be a population maintenance trade-off for long-lived plants between replacement of individuals by seeding and persistence of established plants. A persistence strategy may allow plants to survive through unfavorable conditions, potentially to reproduce again when conditions are more favorable (Garcia and Zamora 2003, p. 924). As

mentioned previously, there appears to be little to no regeneration by seed occurring at most *B. nevinii* occurrences. However, since the species is long-lived, it may produce seed intermittently and life-time seed production may be a more important consideration in terms of perpetuation of the species than annual seed production.

Primary Constituents Elements for Berberis nevinii

Under our regulations, we are required to identify the known physical and biological features (PCEs) essential to the conservation of *Berberis nevinii*. All areas proposed as critical habitat for *B. nevinii* are currently occupied, are within the species' historic geographic range, and contain sufficient PCEs to support at least one life history function.

Based on our current knowledge of the life history, biology, and ecology of the species, and the requirements of the habitat necessary to sustain the essential life history functions of the species, we have determined that *Berberis nevinii*'s PCEs are:

(1) Low-gradient (*i.e.*, nearly flat) canyon floors, washes and adjacent terraces, and mountain ridge/summits, or eroded, generally northeast- to northwest-facing mountain slopes and banks of dry washes typically of less than 70 percent slope that provide space for plant establishment and growth;

(2) Well-drained alluvial soils primarily of non-marine sedimentary origin, such as Temecula or sandy arkose soils; soils of the Cajalco-Temescal-Las Posas soil association formed on gabbro (igneous) or latite (volcanic) bedrock; metasedimentary substrates associated with springs or seeps; and heavy adobe/gabbro-type soils derived from metavolcanic geology (Mesozoic basic intrusive rock) that provide the appropriate nutrients and space for growth and reproduction; and

(3) Scrub (chaparral, coastal sage, alluvial, riparian) and woodland (oak, riparian) vegetation communities between 900 and 3,000 ft (275 and 915 m) in elevation that provide the appropriate cover for growth and reproduction.

This proposed designation is designed for the conservation of those areas containing PCEs necessary to support the life history functions that were the basis for the proposal. Because not all life history functions require all the PCEs, not all proposed critical habitat will contain all the PCEs. Units are designated based on sufficient PCEs being present to support one or more of the species' life history functions. Some

units contain all PCEs and support multiple life processes, while some units contain only a portion of the PCEs necessary to support the species' particular use of that habitat. Where a subset of the PCEs is present at the time of designation, this rule protects those PCEs and thus the conservation function of the habitat.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(1)(A) of the Act, we used the best scientific data available in determining areas that contain the features that are essential to the conservation of *Berberis nevinii*. This species naturally occurs in small, isolated stands across its geographic range, with several known occurrences consisting of only a single large and presumably very old individual. At most sites, there is little to no evidence of reproduction. The Vail Lake/Oak Mountain area in western Riverside County has the highest concentration of native *B. nevinii*, representing several size (age) classes. It occurs in numerous stands scattered throughout the area, with the largest number of plants located south of Vail Lake and on the peninsula. The long-term conservation of *B. nevinii* will depend upon the protection of such extant, native occurrences and the maintenance of ecological functions within these sites.

We delineated proposed critical habitat for *Berberis nevinii* using the following criteria: (1) Areas known to be occupied by naturally-occurring individuals of the species at the time of listing and areas that are currently occupied by naturally-occurring individuals; (2) areas within the historic range of the species; (3) areas containing one or more PCEs essential to the conservation of the species; and (4) areas currently occupied by more than two *B. nevinii* plants that show evidence of reproduction (*i.e.*, fruits with seed, seedlings, or plants of various size/age classes) on site. For sites where there was no information available on reproduction or size/age class distribution, we assumed that reproduction had occurred at some point in the past if multiple *B. nevinii* plants were present. As discussed below, we also gave consideration to the ecological uniqueness of sites.

Whether naturalized occurrences may play a role in conservation of the species is currently unknown. However, the naturalized occurrences represent some of the largest (in terms of number of individuals) and most vigorously reproducing occurrences of the species, and could potentially play a role in preserving genetic diversity. At least

one naturalized occurrence (San Francisquito Canyon) may contain an individual and/or descendants of an individual that originated from a location where *B. nevinii* no longer occurs (*i.e.*, the San Fernando Valley). Thus, we will continue to explore the potential conservation value of naturalized occurrences, and consider these occurrences in future recovery actions as appropriate.

We are aware of 39 records for *Berberis nevinii* rangewide documented by the CNDDDB (2006), of which we consider 19 to be extant, native occurrences. All of the extant, native occurrences were known at the time of listing, although each occurrence was not specifically described in the final listing rule (63 FR 54956, October 13, 1998). The majority of these occurrences are in the vicinity of Vail Lake and Oak Mountain, which is described within the final listing rule as one of the main geographical areas occupied by the species.

As discussed in the *Background* section of this proposed rule, our Western Riverside County MSHCP database contains 32 records of extant *Berberis nevinii* occurrences from the vicinity of Vail Lake/Oak Mountain alone, as well as one record from the Soboba Badlands. However, many of the MSHCP records overlap and some appear to duplicate CNDDDB records. Accompanying data, such as number of plants, origin (native versus cultivated), and habitat associations are largely lacking, making it impossible to accurately quantify the actual number of distinct occurrences or plants in this area (Service 2004, pp. 330–331). We also do not know the specific location of many of these occurrences. Therefore, we did not rely on the MSHCP occurrences for determining critical habitat, but rather we are seeking additional information to clarify these records (see *Public Comments Solicited* section).

Of the 19 extant, native occurrences in the CNDDDB (2006), we consider only six in Riverside County in the vicinity of Vail Lake/Oak Mountain to meet our criteria for designating critical habitat (CNDDDB element occurrences 24, 31, 32, 35, 36, and 38). Five of the six occurrences consist of more than two individuals, and evidence of reproduction (multiple size classes, seedlings, and/or fruit with seed) is known for three of the occurrences (CNDDDB element occurrences 24, 31, and 38). We do not know if reproduction has occurred at the other three sites (CNDDDB element occurrences 32, 35, and 36), but we believe that it is possible given that these occurrences

represent some of the largest groupings of the species. While we propose the areas that support these occurrences as critical habitat, we are seeking additional information on the reproductive status and exact numbers of individuals per stand (see *Public Comments Solicited* section). For a detailed description of each of these six occurrences, see the *Proposed Critical Habitat Designation* section of this proposed rule.

We do not have adequate information to determine the status of six *Berberis nevinii* occurrences recorded in the CNDDDB (2006). Three occurrences in Los Angeles County may be extant, but their existence has not been confirmed since the early to mid 1900s (two records in Arroyo Seco near Pasadena (CNDDDB element occurrences 8 and 9) and one record in Big Tejuja Wash near San Fernando (CNDDDB element occurrence 10), which may be mismapped). Three other occurrences have vague location descriptions and/or may be mismapped, including one in Los Angeles County (CNDDDB element occurrence 18), one in Riverside County (CNDDDB element occurrence 14), and one in San Diego County (CNDDDB element occurrence 45). We are seeking additional information to verify and/or clarify these records (see *Public Comments Solicited* section).

We evaluated whether geographically (e.g., Los Angeles and San Bernardino Counties) peripheral native occurrences would fit into our criteria for identifying critical habitat. Despite the biological conservation arguments raised by Lesica and Allendorf (1995; p. 753, 754) to conserve peripheral populations, we found that these *Berberis nevinii* occurrences did not meet our criteria for designation of critical habitat because they consisted of very few individuals (often only one) and did not appear to be reproducing. For example, the Lopez Canyon (CNDDDB element occurrence 43) and Scott Canyon (CNDDDB element occurrence 5) occurrences each consist of only a single large (old) individual with no signs of past or current reproduction by seed (CNDDDB element occurrences 43 and 5). The San Timoteo Canyon occurrence (CNDDDB element occurrence 4) has an unknown number of individuals (potentially only one), and reproduction has likely not occurred at this site in many decades (Sanders 2006).

We also considered the ecological uniqueness of sites because occurrences within unique habitats may harbor genetic diversity that allows for persistence in these areas (Lesica and Allendorf 1995, p. 757). We determined that ecologically unique habitats were

essential to conservation of *Berberis nevinii*, and we included these areas in proposed critical habitat if they were occupied by more than a single large (i.e., mature) individual. Areas occupied by only one large individual represent sites where regeneration is not occurring; thus, we did not consider these areas to be essential to conservation of the species.

We also evaluated whether maintaining adjacent unoccupied habitat or corridors between occurrences may be important to facilitate and allow for pollination and seed dispersal within and between stands of *Berberis nevinii*. However, we do not have any information that suggests a certain quantity of habitat is necessary to maintain the pollinator species associated with *B. nevinii* occurrences. The few available reports actually noted that the genus *Berberis* is pollinated by generalist species, such as honey bees (Lebuhn and Anderson 1994, p. 259; Mussen 2002, unpaginated). It may also be necessary to maintain the natural fire regime associated with this species' habitat. However, sufficient information is not available to quantify the extent of the area necessary to maintain the natural fire regime for particular *B. nevinii* occurrences. Therefore, we are unable to fully incorporate these areas into our identification of essential habitat.

The Vail Lake/Oak Mountain area has the largest number of extant, native *Berberis nevinii*, which are located in numerous scattered stands. Because an extreme catastrophic event could wipe out one or more stands of *B. nevinii*, protecting multiple stands throughout this area may be important to the long-term conservation of the species. The areas that we are proposing as critical habitat are scattered to the north, south, and east of Vail Lake, which may provide some protection against complete loss of the species from this locality due to a catastrophic event, such as flooding or high intensity fire.

We delineated critical habitat unit boundaries in the following manner:

- (1) We identified all areas known to be occupied at the time of listing and/or currently occupied by *Berberis nevinii* using location data in the CNDDDB (2006);
- (2) We classified each of these occurrences as to their origin (native or cultivated), status (extant or extirpated), number of plants, and evidence of reproduction, where possible;
- (3) We determined which occurrences contain features essential to the conservation of the species using the criteria described above;

(4) Using GIS, we overlaid the occurrences identified in number 3 above on aerial imagery and compared the polygon locations for these occurrences with location information provided in field survey forms to narrow down and refine the location of *B. nevinii* occurrence polygons; and

(5) We then overlaid these occurrences with a series of 100 x 100 meter grid cells. Areas where the occurrence polygon intersected with a grid cell were retained. We used GIS soil and vegetation data to ensure that habitat within the grid cells containing the occurrence polygons contained one or more of the PCEs. Using aerial photography, we removed areas that did not contain any of the PCEs for the species (e.g., aquatic habitat in Vail Lake). Critical habitat designations were then described and mapped using Universal Transverse Mercator (UTM) North American Datum 27 (NAD 27) coordinates.

Areas meeting these criteria were then analyzed to determine if any existing conservation or management plans exist that benefit the species and their PCEs. *Berberis nevinii* is included as a covered species in the Western Riverside County MSHCP. As a result, occupied areas on private land within the area covered by the MSHCP (Plan Area) are being proposed for exclusion from the final designation of critical habitat for this species under section 4(b)(2) of the Act (see *Relationship of Critical Habitat to Approved Habitat Conservation Plans (HCPs)—Exclusion Under Section 4(b)(2) of the Act* for a detailed discussion).

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as buildings, paved areas, and other structures that lack PCEs for *Berberis nevinii*. The scale of the maps prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed areas. Any such structures and the land under them inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, Federal actions limited to these areas would not trigger section 7 consultation, unless they affect the species and/or primary constituent elements in adjacent critical habitat.

We propose to designate critical habitat in areas that contain naturally occurring *Berberis nevinii* plants (i.e., not of cultivated origin or consisting of outplanted individuals). We have determined these areas were occupied at

the time of listing and contain sufficient primary constituent elements (PCEs) to support life history functions essential for the conservation of the species. No areas outside the geographical area occupied at the time of listing have been proposed for designation. Additionally, information provided in comments on the proposed critical habitat designation and draft economic analysis will be evaluated and considered in the development of the final designation for *B. nevinii*.

Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed species incidental to otherwise lawful activities. An incidental take permit application must be supported by a habitat conservation plan (HCP) that identifies conservation measures that the permittee agrees to implement for the species to minimize and mitigate the impacts of the requested incidental take. We often exclude non-Federal public lands and private lands that are covered by an existing operative HCP and executed implementation agreement (IA) under section 10(a)(1)(B) of the Act from designated critical habitat because the benefits of exclusion outweigh the benefits of inclusion as discussed in section 4(b)(2) of the Act. All of the private land included in this proposed critical habitat designation is in the vicinity of Vail Lake and Oak Mountain and is covered by the Western Riverside County MSHCP. We are proposing to exclude private lands covered under the MSHCP from the final designation of critical habitat for *Berberis nevinii* because we believe that the benefits of exclusion outweigh the benefits of inclusion (*See Relationship of Critical Habitat to Approved Habitat Conservation Plans (HCPs)—Exclusion Under Section 4(b)(2) of the Act* section for more details on the Western Riverside County MSHCP and a complete discussion and analysis of the benefits of exclusion and inclusion of these lands in the critical habitat designation).

Special Management Considerations or Protection

When designating critical habitat, we assess whether the areas determined to be occupied at the time of listing contain primary constituent elements that may require special management considerations or protection. As stated in the final listing rule (63 FR 54956, October 13, 1998), threats to the species include urban development, off-road vehicle use, human recreation (*e.g.*, horseback riding), highway projects, fire management strategies (suppression measures, brush clearing) that alter

natural fire processes to which native plant communities are adapted and which they require for long-term survival, and the introduction of invasive, nonnative plants that may compete with *Berberis nevinii* and/or contribute to combustible fuel loads (63 FR 54961). These threats can directly or indirectly result in the loss, modification, degradation, and/or fragmentation of *B. nevinii* habitat, thereby eliminating or reducing potential habitat for seed germination, seedling establishment, plant growth and maturation, and/or population growth. Individually or combined, these threats may require special management considerations or protection of the PCEs as addressed here and in more detail within the individual critical habitat unit descriptions that follow.

Urbanization, flood control measures, road widening, and habitat degradation from extensive recreational use have contributed to the loss of *Berberis nevinii* habitat and have apparently resulted in the extirpation of several occurrences, particularly within the San Fernando Valley of Los Angeles County (63 FR 54961). Urbanization may destroy, degrade, fragment, or otherwise alter the topography, soil, and vegetation community structure in ways that make areas less suitable for *B. nevinii*. Land grading for residential development and road projects may affect the topography of the site (PCE 1); alter soil composition and structure (PCE 2); change vegetation community composition and structure through clearing or thinning of vegetation and the introduction of nonnative plants (PCE 3); increase erosion potential (PCE 1 and 2); and change hydrological (drainage and water infiltration) patterns, thereby decreasing the quality and extent of available habitat for *B. nevinii*. Additionally, urban development near this species may increase the frequency of fire. No urban development is expected to directly impact the known occurrences of *B. nevinii* on Federal or private land in the vicinity of Vail Lake and Oak Mountain, although indirect impacts associated with increased urbanization may occur.

Recreational activities may also impact the physical and biological features determined to be essential for conservation of the species by destroying, degrading, fragmenting, or otherwise altering the topography, soil, and vegetation community in ways that make areas less suitable for *Berberis nevinii*. For example, off-highway vehicle use, hiking, camping, horseback riding, and recreational facility development in or near *B. nevinii* occurrences could alter or destroy

surface and subsurface structure through trampling and clearing or thinning of vegetation, and the introduction of nonnative plants (PCE 3), soil disturbance and/or compaction (PCE 2), and increased erosion and changes to hydrological (drainage and water infiltration) patterns, which may in turn affect the topography, soil, and vegetation of the site (PCE 1, 2, and 3).

Activities associated with fire management, such as fuel treatments, prescribed burns, and wildfire suppression, may also impact the physical and biological features essential for conservation of the species. The creation of firebreaks, brush clearing or thinning, and the use of heavy equipment and off-road vehicles for fire management could physically remove or disturb soils and alter soil composition (PCE 2), remove or destroy vegetation (PCE 3), increase erosion, and alter the topography (PCE 1) and hydrologic patterns in or near *Berberis nevinii* occurrences. Fire management activities could facilitate the incursion or spread of invasive, nonnative plants by potentially creating (disturbance) conditions that increase the competitive edge of nonnative species over native species, thereby altering the composition of the vegetation community (PCE 3). Prescribed fires that are too frequent or that occur at times of the year atypical of the natural fire regime could also result in changes to vegetation community and structure (PCE 3). Alternatively, if fire management activities are successful in keeping fire from the landscape, and high canopy cover ensues, plant species that require full or partial sun (*i.e.*, canopy gaps) to effectively establish may become underrepresented in the plant community, as will those plants that require fire for seed germination.

Proposed Critical Habitat Designation

We are proposing one unit as critical habitat for *Berberis nevinii*: the Agua Tibia/Vail Lake unit. This critical habitat unit is further divided into six subunits. The critical habitat unit and subunits described below constitute our best assessment at this time of areas that: (1) Have extant, native occurrences consisting of more than two *B. nevinii* plants with evidence of reproduction; and (2) contain some or all of the primary constituent elements that may require special management considerations or protection. All of these units were occupied at the time of listing and are currently occupied to the best of our knowledge. Table 2 identifies the approximate area (ac/ha) of proposed critical habitat for *B. nevinii*, and the areas being considered for

exclusion from the final critical habitat designation under section 4(b)(2) of the Act. Areas proposed for exclusion are those areas covered under the Western

Riverside County MSHCP (see *Relationship of Critical Habitat to Approved Habitat Conservation Plans (HCPs)—Exclusion Under Section*

4(b)(2) of the Act section for a detailed discussion). Table 3 identifies the occupancy status for each unit.

TABLE 2.—AREAS PROPOSED FOR CRITICAL HABITAT DESIGNATION FOR *BERBERIS NEVINII*, AND AREAS BEING CONSIDERED FOR EXCLUSION FROM THE FINAL CRITICAL HABITAT DESIGNATION UNDER SECTION 4(b)(2) OF THE ACT.

Critical habitat unit	Land ownership	Area proposed as critical habitat	Area being considered for exclusion from final critical habitat
1. Agua Tibia/Vail Lake:			
1A. Big Oak Mountain Summit	BLM	15 ac (6 ha)	0 ac (0 ha)
1B. Agua Tibia Mountain Foothills	USFS	17 ac (7 ha)	0 ac (0 ha)
	Private	5 ac (2 ha)	5 ac (2 ha)
1C. South Flank Big Oak Mountain	Private	87 ac (35 ha)	87 ac (35 ha)
1D. North of Vail Lake	Private	22 ac (9 ha)	22 ac (9 ha)
1E. South of Vail Lake/Peninsula	Private	251 ac (102 ha)	251 ac (102 ha)
1F. Temecula Creek East	Private	20 ac (8 ha)	20 ac (8 ha)
Total		417 ac (169 ha)	385 ac (156 ha)

TABLE 3.—OCCUPANCY OF CRITICAL HABITAT UNITS DESIGNATED FOR *BERBERIS NEVINII*.

Critical habitat subunit	Occupied at time of listing?	Occupied currently?	Acres (hectares)
Subunit 1A: Big Oak Mountain Summit	Yes	Yes	15 (6)
Subunit 1B: Agua Tibia Mountain Foothills	Yes	Yes	22 (9)
Subunit 1C: South Flank Big Oak Mountain	Yes	Yes	87 (35)
Subunit 1D: North of Vail Lake	Yes	Yes	22 (9)
Subunit 1E: South of Vail Lake/Peninsula	Yes	Yes	251 (102)
Subunit 1F: Temecula Creek East	Yes	Yes	20 (8)
Total			417 (169)

Below, we present brief descriptions of the proposed subunits and reasons why they meet the definition of critical habitat for *Berberis nevinii*.

Unit 1: Agua Tibia/Vail Lake

Unit 1 comprises approximately 417 ac (169 ha) and is divided into six subunits: Big Oak Mountain Summit (1A), Agua Tibia Mountain Foothills (1B), South Flank Big Oak Mountain (1C), North of Vail Lake (1D), South of Vail Lake/Peninsula (1E), and Temecula Creek East (1F). These lands in Unit 1 contain the PCEs for *Berberis nevinii* and also may be important for maintaining genetic diversity for the species as they include occurrences in ecologically unique areas.

Subunit 1A: Big Oak Mountain Summit

Subunit 1A consists of approximately 15 ac (6 ha) located on Big Oak Mountain to the north of Vail Lake in southern Riverside County. This subunit consists entirely of federally owned land managed by BLM. Two *Berberis nevinii* individuals of different sizes (ages) are known to occur in this unit on the summit of Big Oak Mountain at approximately 2,700 ft (823 m) elevation (*i.e.*, the lower edge of the marine layer)

(PCE 1 and 3). One individual is an old plant that is covered in lichens, and the other individual is considerably smaller and at some distance to the northeast of the older plant. This location is considered unusual (*i.e.*, ecologically unique) for the species in that it is at higher elevation and on relatively flat clay lenses consisting of heavy adobe/gabbro type soils with high water-holding capacity, derived from Mesozoic basic intrusive rock (PCE 2) (Soza 2003). Soils in this area are classified primarily as Auld clay, 8 to 15 percent slopes, and Las Posas loam, 8 to 15 percent slopes, eroded (PCE 2) (Service GIS data 2006). This occurrence is located in an open grassland area with chaparral nearby. Associated plant species include *Chenopodium californicum*, *Avena fatua*, *Harpagonella palmeri*, *Plantago erecta*, *Galium porrigens*, and *Delphinium* species.

We are proposing this subunit as critical habitat even though it is occupied by only two *Berberis nevinii* plants because it represents an ecologically unique site for the species and contains the features essential to the conservation of *B. nevinii*. Additionally, this site contains naturally-occurring *B.*

nevinii of different sizes (ages), indicative of successful reproduction in the past. Because this occurrence is on an ecologically unique site, this subunit may be important in terms of preserving genetic diversity throughout the range of the species. *Berberis nevinii* occupied this subunit at the time of listing, as identified in the final listing rule (63 FR 54956, October 13, 1998).

Bureau of Land Management land on Big Oak Mountain consists of three small parcels totaling 888 ac (360 ha), which is surrounded by private land. The primary threats to *Berberis nevinii* habitat in this area that may require special management considerations or protection of the PCEs are the indirect effects of urban/residential development, such as increased human recreation; incursion or spread of invasive, nonnative plants; and changes to the natural fire regime (*i.e.*, increased ignitions and fire frequency, and shortened fire return intervals that can lead to type conversion of shrublands to annual grasslands). The BLM Resource Management Plan indicates that these parcels are closed to motorized vehicles and livestock grazing (BLM 1994, p. 28). Special management considerations or protection of the PCEs may be required

to minimize disturbance to the vegetation and soils within this subunit; control invasive, nonnative plants; and maintain the natural hydrologic and fire regime of the area. While this site falls within the Conservation Area for the Western Riverside County MSHCP, this area is federal land managed by BLM. Therefore, we are not proposing BLM-managed lands within this subunit for exclusion under section 4(b)(2) of the Act.

Subunit 1B: Agua Tibia Mountain Foothills

Subunit 1B consists of approximately 22 ac (9 ha) located near the Agua Tibia Wilderness Area in southern Riverside County. This subunit consists of 17 ac (7 ha) of federally owned land managed by the USFS (Cleveland National Forest) and 5 ac (2 ha) of private land. Five *Berberis nevinii* individuals are known from this area and are located at the edge of a stream channel (PCE 1) growing in association with coast live oak and riparian woodland species (PCE 3). Nearby chaparral includes such species as *Quercus berberidifolia*, *Adenostoma fasciculatum*, and *Haplopappus squarrosus*, and nearby desert species include *Yucca schidigera* (CNDDDB 2006). These *B. nevinii* plants are growing under a canopy of *Quercus agrifolia* and *Platanus racemosa* with the following species: *Heteromeles arbutifolia*, *Q. berberidifolia*, *Elymus condensatus*, *Mimulus aurantiacus*, *Lonicera subspicata*, *Pterostegia drymarioides*, and *Epilobium canum*. Soils in this area are classified as gullied land and coarse sandy loam of the Hanford series, 8 to 15 percent slopes, eroded (PCE 2) (Service GIS data 2006).

We are proposing this subunit as critical habitat because it contains features essential to conservation of *Berberis nevinii* and it contains a relatively large natural occurrence of the species. Additionally, Service personnel visited this site in June 2006 while *B. nevinii* was in fruit, and found that several of the fruits had three to four seeds, which may be significant for a species that appears to rarely set seed. *Berberis nevinii* occupied this subunit at the time of listing, as identified in the final listing rule (63 FR 54956, October 13, 1998).

The *Berberis nevinii* occurrence on Cleveland National Forest lands is not as well protected as the occurrence on the Angeles National Forest (USFS 2005, p. 238). Threats to *B. nevinii* habitat in this area are associated with the proximity of State Highway 79 and include recreational impacts (off-road vehicle use, shooting) and increased risk of fire ignition (USFS 2005, p. 232). Off-

road vehicle use has occurred adjacent to Highway 79, close to but not within occupied habitat. Additionally, this occurrence has shown signs of disturbance from road activities (USFS 2005, p. 235), and Highway 79 is proposed for realignment (USFWS 2004, p. 332), which could adversely affect this occurrence. The USFS does not anticipate that the magnitude of impacts related to camping and hiking will be substantial, and these impacts will be avoided or mitigated by use of Forest Plan standards (USFS 2005, p. 234). Also, invasive, nonnative plants may pose a threat to *B. nevinii* habitat quality at this site.

One of the greatest threats to occupied habitat on the Cleveland National Forest is from wildland fire and the management of fire and fuels (*i.e.*, fire suppression and prevention activities). The Wildland-Urban Interface (WUI) Defense Zone overlaps about 43 percent of occupied habitat on Cleveland National Forest (USFS 2005, p. 237; USFWS 2005, p. 127). Some plants and/or habitat within the WUI Defense Zone could be removed or degraded under the Revised Land and Resource Management Plan due to fuel removal for fire protection or overly frequent fuel treatments (USFWS 2005, p. 127). Special management considerations or protection of the PCEs may be required to minimize disturbance to the vegetation and soils within this subunit; control invasive, nonnative plants; and maintain the natural fire regime of the area.

This subunit falls within the Conservation Area for the Western Riverside County MSHCP; however, the majority of this subunit is Federal land managed by the USFS. Therefore, we are not proposing USFS lands within this subunit for exclusion under section 4(b)(2) of the Act. On the other hand, we are proposing to exclude the private lands within this subunit from the final designation of critical habitat for *Berberis nevinii*. Please see *Relationship of Critical Habitat to Approved Habitat Conservation Plans (HCPs)—Exclusion Under Section 4(b)(2) of the Act—Western Riverside County Multiple Species Habitat Conservation Plan* for a detailed discussion.

Subunit 1C: South Flank Big Oak Mountain

Subunit 1C consists of approximately 87 ac (35 ha) of private land located north of Vail Lake on the south flank of Big Oak Mountain in southern Riverside County. This occurrence is mapped as four small subpopulations by CNDDDB (2006); while the total number of plants is unknown, 17 *Berberis nevinii* plants

were attributed to one of the subpopulations based on a 1989 survey (CNDDDB 2006). *Berberis nevinii* individuals in this area are found on south-facing drainage bottoms in chaparral and sage scrub vegetation communities (PCE 1 and 3) (CNDDDB 2006). Associated species include *Adenostoma fasciculatum*, *Arctostaphylos glauca*, *Artemisia californica*, and *Brickellia californica*. Soils in this area are classified primarily as Cajalco rocky fine sandy loam, 15 to 50 percent slopes, eroded; with Las Posas rocky loam, 15 to 50 percent slopes, severely eroded; and Auld clay, 8 to 15 percent slopes to a lesser extent (PCE 2) (Service GIS data 2006).

We are proposing this subunit as critical habitat because it contains features essential to conservation of *Berberis nevinii*, and it contains a relatively large natural occurrence of the species (CNDDDB 2006). This subunit has one of several relatively large occurrences (potentially the second largest) of *B. nevinii* in the Vail Lake area and thus has a greater potential for regeneration by seed. This site may also be ecologically unique for the species; Boyd and others (1989, p. 14) indicated that *B. nevinii* located in canyons draining the south flank of Big Oak Mountain are associated with springs or seepages, which appears to be unusual for the species. *Berberis nevinii* occupied this subunit at the time of listing, as identified in the final listing rule (63 FR 54956, October 13, 1998).

The primary threats to *Berberis nevinii* habitat in this area that may require special management considerations or protection of the PCEs are the indirect effects of urban/residential development, such as increased human recreation; erosion; incursion or spread of invasive, nonnative plants; and changes to the natural fire regime (*i.e.*, increased ignitions and fire frequency and shortened fire return intervals) that can lead to type conversion of shrublands to annual grasslands.

This subunit falls within the Conservation Area for the Western Riverside County MSHCP, and we are proposing to exclude the private lands within this subunit from the final designation of critical habitat for *B. nevinii*. Please see *Relationship of Critical Habitat to Approved Habitat Conservation Plans (HCPs)—Exclusion Under Section 4(b)(2) of the Act—Western Riverside County Multiple Species Habitat Conservation Plan* for a detailed discussion.

Subunit 1D: North of Vail Lake

Subunit 1D consists of approximately 22 ac (9 ha) of private land located immediately north of Vail Lake in southern Riverside County. This occurrence is mapped along a canyon just above the highwater line of Vail Lake, and consists of seven plants based on a 1989 survey (CNDDDB 2006). *Berberis nevinii* individuals in this area are found in sandy and gravelly soils in a drainage bottom (PCE 1 and 2). The vegetation community is classified as coastal scrub and valley foothill riparian (PCE 3) (Service GIS data 2006). At this site, *B. nevinii* is associated with *Adenostoma fasciculatum*, *Arctostaphylos glauca*, *Rhus integrifolia*, *Juniperus californica*, and *Rhamnus crocea*; and to the north is a large grove of *Prosopis glandulosa* (CNDDDB 2006). Soils in this area are classified as badland (PCE 2) (Service GIS data 2006).

We are proposing this subunit as critical habitat because it contains features essential to conservation of *Berberis nevinii*, and it contains a relatively large natural occurrence of the species (CNDDDB 2006). This subunit is important for conserving *B. nevinii* as it is one of several relatively large occurrences in the Vail Lake area and thus has a greater potential for regeneration by seed. *Berberis nevinii* occupied this subunit at the time of listing, as identified in the final listing rule (63 FR 54956, October 13, 1998).

The primary threats to *Berberis nevinii* habitat in this area that may require special management considerations or protection of the PCEs are the indirect effects of urban/residential development, such as increased human recreation; erosion; incursion or spread of invasive, nonnative plants; and changes to the natural fire regime (*i.e.*, increased ignitions and fire frequency, and shortened fire return intervals that can lead to type conversion of shrublands to annual grasslands). This subunit falls within the Conservation Area for the Western Riverside County MSHCP, and we are proposing to exclude the private lands within this subunit from the final designation of critical habitat for *B. nevinii*. Please see *Relationship of Critical Habitat to Approved Habitat Conservation Plans (HCPs)—Exclusion Under Section 4(b)(2) of the Act—Western Riverside County Multiple Species Habitat Conservation Plan* for a detailed discussion.

Subunit 1E: South of Vail Lake/ Peninsula

Subunit 1E consists of approximately 251 ac (102 ha) of private land located on the south and southwest side of Vail Lake in southern Riverside County. This site has the largest known natural occurrence of *Berberis nevinii*, collectively consisting of 134 plants based on a 1987 survey (Boyd 1987, pp. 7, 61–72; CNDDDB 2006). These plants are located in several stands along both sides of the southwest arm of Vail Lake, the south shore and peninsula, and part of the west shore of the southeast arm of Vail Lake. *Berberis nevinii* individuals in this area are found in canyons, in a wash of 15 percent slope, and on north-facing ridges and slopes between 35 and 70 percent slope (PCE 1) (Boyd 1987, p. 61–72; CNDDDB 2006), primarily in association with coastal scrub, mixed chaparral, and valley foothill riparian communities (PCE 3) (Service GIS data 2006). Associated species include, but are not limited to: *Artemisia californica*, *Adenostoma fasciculatum*, *Eriogonum fasciculatum*, *Salvia mellifera*, *Rhamnus crocea*, *Rhus ovata*, *Encelia farinosa*, *Baccharis glutinosa*, and *Yucca* sp. (Boyd 1987, p. 61–72). Soils in this area are classified as sandy loams (Arlington and Greenfield fine sandy loams, 8 to 15 percent slopes, eroded; Cajalco rocky fine sandy loam, 15 to 50 percent slopes, eroded; Hanford coarse sandy loam, 8 to 15 percent slopes, eroded; Lodi rocky loam, 25 to 50 percent slopes, eroded; Monserate sandy loam, 8 to 15 percent slopes, eroded; Monserate sandy loam, 15 to 25 percent slopes, severely eroded; Pachappa fine sandy loam, 2 to 8 percent slopes, eroded), gullied land, riverwash, and rough broken land (PCE 2) (Service GIS data 2006).

We are proposing this subunit as critical habitat because it contains features essential to conservation of *Berberis nevinii*, and it contains the largest known natural occurrence of the species (CNDDDB 2006). This location also contains the bulk of known individuals in the Vail Lake/Oak Mountain area. Additionally, we interpret that reproduction has occurred at this site in the past based on the presence of several size (age) classes. *Berberis nevinii* occupied this subunit at the time of listing, as identified in the final listing rule (63 FR 54956, October 13, 1998).

The primary threats to *Berberis nevinii* habitat in this area that may require special management considerations or protection of the PCEs are the indirect effects of urban/

residential development, such as increased human recreation; erosion; incursion or spread of invasive, nonnative plants (including *Tamarix* sp. and *Nicotiana glauca*) that can compete with native plant species; and changes to the natural fire regime (*i.e.*, increased ignitions and fire frequency and shortened fire return intervals) that can lead to type conversion of shrublands to annual grasslands). Part of this occurrence has burned in the past, and regeneration by stump sprouting has been observed (CNDDDB 2006). Part of this area is fairly inaccessible, except by boat; however, other parts are in close proximity to roads, equestrian trails, and the boat launch area (Boyd 1987, pp. 61–72; CNDDDB 2006), and thus may be more heavily impacted by recreational use. Rising lake levels could also adversely affect those individuals occurring adjacent to the lake (Boyd 1987, pp. 61–72; CNDDDB 2006).

This site falls within the Conservation Area for the Western Riverside County MSHCP, and we are proposing to exclude the private lands within this subunit from the final designation of critical habitat for *B. nevinii*. Please see *Relationship of Critical Habitat to Approved Habitat Conservation Plans (HCPs)—Exclusion Under Section 4(b)(2) of the Act—Western Riverside County Multiple Species Habitat Conservation Plan* for a detailed discussion.

Subunit 1F: Temecula Creek East

Subunit 1F consists of approximately 20 ac (8 ha) of private land located southeast of Vail Lake on the north side of Temecula Creek in Riverside County. This occurrence is mapped as two small subpopulations; while the total number of plants is unknown, three plants were attributed to one of the subpopulations based on a 1989 survey (CNDDDB 2006). *Berberis nevinii* individuals in this area are found on a bank adjacent to a dry wash (PCE 1) in a mixed chaparral community (CNDDDB 2006) with coastal scrub and annual grassland components (PCE 3) (Service GIS data 2006). Associated species include *Adenostoma fasciculatum*, *Rhamnus crocea*, *Eriogonum fasciculatum*, *Rhus ovata*, and *Lonicera subspicata*. Fine, sandy soils are characteristic of the area (CNDDDB 2006), and soils are classified as Badland and San Timoteo loam, 8 to 15 percent slopes, eroded (PCE 2) (Service GIS data 2006).

We are proposing this subunit as critical habitat because it contains features essential to conservation of *Berberis nevinii*, and it contains a relatively large natural occurrence of the

species (CNDDDB 2006). This subunit may be important for conserving *B. nevinii* as it is one of several relatively large occurrences in the Vail Lake area, and thus has a greater potential for regeneration by seed. *Berberis nevinii* occupied this subunit at the time of listing, as identified in the final listing rule (63 FR 54956, October 13, 1998).

The primary threats to *Berberis nevinii* habitat in this area that may require special management considerations or protection of the PCEs are the indirect effects of urban/residential development, such as increased human recreation; erosion; incursion or spread of invasive, nonnative plants; and changes to the natural fire regime (*i.e.*, increased ignitions and fire frequency and shortened fire return intervals) that can lead to type conversion of shrublands to annual grasslands.

This site falls within the Conservation Area for the Western Riverside County MSHCP, and we are proposing to exclude the private lands within this subunit from the final designation of critical habitat for *B. nevinii*. Please see *Relationship of Critical Habitat to Approved Habitat Conservation Plans (HCPs)—Exclusion Under Section 4(b)(2) of the Act—Western Riverside County Multiple Species Habitat Conservation Plan* for a detailed discussion.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. In our regulations at 50 CFR 402.02, we define destruction or adverse modification as “a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.” However, recent decisions by the 5th and 9th Circuit Court of Appeals have invalidated this definition (see *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir 2004) and *Sierra Club v. U.S. Fish and Wildlife Service et al.*, 245 F.3d 434, 442F (5th Cir 2001)). Pursuant to current national policy and the statutory provisions of the Act, destruction or adverse modification is determined on the basis of whether, with implementation of the proposed Federal action, the affected critical

habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. This is a procedural requirement only. However, once a proposed species becomes listed, or proposed critical habitat is designated as final, the full prohibitions of section 7(a)(2) apply to any Federal action. The primary utility of the conference procedures is to maximize the opportunity for a Federal agency to adequately consider proposed species and critical habitat and avoid potential delays in implementing their proposed action because of the section 7(a)(2) compliance process, should those species be listed or the critical habitat designated.

Under conference procedures, the Service may provide advisory conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The Service may conduct either informal or formal conferences. Informal conferences are typically used if the proposed action is not likely to have any adverse effects to the proposed species or proposed critical habitat. Formal conferences are typically used when the Federal agency or the Service believes the proposed action is likely to cause adverse effects to proposed species or critical habitat, inclusive of those that may cause jeopardy or adverse modification.

The results of an informal conference are typically transmitted in a conference report while the results of a formal conference are typically transmitted in a conference opinion. Conference opinions on proposed critical habitat are typically prepared according to 50 CFR 402.14, as if the proposed critical habitat were designated. We may adopt the conference opinion as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50

CFR 402.10(d)). As noted above, any conservation recommendations in a conference report or opinion are strictly advisory.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, compliance with the requirements of section 7(a)(2) will be documented through the Service's issuance of: (1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or (2) a biological opinion for Federal actions that are likely to adversely affect listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to result in jeopardy to a listed species or the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. “Reasonable and prudent alternatives” are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid jeopardy to the listed species or destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinstate consultation on previously reviewed actions in instances where a new species is listed or critical habitat is subsequently designated that may be affected and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions may affect subsequently listed species or designated critical habitat or

adversely modify or destroy proposed critical habitat.

Federal activities that may affect *Berberis nevinnii* or its designated critical habitat will require section 7 consultation under the Act. Activities on State, Tribal, local, or private lands requiring a Federal permit (such as a permit from the Army Corps of Engineers under section 404 of the Clean Water Act or a permit under section 10(a)(1)(B) of the Act from the Service) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) will also be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or permitted, do not require section 7 consultations.

Application of the Jeopardy and Adverse Modification Standards for Actions Involving Effects to Berberis nevinnii and Its Critical Habitat

Jeopardy Standard

The Service applies an analytical framework for *Berberis nevinnii* jeopardy analyses that relies heavily on the importance of core area populations to the survival and recovery of *B. nevinnii*. The section 7(a)(2) analysis is focused not only on these populations but also on the habitat conditions necessary to support them.

The jeopardy analysis usually expresses the survival and recovery needs of *Berberis nevinnii* in a qualitative fashion without making distinctions between what is necessary for survival and what is necessary for recovery. Generally, if a proposed Federal action is incompatible with the viability of the affected core area population(s), inclusive of associated habitat conditions, a jeopardy finding is considered to be warranted, because of the relationship of each core area population to the survival and recovery of the species as a whole.

Adverse Modification Standard

For the reasons described in the Director's December 9, 2004 memorandum, the key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the

species. Generally, the conservation role of *Berberis nevinnii* critical habitat units is to support viable core area populations.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat may also jeopardize the continued existence of the species.

Activities that may destroy or adversely modify critical habitat are those that alter the PCEs to an extent that the conservation value of critical habitat for *Berberis nevinnii* is appreciably reduced. Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore should result in consultation for *B. nevinnii* include, but are not limited to:

(1) Activities that would directly or indirectly impact *Berberis nevinnii* habitat and its PCEs. Such activities could include, but are not limited to: Residential or commercial development; fire prevention and suppression activities, such as the creation of firebreaks and brush clearing or thinning; off-road vehicle use; heavy recreational use; placement of recreational trailheads and facilities; road development, maintenance, or improvement projects, such as road grading, widening, or realignment; and flood control projects, such as vegetation stripping. These activities could change the physical and biological features of the habitat by affecting the topography of the site; by physically removing or damaging soils and associated vegetation; by altering the natural hydrology of the area; and by introducing and facilitating the spread of invasive, nonnative plant species.

(2) Activities that would alter fire frequency in areas occupied by *Berberis nevinnii*. Such activities could include, but are not limited to, prescribed burns that are too frequent or poorly timed. These activities could reduce the ability of *B. nevinnii* to grow and reproduce by altering soil and vegetation community structure and composition (e.g., type conversion of shrublands into grasslands).

(3) Activities that would foster the introduction or spread of nonnative vegetation. These activities could include, but are not limited to: Seeding areas with nonnative species following a fire; planting nonnative species or using non-weed free hay straw for slope, bank, and soil erosion control; and

ground-disturbing activities, such as road maintenance, improvement, or construction projects. These activities could reduce the ability of *Berberis nevinnii* to grow and reproduce because nonnative plant species may crowd out or otherwise compete with *B. nevinnii*. Additionally, an increase in nonnative plants could change the fire regime by creating conditions prone to frequent fire (e.g., increased fuel loads and continuous fuel beds) and by altering soil composition.

All lands proposed as critical habitat for *Berberis nevinnii*, including those that have been proposed for exclusion from the final designation, contain features essential to conservation of the species. All of the subunits proposed for designation are within the geographical range of the species, were known to be occupied at the time of listing, and are currently occupied by *B. nevinnii*. Federal agencies already consult with us on activities in areas occupied by *B. nevinnii*, and if the species may be affected by the action, to ensure that their actions do not jeopardize the continued existence of *B. nevinnii*.

Exclusions Under Section 4(b)(2) of the Act

There are multiple ways to provide protection and management for species' habitat. Statutory and regulatory frameworks that exist at a local level can provide such protection and management, as can lack of pressure for change, such as areas too remote for anthropogenic disturbance. Finally, State, local, or private management plans as well as management under Federal agencies' jurisdictions can provide protection and management that may lessen or even eliminate any appreciable benefit to a designation of critical habitat. When we consider a plan to determine its adequacy in protecting habitat, we consider whether the plan, as a whole will provide the same level of protection that designation of critical habitat would provide. The plan need not lead to exactly the same result as a designation in every individual application, as long as the protection it provides is equivalent, overall. In making this determination, we examine whether the plan provides management, protection, or enhancement of the PCEs that is at least equivalent to that provided by a critical habitat designation, and whether there is a reasonable expectation that the management, protection, or enhancement actions will continue into the foreseeable future. Each review is particular to the species and the plan, and some plans may be adequate for some species and inadequate for others.

Section 4(b)(2) of the Act states that critical habitat shall be designated and revised on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the Congressional record is clear that the Secretary is afforded broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, in considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If an exclusion is contemplated, then we must determine whether excluding the area would result in the extinction of the species. In the following sections, we address a number of general issues that are relevant to the exclusions we considered. In addition, the Service is conducting an economic analysis of the impacts of the proposed critical habitat designation and related factors, which will be available for public review and comment. Based on public comment on that document, the proposed designation itself, and the information in the final economic analysis, additional areas beyond those identified in this assessment may be excluded from critical habitat by the Secretary under the provisions of section 4(b)(2) of the Act. This is provided for in the Act, and in our implementing regulations at 50 CFR 242.19.

Conservation Partnerships on Non-Federal Lands

Most federally listed species in the United States will not recover without the cooperation of non-Federal landowners. More than 60 percent of the United States is privately owned (National Wilderness Institute 1995) and at least 80 percent of endangered or threatened species occur either partially or solely on private lands (Crouse *et al.* 2002). Stein *et al.* (1995) found that only about 12 percent of listed species were found almost exclusively on Federal

lands (90 to 100 percent of their known occurrences restricted to Federal lands) and that 50 percent of federally listed species are not known to occur on Federal lands at all.

Given the distribution of listed species with respect to land ownership, conservation of listed species in many parts of the United States is dependent upon working partnerships with a wide variety of entities and the voluntary cooperation of many non-Federal landowners (Wilcove and Chen 1998, Crouse *et al.* 2002, James 2002). Building partnerships and promoting voluntary cooperation of landowners is essential to understanding the status of species on non-Federal lands and is necessary to implement recovery actions such as reintroducing listed species, habitat restoration, and habitat protection.

Many non-Federal landowners derive satisfaction in contributing to endangered species recovery. The Service promotes these private-sector efforts through cooperative conservation. This is evident in Service programs such as HCPs, Safe Harbors Agreements, Candidate Conservation Agreements, Candidate Conservation Agreements with Assurances, and conservation challenge cost-share. Many private landowners, however, are wary of the possible consequences of encouraging endangered species to their property, and there is mounting evidence that some regulatory actions by the Federal government, while well-intentioned and required by law, can under certain circumstances have unintended negative consequences for the conservation of species on private lands (Wilcove *et al.* 1996; Bean 2002; Conner and Mathews 2002; James 2002; Koch 2002; Brook *et al.* 2003). Many landowners fear a decline in their property value due to real or perceived restrictions on land-use options where threatened or endangered species are found. Consequently, harboring endangered species is viewed by many landowners as a liability, resulting in anti-conservation incentives because maintaining habitats that harbor endangered species represents a risk to future economic opportunities (Main *et al.* 1999; Brook *et al.* 2003).

The purpose of designating critical habitat is to contribute to the conservation of threatened and endangered species and the ecosystems upon which they depend. The outcome of the designation, triggering regulatory requirements for actions funded, authorized, or carried out by Federal agencies under section 7 of the Act, can sometimes be counterproductive to its intended purpose on non-Federal lands.

According to some researchers, the designation of critical habitat on private lands significantly reduces the likelihood that landowners will support and carry out conservation actions (Main *et al.* 1999; Bean 2002; Brook *et al.* 2003). The magnitude of this negative outcome is greatly amplified in situations where active management measures (such as reintroduction, fire management, control of invasive species) are necessary for species conservation (Bean 2002). The Service believes that the judicious use of excluding specific areas of non-federally owned lands from critical habitat designations can contribute to species recovery and provide a superior level of conservation than critical habitat alone.

The Department of the Interior's cooperative conservation policy is the foundation for developing the tools of conservation. These tools include conservation grants, funding for Partners for Fish and Wildlife Program, the Coastal Program, and cooperative-conservation challenge cost-share grants. Our Private Stewardship Grant program and Landowner Incentive Program provide assistance to private land owners in their voluntary efforts to protect threatened, imperiled, and endangered species, including the development and implementation of Habitat Conservation Plans.

Conservation agreements with non-Federal landowners (*e.g.*, HCPs, contractual conservation agreements, easements, and stakeholder-negotiated State regulations) enhance species conservation by extending species protections beyond those available through section 7(a)(2) consultations. In the past decade, we have encouraged non-Federal landowners to enter into conservation agreements, based on a view that we can achieve greater species conservation on non-Federal land through such partnerships than we can through coercive methods (61 FR 63854; December 2, 1996).

Exclusions Under Section 4(b)(2) of the Act for *Berberis nevini*

After consideration under section 4(b)(2) of the Act, we are proposing to exclude the following areas from critical habitat for *Berberis nevini*: private lands covered by the Western Riverside County MSHCP, which includes five ac (2 ha) of the Agua Tibia Mountain Foothills subunit (1B), and all of the South Flank Big Oak Mountain subunit (1C) (87 ac (35 ha)), North of Vail Lake subunit (1D) (22 ac (9ha)), South of Vail Lake/Peninsula subunit (1E) (251 ac (102 ha)), and Temecula Creek East subunit (1F) (20 ac (8ha)). We believe that: (1) The private lands' value for

conservation is preserved by existing protective action, or (2) it is appropriate for exclusion pursuant to the "other relevant factor" provisions of section 4(b)(2) of the Act. We specifically solicit comment, however, on the inclusion or exclusion of such areas. A detailed analysis of our exclusion of these lands under section 4(b)(2) of the Act is provided below; starting with *General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process*.

We evaluated existing management plans relevant to Federal lands occurring within the boundaries of proposed critical habitat for *Berberis nevinii* (i.e., Subunit 1A and part of Subunit 1B). While Federal lands within subunits 1A and 1B fall within the Conservation Area for the Western Riverside County MSHCP, neither of the Federal land management agencies (USFS and BLM) is obligated to manage these lands in compliance with the MSHCP. Therefore, we have not identified any benefits of exclusion for USFS or BLM managed lands within Unit 1 (Subunit 1A and part of Subunit 1B) and are not proposing to exclude these lands under section 4(b)(2) of the Act.

We also evaluated the USFS land management plan for the Cleveland National Forest and other relevant documents (i.e., USFS species management guide for *Berberis nevinii* and relevant MOUs) for potential exclusion under section 4(b)(2) of the Act. The USFS and Rancho Santa Ana Botanic Garden (Claremont, California) developed a species management guide for *B. nevinii* for the Angeles National Forest (Guide) (Mistretta and Brown 1989). The Guide provides management direction to the USFS for protecting the species while minimizing conflicts with other resource values and recommends specific actions, such as developing and implementing site-specific monitoring plans and surveying potential habitat for additional occurrences of *B. nevinii* (Mistretta and Brown 1989). However, this management guide was written for the Angeles National Forest, and thus does not provide specific guidance or recommendations for the *B. nevinii* occurrence on the Cleveland National Forest, which is included in this proposed critical habitat designation (Subunit 1B). On the other hand, a monitoring program was initiated in 1991 on the Angeles National Forest (Soza and Boyd 2000, p. 1), and the Angeles National Forest continues to utilize recommendations in the Guide when planning projects and managing ongoing activities (USFS 2005, p. 232).

In 1997, a Memorandum of Understanding (MOU) was signed

between the Service, USFS Cleveland National Forest, and CDFG for a Conservation Strategy for Coastal Sage Scrub and Interdigitated Habitats (Strategy) (USDA, USDI, CDFG 1997). These agencies agreed to work cooperatively to protect and preserve coastal sage scrub and interdigitated sensitive habitats and their associated species on the Cleveland National Forest and contiguous lands. Specific actions under the Strategy included, but were not limited to: developing standards and guidelines which provide management that compliments surrounding habitat preserves; establishing landscape-scale fire management objectives to guide fire and vegetation management activities; and conferring with the Service and CDFG regarding land exchange and acquisition proposals (USDA, USDI, CDFG 1997, pp. 4–5). *Berberis nevinii* is recognized as a species associated with coastal sage scrub and chaparral communities in the geographic area covered by this MOU. However, the MOU does not make any decisions regarding site-specific project proposals that may be implemented by any of the signatories to the MOU, nor does it compel managers to implement any specific activity.

The USFS recently completed Revised Land and Resource Management Plans for the Cleveland, Angeles, and two other National Forests in southern California (Forest Plans) (USDA 2005). The goal of the Forest Plans is to describe a strategic direction for the management of the National Forests over the next 10 to 15 years. The Forest Plans also divide the National Forests into several "Land Use Zones." The Land Use Zones were designed to describe the type of public use or administrative activities allowable in certain areas. The Land Use Zone where *Berberis nevinii* occurs on the Cleveland National Forest is classified as Developed Area Interface, which typically has a higher level of human use and infrastructure than that found in other Land Use Zones. As such, the USFS considers this *B. nevinii* occurrence to be less protected than the San Francisquito Canyon occurrence on the Angeles National Forest (USFS 2005, p. 238). No new permanent loss of *B. nevinii* occupied habitat is expected under the Forest Plans with the potential exception of areas within the WUI Defense Zone, which overlaps about 40 percent of occupied *B. nevinii* habitat in the Cleveland National Forest (USFS 2005, p. 237; Service 2005, p. 128). Thus, fire and fuels management within or near the WUI defense zones

could directly and indirectly affect *B. nevinii* and its PCEs.

Overall, the Forest Plans provides general guidance on management of lands within the Cleveland National Forest. However, like the MOU mentioned previously, it does not make any decisions regarding USFS site-specific project proposals for implementation of the land resource management plan, nor does it compel managers to implement any specific activity. Thus, we have not identified any benefits of exclusion for USFS lands within Subunit 1B and are not proposing to exclude these lands under section 4(b)(2) of the Act.

We also evaluated the existing BLM land management plan that covers BLM parcels on Big Oak Mountain (Subunit 1A). Direction for management of these parcels is provided in the South Coast Resource Management Plan (RMP) for the California Desert District, Palm Springs South Coast Resource Area (BLM 1994). The goal of the RMP is to guide future management of approximately 296,000 acres of BLM-administered public lands within the South Coast Resource Area of southern California over the next 15 years (BLM 1994, pp. 1, 8). The RMP addresses five planning issues, one of which is related to threatened, endangered, and other sensitive species. The geographic area covered by this RMP is divided into four Management Areas, with Oak Mountain falling within the Riverside San Bernardino County Management Area. The RMP directs management of the Oak Mountain parcels for sensitive plant and wildlife species by acquiring and consolidating sensitive plant habitat. These parcels (totaling 888 acres) are closed to motorized vehicles and livestock grazing (BLM 1994, p. 28).

While the RMP provides overall direction to the BLM for managing sensitive species and their habitat on BLM-administered land in the Oak Mountain area, it does not make any decisions regarding BLM site-specific project proposals for implementation of the land management plan, nor does it compel managers to implement any specific activity. Overall, the RMP provides general guidance that can either benefit or remain neutral to sensitive species. Additionally, the biological opinions that the Service issued on August 31, 1992, and November 22, 1993, for the preferred alternative of the South Coast RMP did not take into account effects to *Berberis nevinii*, which had not been federally listed yet. Thus, we have not identified any benefits of exclusion for BLM lands within Subunit 1A and are not

proposing to exclude these lands under section 4(b)(2) of the Act.

General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process

The most direct, and potentially largest, regulatory benefit of critical habitat is that federally authorized, funded, or carried out activities require consultation pursuant to section 7(a)(2) of the Act to ensure that they are not likely to destroy or adversely modify critical habitat. There are two limitations to this regulatory effect. First, it only applies where there is a Federal nexus—if there is no Federal nexus, designation itself does not restrict actions that destroy or adversely modify critical habitat. Second, it only limits destruction or adverse modification. By its nature, the prohibition on adverse modification is designed to ensure those areas that contain the physical and biological features essential to the conservation of the species or unoccupied areas that are essential to the conservation of the species are not eroded. Critical habitat designation alone, however, does not require specific steps toward recovery.

Once consultation under section 7(a)(2) of the Act is triggered, the process may conclude informally when the Service concurs in writing that the proposed Federal action is not likely to adversely affect the listed species or its critical habitat. However, if the Service determines through informal consultation that adverse impacts are likely to occur, then formal consultation would be initiated. Formal consultation concludes with a biological opinion issued by the Service on whether the proposed Federal action is likely to jeopardize the continued existence of a listed species or result in destruction or adverse modification of critical habitat, with separate analyses being made under both the jeopardy and the adverse modification standards. For critical habitat, a biological opinion that concludes in a determination of no destruction or adverse modification may contain discretionary conservation recommendations to minimize adverse effects to primary constituent elements, but it would not contain any mandatory reasonable and prudent measures or terms and conditions. Mandatory measures and terms and conditions to implement such measures are only specified when the proposed action would result in the incidental take of a listed animal species. Reasonable and prudent alternatives to the proposed Federal action would only be suggested when the biological opinion results in a

jeopardy or adverse modification conclusion.

We also note that for 30 years prior to the Ninth Circuit Court's decision in *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir 2004) (hereinafter *Gifford Pinchot*), the Service conflated the jeopardy standard with the standard for destruction or adverse modification of critical habitat when evaluating federal actions that affect currently-occupied critical habitat. The Court ruled that the two standards are distinct and that adverse modification evaluations require consideration of impacts on the recovery of species. Thus, under the *Gifford Pinchot* decision, critical habitat designations may provide greater benefits to the recovery of a species. However, we believe the conservation achieved through implementing habitat conservation plans (HCPs) or other habitat management plans is typically greater than would be achieved through multiple site-by-site, project-by-project, section 7(a)(2) consultations involving consideration of critical habitat. Management plans commit resources to implement long-term management and protection to particular habitat for at least one and possibly other listed or sensitive species. Section 7(a)(2) consultations only commit Federal agencies to prevent adverse modification to critical habitat caused by the particular project, and they are not committed to provide conservation or long-term benefits to areas not affected by the proposed project. Thus, any HCP or management plan which considers enhancement or recovery as the management standard will often provide as much or more benefit than a consultation for critical habitat designation conducted under the standards required by the Ninth Circuit in the *Gifford Pinchot* decision.

The information provided in this section applies to all the discussions below that discuss the benefits of inclusion and exclusion of critical habitat in that it provides the framework for the consultation process.

Educational Benefits of Critical Habitat

A benefit of including lands in critical habitat is that the designation of critical habitat serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by clearly delineating areas of high conservation value for *Berberis nevadensis*. In general the educational benefit of a critical habitat designation always exists, although in some cases it may be redundant with

other educational effects. For example, HCPs have significant public input and may largely duplicate the educational benefit of a critical habitat designation. This benefit is closely related to a second, more indirect benefit: that designation of critical habitat would inform State agencies and local governments about areas that could be conserved under State laws or local ordinances.

However, we believe that there would be little additional informational benefit gained from the designation of critical habitat for the exclusions we are proposing in this rule because these areas are included in this proposed rule as having habitat containing the features essential to the conservation of the species. Consequently, we believe that the informational benefits are already provided. Additionally, the purpose normally served by the designation, that of informing State agencies and local governments about areas that would benefit from protection and enhancement of habitat for *Berberis nevadensis*, is already well established among State and local governments and Federal agencies in those areas that we proposing to exclude from critical habitat in this rule on the basis of other existing habitat management protections.

The information provided in this section applies to all the discussions below that discuss the benefits of inclusion and exclusion of critical habitat.

Benefits of Excluding Lands With HCPs or Other Approved Management Plans From Critical Habitat

The benefits of excluding lands with HCPs or other approved management plans from critical habitat designation include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed by a critical habitat designation. Most HCPs and other conservation plans take many years to develop, and upon completion are consistent with the recovery objectives for listed species that are covered within the plan area. Many conservation plans also provide conservation benefits to unlisted sensitive species. Imposing an additional regulatory review as a result of the designation of critical habitat may undermine these conservation efforts and partnerships designed to proactively protect species to ensure that listing under the Act will not be necessary. Designation of critical habitat within the boundaries of management plans that provide conservation measures for a species could be viewed as a disincentive to those entities

currently developing these plans or contemplating them in the future, because one of the incentives for undertaking conservation is greater ease of permitting where listed species are affected. Addition of a new regulatory requirement would remove a significant incentive for undertaking the time and expense of management planning. In fact, designating critical habitat in areas covered by a pending HCP or conservation plan could result in the loss of some conservation benefits to the species if participants abandon the planning process, in part because of the strength of the perceived additional regulatory compliance that such designation would entail. The time and cost of regulatory compliance for a critical habitat designation do not have to be quantified for them to be perceived as additional Federal regulatory burden sufficient to discourage continued participation in plans targeting listed species' conservation.

A related benefit of excluding lands within management plans from critical habitat designation is the unhindered, continued ability to seek new partnerships with future plan participants including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. If lands within approved management plan areas are designated as critical habitat, it would likely have a negative effect on our ability to establish new partnerships to develop these plans, particularly plans that address landscape-level conservation of species and habitats. By preemptively excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

Furthermore, an HCP or NCCP/HCP application must itself be consulted upon, even without the critical habitat designation. Such a consultation would review the effects of all activities covered by the HCP that might adversely impact the species under a jeopardy standard, including possibly significant habitat modification (see definition of "harm" at 50 CFR 17.3). In addition, Federal actions not covered by the HCP in areas occupied by listed species would still require consultation under section 7(a)(2) of the Act and would be reviewed for possibly significant habitat modification in accordance with the definition of harm referenced above.

The information provided in this section applies to all the discussions below that discuss the benefits of

inclusion and exclusion of critical habitat.

Relationship of Critical Habitat to Approved Habitat Conservation Plans (HCPs)—Exclusion Under Section 4(b)(2) of the Act

Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP)

We consider a current plan to provide adequate management or protection if it meets three criteria: (1) The plan is complete and provides the same or better level of protection from adverse modification or destruction than that provided through a consultation under section 7 of the Act; (2) there is a reasonable expectation that the conservation management strategies and actions will be implemented based on past practices, written guidance, or regulations; and (3) the plan provides conservation strategies and measures consistent with currently accepted principles of conservation biology. We believe that the Western Riverside County MSHCP fulfills these criteria, and we are considering the exclusion of non-federal lands covered by this plan that provide for the conservation of *Berberis nevinii*.

The Western Riverside County MSHCP is a large-scale, multi-jurisdictional habitat conservation plan (HCP) that addresses 146 listed and unlisted "Covered Species," including *Berberis nevinii*, within the 1.26-million ac (510,000 ha) Plan Area in western Riverside County. Participants in the MSHCP include 14 cities in western Riverside County; the County of Riverside, including the Riverside County Flood Control and Water Conservation Agency, Riverside County Transportation Commission, Riverside County Parks and Open Space District, and Riverside County Waste Department; California Department of Parks and Recreation; and the California Department of Transportation (Caltrans). The MSHCP was designed to establish a multi-species conservation program that minimizes and mitigates the expected loss of habitat and the incidental take of Covered Species. On June 22, 2004, the Service issued a single incidental take permit under section 10(a)(1)(B) of the Act to 22 Permittees under the MSHCP for a period of 75 years. The Service granted the participating jurisdictions "take authorization" of listed species in exchange for their contribution to the assembly and management of the MSHCP Conservation Area.

The MSHCP will establish approximately 153,000 ac (61,916 ha) of

new conservation lands (Additional Reserve Lands) to complement the approximate 347,000 ac (140,426 ha) of existing natural and open space areas (e.g., State Parks, USFS, and County Park lands known as Public/Quasi-Public (PQP) Lands) in forming the MSHCP Conservation Area. The location and configuration of the 153,000 ac (61,916 ha) Additional Reserve Lands is not mapped or precisely identified in the MSHCP, but rather is based on textual descriptions and will be chosen from within a 310,000-ac (125,453 ha) Criteria Area that will be interpreted as implementation of the MSHCP proceeds. The defined Criteria Area is divided into cells of approximately 160 ac each, and each cell or group of cells has specific conservation criteria associated with it (MSHCP Section 3.2.3). For *Berberis nevinii*, critical habitat subunits 1A through 1F within the Agua Tibia/Vail Lake unit are located entirely within the MSHCP Plan Area and are comprised of USFS, BLM, and private lands.

The private lands within proposed critical habitat for *Berberis nevinii* are within the Criteria Area and are targeted for inclusion within the MSHCP Conservation Area as potential Additional Reserve Lands. Specific conservation objectives in the MSHCP for *Berberis nevinii* provide for conservation and management of at least 8,000 ac (3,238 ha) of suitable habitat (defined as chaparral and Riversidean alluvial fan sage scrub between 984 and 2,162 ft (300 and 659 m) in elevation) in the Vail Lake area and all known locations for *B. nevinii* in the Vail Lake area. The Soboba Badlands occurrence is also located within proposed Additional Reserve Lands. Additionally, the MSHCP requires surveys for *B. nevinii* as part of the project review process for public and private projects where suitable habitat is present within a defined boundary of the Criteria Area (see Criteria Area Species Survey Area Map, Figure 6–2 of the MSHCP, Volume I). For locations with positive survey results, 90 percent of those portions of the property that provide long-term conservation value for the species will be avoided until it is demonstrated that the conservation objectives for the species are met.

As discussed in the *Background* section of this rule, we were unable to accurately quantify the exact number of *Berberis nevinii* occurrences or plants within the MSHCP Plan Area. Nevertheless, all of these occurrences except those identified below are located within either existing PQP lands or proposed Additional Reserve Lands.

Two records near Temecula are outside of existing PQP Lands and the proposed Additional Reserve Lands and may be impacted; however, these occurrences are likely extirpated. Another occurrence in the Temecula area needs to be verified, but may also be impacted. The goal of the MSHCP is to conserve all known locations of *B. nevinii* in the Agua Tibia/Vail Lake area and the Soboba Badlands. Additionally, new occurrences that are found as a result of survey efforts and are subsequently determined to be important to the overall conservation of the species may be included in the Additional Reserve Lands. Although the specific location of individual target areas for this species has yet to be identified, we agree that conservation of known occurrences of this plant in the Agua Tibia/Vail Lake area (which includes Oak Mountain) through the survey requirements, avoidance and minimization measures, and management for *B. nevinii* (and its PCEs) provided for in the Western Riverside County MSHCP exceeds any conservation value provided as a result of regulatory protections that may be afforded through a critical habitat designation.

We propose to exclude approximately 385 ac (156 ha) of non-Federal lands from the final critical habitat designation for *Berberis nevinii* under section 4(b)(2) of the Act. These non-Federal lands fall within the MSHCP Plan Area and include: approximately 5 ac (2 ha) of private lands near the foothills of the Agua Tibia Mountains north of Cleveland National Forest (part of Subunit 1B); approximately 87 ac (35 ha) of private lands on the south flank of Big Oak Mountain (Subunit 1C); approximately 22 ac (9 ha) of private land directly north of Vail Lake (Subunit 1D); approximately 251 ac (102 ha) of private land to the south of Vail Lake and on the Vail Lake peninsula, which is the area with the largest known occurrence of *B. nevinii* (Subunit 1E); and approximately 20 ac (8 ha) of private land north of Temecula Creek and southeast of Vail Lake (Subunit 1F). All of these lands are also within the MSHCP's Conservation Area and the MSHCP's Survey Area and will receive conservation benefits under the Additional Survey Needs and Procedures policy.

The Federal lands within Subunit 1A (BLM-managed) and Subunit 1B (USFS managed) are considered PQP lands under the MSHCP and as such are included within the overall 500,000-ac (202,343 ha) MSHCP Conservation Area. However, as explained in detail above, we are not proposing to exclude BLM or USFS lands within subunits 1A and 1B.

Benefits of Inclusion

We believe there is minimal benefit from designating critical habitat for *Berberis nevinii* on private lands in Unit 1 (subunits 1B, 1C, 1D, 1E, and 1F) because the habitat essential for this species in the vicinity of Vail Lake and Oak Mountain in western Riverside County is targeted for conservation under the Western Riverside County MSHCP as explained above.

The primary benefit of including an area within a critical habitat designation is the protection provided by section 7(a)(2) of the Act which directs Federal agencies to ensure that their actions do not result in the destruction or adverse modification of critical habitat. The protections provided by section 7(a)(2) apply to actions on private lands whenever there is a Federal nexus, such as the use of Federal funds or the need for a Federal permit to conduct a project. The designation of critical habitat may provide a different level of protection under section 7(a)(2) for *Berberis nevinii* separate from the obligation of a Federal agency to ensure that their actions are not likely to jeopardize the continued existence of the endangered species. Under the *Gifford Pinchot* decision, critical habitat designations may provide greater benefits to the recovery of a species than was previously believed, but it is not possible to quantify this benefit at present. However, the protection provided is still a limitation on the adverse effects that occur as opposed to a requirement to provide a conservation benefit.

The inclusion of these 385 ac (156 ha) of private land in the proposed critical habitat designation for *Berberis nevinii* is unlikely to provide any additional Federal regulatory benefits for the species consistent with the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. Inclusion of this area in critical habitat would require Federal agencies to ensure that their actions on these lands are not likely to result in the destruction or adverse modification of critical habitat. The potential benefits resulting from this additional analysis to determine destruction or adverse modification of critical habitat are likely to be minimal to nonexistent because known locations of this plant in the vicinity of Vail Lake and Oak Mountain will be conserved through the survey requirements, avoidance and minimization measures, and management of *B. nevinii* (and its PCEs) provided for in the Western Riverside County MSHCP. Additionally, new occurrences documented through

survey efforts that are subsequently determined to be important to the overall conservation of the species may be included in the Additional Reserve Lands. We anticipate that these conservation measures will exceed any conservation value provided as a result of regulatory protections that may be afforded through a critical habitat designation.

Another potential benefit of critical habitat would be to signal the importance of these lands to Federal agencies, scientific organizations, State and local governments, and the public to encourage conservation efforts to benefit *Berberis nevinii* and its habitat. However, as discussed above, the importance of protecting the biological resource values of these lands, including *B. nevinii*, has already been clearly and effectively communicated to Federal, State, and local agencies and other interested organizations and members of the public through this proposed rule and the Western Riverside County MSHCP approval and implementation process.

In short, we expect the Western Riverside County MSHCP to provide enhanced protection and management of *Berberis nevinii* and its PCEs within areas considered essential for conservation of the species on private lands in the vicinity of Vail Lake and Oak Mountain. We expect the MSHCP to provide a greater level of conservation for *B. nevinii* on private lands in this area than would designation of critical habitat.

Benefits of Exclusion

In contrast to section 7(a)(2) of the Act, the Western Riverside County MSHCP commits the permittees to manage private lands in western Riverside County, California, for the benefit of *Berberis nevinii* and other covered species. These commitments go well beyond a simple requirement for Federal agencies to avoid adverse modification of critical habitat by including conservation and management of at least 8,000 ac (3,238 ha) of suitable *B. nevinii* habitat in the vicinity of Vail Lake and Oak Mountain, and all known locations of the species in this area. Excluding the 385 ac (156 ha) of private land in subunits 1B through 1F from critical habitat designation would recognize the permittees' commitment under the MSHCP to manage non-Federal lands in western Riverside County consistent with the conservation goals and objectives of the MSHCP. It would also provide additional incentive to the permittees to maintain and strengthen the partnerships created by their official

participation in the MSHCP planning process, especially considering the high level of cooperation by the participants in the MSHCP to conserve this taxon.

Benefits of Exclusion Outweigh the Benefits of Inclusion

We have reviewed and evaluated the proposed exclusion of approximately 385 ac (156 ha) of non-Federal lands within the MSHCP Plan Area from the final designation of critical habitat, and we have determined that the benefits of excluding the non-Federal lands in Unit 1 outweigh the benefits of including these lands. The PCEs required by *Berberis nevinii* will benefit from the conservation measures outlined in the MSHCP. In summary, these conservation measures include protecting and managing important habitat containing PCEs within the MSHCP Conservation Area, primarily through the protection of habitat from surface-disturbing activities; implementing specific management and monitoring practices to help ensure conservation of *B. nevinii* in the Plan Area; maintaining physiological and ecological characteristics of occupied habitat and suitable areas not known to be occupied (*e.g.*, managing flood control activities, nonnative species, and other activities so as to limit alterations to the natural hydrologic and fire regime); and conducting surveys and implementing other required procedures to ensure avoidance of impacts to at least 90 percent of suitable habitat areas determined important to the long-term conservation of *B. nevinii* within the Criteria Area. The specific areas identified as subunits 1C, 1D, 1E, and 1F, as well as the non-Federal lands identified within Subunit 1B, will be addressed under the MSHCP. These specific conservation actions, survey requirements, avoidance and minimization measures, and management of *B. nevinii* and its habitat/PCEs as outlined in the MSHCP exceed any conservation value provided as a result of regulatory protections that may be afforded through a critical habitat designation.

The exclusion of these lands from critical habitat would also help preserve the partnerships that we have developed with the local jurisdictions and project proponents in the development of the MSHCP. The benefits of excluding these lands from critical habitat would outweigh the minimal benefits of including these lands as critical habitat, including the educational benefits gained by informing the public of areas important for the long-term conservation of this species. Such educational benefits can still be

accomplished from materials provided on our Web site. Furthermore, many of the educational benefits of critical habitat designation would be achieved through the overall designation, notice, and public comment process, and would occur whether or not these particular subunits are designated.

Exclusion Would Not Result in Extinction of the Species

We do not believe that the exclusion of 385 ac (156 ha) from the final designation of critical habitat for *Berberis nevinii* would result in the extinction of the species because the Western Riverside County MSHCP provides for the conservation of this species and its PCEs on occupied areas in the Agua Tibia/Vail Lake area (including Oak Mountain), as well as areas discovered to be occupied by *B. nevinii* during surveys of suitable habitat within a defined boundary of the Criteria Area. Importantly, as we stated in our biological opinion for the MSHCP (Service 2004), while some loss of modeled habitat for *B. nevinii* is anticipated due to implementation of the MSHCP, implementation of the plan will not jeopardize the continued existence of this species.

The jeopardy standard of section 7 and routine implementation of conservation measures through the section 7 process will also provide assurances that the species will not go extinct. The proposed exclusion of critical habitat leaves these protections unchanged from those that would exist if the proposed excluded areas were designated as critical habitat.

Economic Analysis

An analysis of the economic impacts of proposing critical habitat for *Berberis nevinii* is being prepared. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at <http://www.fws.gov/carlsbad>, or by contacting the Carlsbad Fish and Wildlife Office directly (see **ADDRESSES** section). Based on public comments, the proposed designation itself, and the information in the full economic analysis, additional areas beyond those identified in this assessment may be excluded from final critical habitat by the Secretary under the provisions of section 4(b)(2) of the Act. This is provided for in the Act and in our implementing regulations at 50 CFR 242.19.

Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will send to these peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed designation of critical habitat.

We will consider all comments and information received during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests for public hearings must be made in writing at least 15 days prior to the close of the public comment period. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings in the **Federal Register** and local newspapers at least 15 days prior to the first hearing.

Clarity of the Rule

Executive Order 12866 (Regulatory Planning and Review) requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical jargon that interferes with the clarity? (3) Does the format of the proposed rule (grouping and order of the sections, use of headings, paragraphing, and so forth) aid or reduce its clarity? (4) Is the description of the notice in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule? (5) What else could we do to make this proposed rule easier to understand?

Send a copy of any comments on how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW.,

Washington, DC 20240. You may e-mail your comments to this address: Exsec@ios.doi.gov.

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but it is not anticipated to have an annual effect on the economy of \$100 million or more or affect the economy in a material way. Due to the tight timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule. We are preparing a draft economic analysis of this proposed action, which will be available for public comment, to determine the economic consequences of designating the specific area as critical habitat. This economic analysis also will be used to determine compliance with Executive Order 12866, Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, Executive Order 12630, Executive Order 13211, and Executive Order 12875.

Further, Executive Order 12866 directs Federal Agencies promulgating regulations to evaluate regulatory alternatives (Office of Management and Budget, Circular A-4, September 17, 2003). Pursuant to Circular A-4, once it has been determined that the Federal regulatory action is appropriate, then the agency will need to consider alternative regulatory approaches. Since the determination of critical habitat is a statutory requirement pursuant to the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), we must then evaluate alternative regulatory approaches, where feasible, when promulgating a designation of critical habitat.

In developing our designations of critical habitat, we consider economic impacts, impacts to national security, and other relevant impacts under section 4(b)(2) of the Act. Based on the discretion allowable under this provision, we may exclude any particular area from the designation of critical habitat providing that the benefits of such exclusion outweigh the benefits of specifying the area as critical habitat and that such exclusion would not result in the extinction of the subspecies. As such, we believe that the evaluation of the inclusion or exclusion of particular areas, or combination thereof, in a designation constitutes our regulatory alternative analysis.

Within these areas, the types of Federal actions or authorized activities

that we have identified as potential concerns are listed above in the section on Section 7 Consultation. The availability of the draft economic analysis will be announced in the **Federal Register** and in local newspapers so that it is available for public review and comments. The draft economic analysis can be obtained from our Web site at <http://www.fws.gov/carlsbad>, or by contacting the Carlsbad Fish and Wildlife Office directly (see **ADDRESSES** section).

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

At this time, the Service lacks the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, the RFA finding is deferred until completion of the draft economic analysis prepared under section 4(b)(2) of the Act and E.O. 12866. This draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, the Service will publish a notice of availability of the draft economic analysis of the proposed designation and reopen the public comment period for the proposed designation for an additional 60 days. The Service will include with the notice of availability, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination. The Service has concluded that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the

RFA. Deferring the RFA finding in this manner will ensure that the Service makes a sufficiently informed determination based on adequate economic information and provides the necessary opportunity for public comment.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211; Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Although this proposed rule to designate critical habitat for *Berberis nevadensis* is a significant regulatory action under Executive Order 12866, it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)-(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or Tribal governments" with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or Tribal governments "lack authority" to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services

Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) A condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) We do not believe that this rule would significantly affect small governments. The lands being proposed for final critical habitat designation are owned by the Federal Bureau of Land Management and the U.S. Forest Service. Neither of these government entities fit the definition of "small governmental jurisdiction." As such, a Small Government Agency Plan is not required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

Takings

In accordance with Executive Order 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of designating critical habitat for the *Berberis nevinii* in a takings implications assessment. The takings implications assessment concludes that this proposed designation of critical habitat for the *B. nevinii* would not pose significant takings implications. However, we will further evaluate this issue as we

conduct our economic analysis and review and revise this assessment as warranted.

Federalism

In accordance with Executive Order 13132 (Federalism), the rule would not have significant Federalism effects. A Federalism assessment is not required. In keeping with DOI and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in California. The designation of critical habitat in areas currently occupied by *Berberis nevinii* would impose no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation would likely have some benefit to these governments in that the areas that contain the features essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of *Berberis nevinii*.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

It is our position that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We have determined that there are no tribal lands occupied at the time of listing that contain the features essential for the conservation of *Berberis nevinii*, and no Tribal lands that are unoccupied areas that are essential for the conservation of *B. nevinii*. Therefore, the designation of critical habitat for *B. nevinii* has not been proposed on Tribal lands.

References Cited

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

Authors

The primary authors of this package are the Nevada Fish and Wildlife Office, Reno, Nevada, and the Carlsbad Fish and Wildlife Office, Carlsbad, California.

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.12(h), revise the entry for “*Berberis nevinii*” under “FLOWERING PLANTS” to read as follows:

§ 17.12 Endangered and threatened plants.
* * * * *
(h) * * *

Species		Historic range	Family	Status	When list- ed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*		*
<i>Berberis nevinii</i>	Nevin's barberry	U.S.A. (CA) ..	Berberidaceae	E	648	17.96(a)	NA.
*	*	*	*	*	*		*

3. Amend § 17.96(a) as follows:

a. Add “Family Berberidaceae” in alphabetical order of the family names; and

b. Add a critical habitat entry for “*Berberis nevinii*” under Family Berberidaceae to read as set forth below.

§ 17.96 Critical habitat—plants.

(a) Flowering Plants.

* * * * *

Family Berberidaceae: *Berberis nevinii* (Nevin's barberry)

(1) Critical habitat is depicted for Riverside County, California, in the text and on the maps below.

(2) The primary constituent elements (PCEs) of critical habitat for *Berberis nevinii* are:

(i) Low-gradient (*i.e.*, nearly flat) canyon floors, washes and adjacent terraces, and mountain ridges/summits, or eroded, generally northeast- to northwest-facing mountain slopes and banks of dry washes typically of less than 70 percent slope that provide space for plant establishment and growth;

(ii) Well-drained alluvial soils primarily of non-marine sedimentary origin, such as Temecula or sandy arkose soils; soils of the Cajalco-Temescal-Las Posas soil association formed on gabbro (igneous) or latite (volcanic) bedrock; metasedimentary substrates associated with springs or seeps; and heavy adobe/gabbro-type soils derived from metavolcanic geology (Mesozoic basic intrusive rock) that provide the appropriate nutrients and space for growth and reproduction; and

(iii) Scrub (chaparral, coastal sage, alluvial, riparian) and woodland (oak, riparian) vegetation communities between 900 and 3,000 ft (275 and 915 m) in elevation that provide the appropriate cover for growth and reproduction.

(3) Critical habitat does not include man made structures (such as buildings, aqueducts, airports, roads, and other paved areas) existing on the effective date of this rule and not containing one

or more of the primary constituent elements.

(4) Data layers defining map units were created on a base of USGS 1:24,000 maps, and critical habitat units were then mapped using Universal Transverse Mercator (UTM) North American Datum (NAD) 1927 coordinates. We used aerial photographs as well as soils and vegetation data to help refine unit boundaries based on presence of PCEs.

(5) Unit 1. Agua Tibia/Vail Lake, Riverside County, California.

(i) Subunit 1A for *Berberis nevinii*, Big Oak Mountain Summit Subunit, Riverside County, California. From USGS 1:24,000 quadrangle Sage, lands bounded by the following UTM NAD27 coordinates (E, N): 502200, 3708400; 502400, 3708400; 502400, 3708100; 502200, 3708100; thence returning to 502200, 3708400.

(ii) Subunit 1B for *Berberis nevinii*, Agua Tibia Mountain Foothills Subunit, Riverside County, California. From USGS 1:24,000 quadrangle Vail Lake, lands bounded by the following UTM NAD27 coordinates (E, N): 504222, 3703100; 504400, 3703100; 504400, 3703000; 504500, 3703000; 504500, 3702700; 504300, 3702700; 504300, 3702900; 504200, 3702900; 504200, 3703086; thence returning to 504222, 3703100.

(iii) Subunit 1C for *Berberis nevinii*, South Flank Big Oak Mountain Subunit, Riverside County, California. From USGS 1:24,000 quadrangles Sage and Vail Lake, lands bounded by the following UTM NAD27 coordinates (E, N): 501900, 3707400; 502100, 3707400; 502100, 3707200; 502400, 3707200; 502400, 3707100; 502700, 3707100; 502700, 3706900; 502100, 3706900; 502100, 3706400; 501900, 3706400; thence returning to 501900, 3707400.

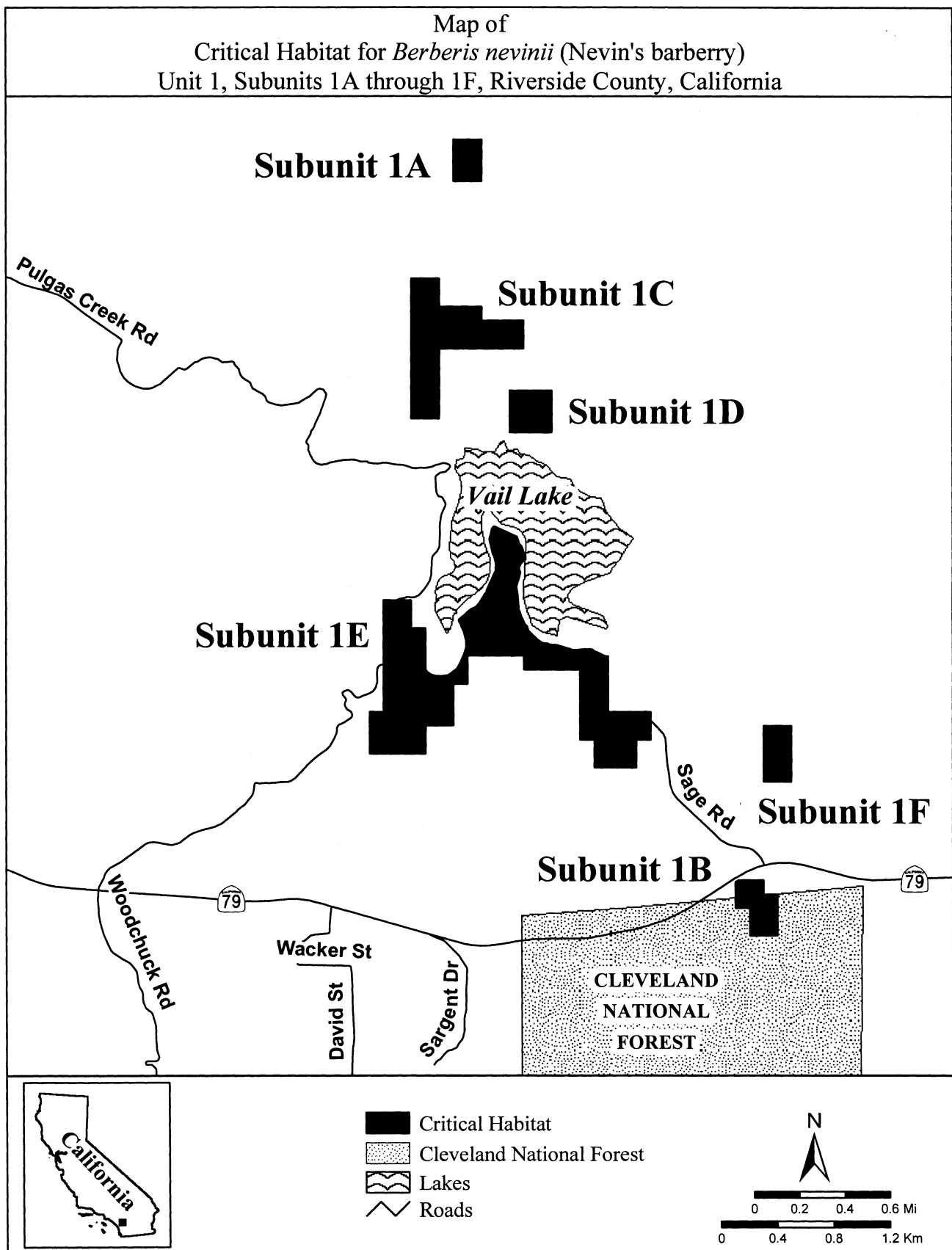
(iv) Subunit 1D for *Berberis nevinii*, North Vail Lake Subunit, Riverside County, California. From USGS 1:24,000 quadrangles Sage and Vail Lake, lands bounded by the following UTM NAD27 coordinates (E, N): 502600, 3706600; 502900, 3706600; 502900, 3706300; 502600, 3706300; thence returning to 502600, 3706600.

(v) Subunit 1E for *Berberis nevinii*, South of Vail Lake/Peninsula Subunit, Riverside County, California. From USGS 1:24,000 quadrangle Vail Lake, lands bounded by the following UTM NAD27 coordinates (E, N): 502473, 3705611; 502487, 3705628; 502494,

3705628; 502641, 3705560; 502648, 3705557; 502653, 3705552; 502659, 3705538; 502665, 3705518; 502667, 3705506; 502676, 3705495; 502684, 3705486; 502693, 3705468; 502695, 3705461; 502693, 3705456; 502700, 3705444; 502707, 3705436; 502712, 3705428; 502712, 3705419; 502708, 3705408; 502705, 3705396; 502698, 3705384; 502689, 3705376; 502676, 3705356; 502669, 3705334; 502674, 3705311; 502677, 3705301; 502672, 3705285; 502669, 3705266; 502659, 3705234; 502649, 3705196; 502652, 3705152; 502658, 3705122; 502661, 3705080; 502665, 3705034; 502674, 3705014; 502685, 3704979; 502705, 3704936; 502708, 3704929; 502724, 3704909; 502725, 3704908; 502736, 3704876; 502793, 3704820; 502828, 3704794; 502859, 3704788; 502865, 3704791; 502879, 3704784; 502907, 3704779; 502941, 3704777; 503019, 3704751; 503051, 3704744; 503079, 3704742; 503108, 3704745; 503134, 3704748; 503151, 3704748; 503164, 3704748; 503174, 3704748; 503187, 3704746; 503198, 3704737; 503207, 3704732; 503215, 3704728; 503281, 3704698; 503289, 3704697; 503300, 3704696; 503300, 3704300; 503600, 3704100; 503500, 3704100; 503500, 3703900; 503200, 3703900; 503200, 3704100; 503100, 3704100; 503100, 3704600; 502700, 3704600; 502700, 3704700; 502300, 3704500; 502200, 3704500; 502200, 3704200; 502000, 3704200; 502000, 3704000; 501600, 3704000; 501600, 3704300; 501700, 3704300; 501700, 3705100; 501900, 3705100; 501900, 3704900; 502000, 3704900; 502000, 3704600; 502009, 3704588; 502038, 3704568; 502064, 3704558; 502111, 3704555; 502159, 3704562; 502191, 3704583; 502222, 3704611; 502247, 3704656; 502274, 3704719; 502287, 3704762; 502287, 3704806; 502271, 3704875; 502242, 3704940; 502237, 3704948; 502237, 3704961; 502272, 3704992; 502296, 3705015; 502330, 3705040; 502358, 3705052; 502382, 3705079; 502404, 3705116; 502423, 3705150; 502434, 3705160; 502436, 3705171; 502487, 3705293; 502496, 3705308; 502500, 3705322; 502497, 3705332; 502501, 3705348; 502497, 3705372; 502487, 3705414; 502481, 3705428; 502475, 3705447; 502456, 3705535; thence returning to 502473, 3705611.

(vi) Subunit 1F for *Berberis nevinii*, Temecula Creek East Subunit, Riverside County, California. From USGS 1:24,000 quadrangle Vail Lake, lands bounded by the following UTM NAD27 coordinates (E, N): 504400, 3704200; 504600, 3704200; 504600, 3703800; 504400, 3703800; thence returning to 504400, 3704200.

(vii) Map of Subunits 1A through 1F (Map 1) follows.



* * * * *

Dated: January 30, 2007.

David M. Verhey,

*Acting Assistant Secretary for Fish and
Wildlife and Parks.*

[FR Doc. 07-472 Filed 2-5-07; 8:45 am]

BILLING CODE 4310-55-C



Federal Register

**Tuesday,
February 6, 2007**

Part IV

Department of Housing and Urban Development

**America's Affordable Communities
Initiative; HUD's Initiative on Removal of
Regulatory Barriers: Incentive Criteria on
Barrier Removal in HUD's Competitive
Funding Allocations; Solicitation of
Comments on Effectiveness of Criteria;
Notice**

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**[Docket No. FR-4882-N-04]****America's Affordable Communities Initiative; HUD's Initiative on Removal of Regulatory Barriers: Incentive Criteria on Barrier Removal in HUD's Competitive Funding Allocations; Solicitation of Comments on Effectiveness of Criteria****AGENCY:** Office of the General Counsel, HUD.**ACTION:** Notice.

SUMMARY: In this notice, HUD solicits comment on the effectiveness of increasing efforts to reduce regulatory barriers to affordable housing by establishing, in HUD's competitive funding allocations, a policy priority for increasing the supply of affordable housing through the removal of regulatory barriers. A description of this policy priority, along with the Department's other policy priorities for competitive funding allocations, can be found each year in the Department's annual publication of its General Section to HUD's Super Notice of Funding Availability (SuperNOFA). Policy priorities provide applicants with the opportunity to obtain higher rating points if the applicants can demonstrate they are undertaking activities that promote the policy priorities.

The publication of the General Section of HUD's FY2007 SuperNOFA on January 18, 2007, marks the fourth year that HUD has included the removal of regulatory barriers as part of its policy priorities. In 2007, HUD is implementing the renewal process, as required by the Paperwork Reduction Act, for the questionnaire that must be completed to obtain the higher rating points for the regulatory barriers policy priority (if an applicant chooses to seek points for this priority). As part of this renewal process, HUD is seeking additional input on the effectiveness of the questionnaire in contributing to or promoting efforts to reduce regulatory barriers, and whether HUD should either (1) continue to implement this incentive criteria through the questionnaire or (2) consider any alternative and more effective means of providing incentive criteria for higher rating points in HUD NOFAs for removal of regulatory barriers. HUD will take this input into consideration in the development of HUD's FY2008 SuperNOFA.

DATES: *Comment Due Date:* March 23, 2007.

ADDRESSES: Interested persons are invited to submit comments regarding this notice to the Office of the General Counsel, Rules Docket Clerk, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410-0001. Communications should refer to the above docket number and title.

Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at www.regulations.gov. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the www.regulations.gov Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable. In all cases, communications must refer to the docket number and title.

Public Inspection of Public Comments. All comments and communications submitted to HUD will be available, without charge, for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at (202) 708-3055 (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339. Copies of all comments submitted are available for inspection and downloading at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Camille E. Acevedo, Associate General Counsel for Legislation and Regulations, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10282, Washington, DC 20410-0500, telephone (202) 708-1793 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

On November 25, 2003, HUD announced through a **Federal Register** notice (68 FR 66294) a proposal to provide an incentive to applicants for HUD funds distributed competitively to engage in efforts to remove regulatory barriers in their jurisdictions. HUD proposed that such incentive criteria would commence with HUD's FY2004 competitive funding process, and the policy priority for increasing the supply of affordable housing through the removal of regulatory barriers (referred to, for brevity purposes, as the "Removal of Regulatory Barriers" policy priority) would be added to HUD's list of already established policy priorities. As a policy priority in HUD's NOFAs (and like other policy priorities in HUD NOFAs), higher rating points are made available to applicants.

For the Removal of Regulatory Barriers policy priority higher rating points would be made available to (1) governmental applicants that are able to demonstrate successful efforts in removing regulatory barriers to affordable housing, and (2) nongovernmental applicants that are associated with jurisdictions that have undertaken successful efforts in removing barriers. The proposal advised that for the higher rating points to be obtained, applicants had to respond to a series of evaluative questions that HUD determined were significantly important and have broad-based applicability to measure state, local, and tribal government efforts at regulatory reform and which serve as good "markers" for effective regulatory reform.

HUD solicited public comment from prospective applicants of HUD funding as well as other interested members of the public. HUD received 37 public comments in response to the November 2003 notice. The majority of the commenters supported the proposal. By **Federal Register** notice published on March 22, 2004 (69 FR 13450), HUD announced that it would proceed to establish the Removal of Regulatory Barriers policy priority in the majority of its FY2004 NOFAs. In announcing this final determination, HUD also advised that it took into consideration the public comments received on the November 2003 notice and made several changes to the questionnaire. The questionnaire was subject to one technical correction, which HUD advised the public by **Federal Register** notice published on April 21, 2004 (69 FR 21664).

The Removal of Regulatory Barriers policy priority was part of HUD's

FY2004 SuperNOFA published on May 14, 2004 (69 FR 26942), and has continued to be included as a policy priority in each year's SuperNOFA since that date. A description of the Removal of Regulatory Barriers policy priority can be found in the General Section to HUD's FY2007 SuperNOFA published on January 18, 2007 (72 FR 2396).

As noted in the "Summary" introduction to this notice, HUD is in the process of renewing, under the Paperwork Reduction Act (PRA), the Office of Management and Budget approval number for the Regulatory Barriers questionnaire that is used to implement the policy priority. This renewal process requires the publication of two **Federal Register** notices and the solicitation of public comments. The first PRA notice solicits public comments for a period of 60 days and the second PRA notice solicits public comments for a period of 30 days.

The "60-day" notice was published in the **Federal Register** on October 12, 2006 (71 FR 60161), and no comments

were received in response to this notice. The "30-day" notice published on January 29, 2007 (72 FR 4015).

Through this notice, HUD seeks comments, apart from the comments solicited by the PRA notices, on the effectiveness of the questionnaire in obtaining information about successful efforts from applicants to remove regulatory barriers in their jurisdictions or to be associated with jurisdictions, which have undertaken successful efforts to remove regulatory barriers. The removal of regulatory barriers remains a high policy priority of HUD. In awarding applicants higher points for undertaking activities related to this policy priority, HUD seeks to ensure that the information requested through the questionnaire is reasonable and meaningful, and the award of higher points is fair. Since the policy priority has now been in effect for a period of four years, which includes the FY2007 SuperNOFA, HUD determined that the passage of this period of time may offer

sufficient information and experience to assess the effectiveness of the questionnaire. Therefore, HUD solicits input from all applicants eligible for HUD competitive funding allocations.

All comments received in response to this solicitation will be taken into consideration as HUD undertakes the development of the FY2008 SuperNOFA. Should a more favorable alternative or proposal be suggested by the commenters, HUD will notify applicants and solicit public comments on any new proposal regarding the Removal of Regulatory Barriers policy priority.

HUD also encourages interested members of the public to respond to the "30-day" PRA notice that was published on January 29, 2007.

Dated: January 31, 2007.

A. Bryant Applegate,

Senior Counsel and Director of America's Affordable Communities Initiative.

[FR Doc. E7-1904 Filed 2-5-07; 8:45 am]

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Federal Register

**Tuesday,
February 6, 2007**

Part V

**Department of
Housing and Urban
Development**

**24 CFR Parts 28, 30, 81, 180, 3282, and
3500**

**Inflation Adjustment of Civil Money
Penalty Amounts; Final Rule**

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 28, 30, 81, 180, 3282, and 3500

[Docket No. FR-5104-F-01]

RIN 2501-AD30

Inflation Adjustment of Civil Money Penalty Amounts

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: This final rule revises HUD's civil money penalty regulations to make inflation adjustments to the civil money penalties imposed by HUD, as required by statute. The applicable statute mandates the adjustments and the formula used to calculate them. HUD also takes this opportunity to delete duplicative language in its regulation for hearing procedures in civil rights matters.

DATES: *Effective Date:* March 8, 2007.

FOR FURTHER INFORMATION CONTACT:

Dane Narode, Deputy Chief Counsel for Administrative Proceedings, Departmental Enforcement Center, Department of Housing and Urban Development, 1250 Maryland Avenue, SW., Suite 200, Washington, DC 20024; telephone (202) 708-2350 (this is not a toll-free number). For information regarding the correction to HUD's regulation for hearing procedures in civil rights matters, contact Joseph Pelletier, Deputy Assistant General Counsel for Fair Housing Enforcement, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10270, Washington, DC 20410; telephone (202) 708-0570 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. This Final Rule

A. Inflation Adjustment of Civil Money Penalty Amounts

The changes made by this rule increase the amount of civil money penalties, consistent with statutory authority.

The Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461) (FCPIA Act), as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. 3701), requires each federal agency to make inflation adjustments to its maximum civil money penalties. This rule raises the maximum penalties

that HUD may impose upon violators with respect to several HUD regulations found in 24 CFR parts 28, 30, 81, 180, 3282, and 3500. For civil money penalties found in some HUD regulations (e.g., 24 CFR 30.55, 30.68, 3282.10, and 3500.17(m)(2)), no amendment is necessary because application of the statute's formula results in no increase to the penalty. The FCPIA Act provides for a "rounding-off," using multiples from \$10 to \$25,000, of the increase calculated based on the change in the Consumer Price Index (CPI). (See 28 U.S.C. 2461(5)(a).) Consequently, in those instances in which the increased dollar amount is determined to be less than the applicable multiple, the existing penalty is unchanged. The following regulations are revised by this rule.

In § 28.10, the maximum penalties for making a false claim or written statement, as described in the regulation, are increased from \$6,500 to \$7,500.

In § 30.20(b), the maximum penalty that HUD may impose upon its employees who improperly disclose funding decisions is increased from \$11,000 to \$16,000.

In § 30.25(b), the maximum penalty that HUD may impose upon applicants for assistance who fail to disclose required information is increased from \$11,000 to \$16,000.

In § 30.35(c)(1), the maximum penalties that the Mortgage Review Board may impose for a series of violations identified in the regulations are increased from \$6,500 to \$7,500 per violation, and from \$1.25 million to \$1.375 million for all violations committed during any one-year period.

In § 30.36(c), the maximum penalty that HUD may impose upon other participants in Federal Housing Administration programs for violations identified in the regulation is increased from \$5,500 to \$6,050, and from \$1.1 million to a maximum of \$1.21 million for all violations committed during any one-year period.

In § 30.40, the maximum penalty that HUD may impose upon a mortgagee or a holder of a guarantee certificate who violates the statutory provisions concerning loan guarantees for Indian housing is increased from \$6,000 to \$7,000 per violation, and from \$1.25 million to a maximum of \$1.375 million for all violations committed during any one-year period.

In § 30.45(g), the maximum penalty that may be imposed upon a mortgagee of a multifamily property or on any person in a relationship with the mortgagee, as described in the

regulations at paragraph (c) of § 30.45, is increased to \$37,500 per violation. In addition, paragraph (g) is corrected to provide expressly for imposition of the same maximum penalty per violation of paragraph (f), which relates to section 202 and section 811 projects.

In § 30.50(c), the maximum penalty that may be imposed against a Government National Mortgage Association issuer or custodian for a violation of any provision of 12 U.S.C. 1723i(b) or other authorities cited in the regulations is increased from \$6,500 to \$7,500 per violation, and from \$1.25 million to \$1.375 million for all violations committed during any one-year period.

In § 30.55(c), the maximum penalty for each violation of any provision of the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 *et seq.*) remains unchanged at \$1,100, but the one-year maximum per person increases from \$1.25 million to \$1.375 million.

In § 30.60(c), the maximum penalty that HUD may impose upon any dealer or loan correspondent for, among other things, falsifying statements or making false representations in violation of section 2(b)(7) of the National Housing Act (12 U.S.C. 1703(b)(7)), is increased from \$6,500 to \$7,500 for each violation, and from \$1.25 million to a maximum of \$1.375 million during any one-year period.

In § 81.83(b)(1), the maximum penalty that HUD may impose upon a Government Sponsored Enterprise (GSE) is increased from \$30,000 to \$35,000 for each day the GSE fails to submit a timely housing plan.

In § 81.83(b)(2), the maximum penalty that HUD may impose upon a GSE that fails to submit information required by the Fannie Mae Charter Act (12 U.S.C. 1716-1723h) or Freddie Mac Act (12 U.S.C. 1451-59), or that fails to make a good faith effort to comply with its approved housing plan, is increased from \$11,000 to \$16,000 for each day the failure occurs.

In §§ 180.671(a) (1), (2), and (3), the maximum penalty that the Administrative Law Judge may impose upon a respondent who is found to have engaged in a discriminatory housing practice is increased from \$11,000 to \$16,000, from \$32,500 to \$37,500, and from \$60,000 to \$65,000.

In § 3282.10, the maximum penalty for each violation of the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401 *et seq.*) remains unchanged at \$1,100. The one-year maximum for any related series of violations occurring within one year from the date of the first

violation is increased from \$1.25 million to \$1.375 million.

In § 3500.17(m)(1), the penalty for a servicer's failure to submit to a borrower an initial or annual escrow account statement is increased from \$65 to \$75 for each such violation. The total of assessed penalties may not exceed \$130,000 (increased from the existing total of \$120,000) for violations not shown to be intentional that occur during any consecutive 12-month period. However, in § 3500.17(m)(2), the penalty for failure to submit an escrow statement when the servicer intentionally disregarded the requirement remains unchanged at \$110 for each violation.

B. Correction to 24 CFR 180.670

On December 18, 1997, HUD published a proposed rule (62 FR 66488) to amend its regulations governing hearing procedures for civil rights matters. The proposed rule provided for imposition of multiple penalties for multiple acts of discrimination. In addition, HUD intended the rule to make clarifying changes by moving paragraphs governing civil money penalties from the existing § 180.670 to a new § 180.671 and by updating the penalty paragraphs' text. HUD received and responded to public comments on the proposed rule and published an interim rule on February 10, 1999 (64 FR 6744). However, a typographical error in the amendatory language of the interim rule caused the penalty paragraphs to remain in § 180.670 while also establishing the updated paragraphs in the new § 180.671, creating the appearance of two distinct sets of penalties. After an additional round of public comment and HUD response, the interim rule was then adopted as final without change on December 28, 1999 (64 FR 72726). HUD takes this opportunity to correct this error by deleting the old paragraphs (b)(3)(iii) (A) through (C) in § 180.670, as intended in the interim and final rules. The corresponding paragraphs in § 180.671 remain unchanged.

II. Justification for Final Rulemaking

In general, HUD publishes a rule for public comment before issuing a rule for effect, in accordance with HUD's regulations on rulemaking at 24 CFR part 10. Part 10, however, provides in § 10.1 for exceptions from that general rule where HUD finds good cause to omit advance notice and public participation. The good cause requirement is satisfied when the prior public procedure is "impracticable, unnecessary or contrary to the public interest."

HUD finds that good cause exists to publish this rule for effect without soliciting public comment in that prior public procedure is unnecessary. The primary purpose of this final rule is merely to implement the statutory directive in the FCPIA Act to make periodic increases in HUD's civil money penalties by applying the adjustment formula established in the statute. Accordingly, because calculation of the increases is formula-driven, HUD has no discretion in updating the regulations to reflect the maximum allowable penalties derived from application of the formula. HUD emphasizes that this rule addresses only the matter of the calculation of the maximum civil money penalties for the respective violations described in the regulations. This rule does not address the issue of the Secretary's discretion to impose or not to impose a penalty, nor the procedures that HUD must follow in initiating a civil money penalty action.

The second purpose of this rule is to make corrections to § 180.670 by deleting paragraphs inadvertently left in it as a result of a typographical error in the 1999 interim rule. The preambles of the proposed and interim rules made clear that the intent was to update and move these paragraphs to § 180.671, thereby deleting the old paragraphs from § 180.670. The specific changes were detailed in both the proposed and interim rules, and HUD provided two opportunities for public comment on the changes before adopting the final rule. This rule merely implements those changes by correcting the typographical error that prevented deletion of the old paragraphs in § 180.670. Since HUD is merely correcting a typographical error, public comment is unnecessary.

III. Findings and Certifications

Impact on Small Entities

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This final rule does not establish special procedures that would need to be complied with by small entities. All entities, small or large, will be subject to the same penalties as established by statute and implemented by this rule. Accordingly, the undersigned certifies that this final rule would not have a significant economic impact on a substantial number of small entities.

Environmental Impact

This final rule involves a statutorily required rate or cost determination that does not constitute a development decision affecting the physical condition of specific project areas or building sites. Accordingly, under 24 CFR 50.19(c)(6), this final rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments nor preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This final rule does not impose any federal mandates on any state, local, or tribal governments or the private sector within the meaning of UMRA.

List of Subjects

24 CFR Part 28

Administrative practice and procedure, Claims, Fraud, Penalties.

24 CFR Part 30

Administrative practice and procedure, Grant programs—housing and community development, Loan programs—housing and community development, Mortgages, Penalties.

24 CFR Part 81

Accounting, Mortgages, Reporting and recordkeeping requirements, Securities.

24 CFR Part 180

Administrative practice and procedure, Aged, Civil Rights, Fair housing, Individuals with disabilities, Investigations, Mortgages, Penalties, Reporting and recordkeeping requirements.

24 CFR Part 3282

Administrative practice and procedure, Consumer protection, Intergovernmental relations, Investigations, Manufactured homes, Mortgages, Reporting and recordkeeping requirements.

24 CFR Part 3500

Consumer protection, Housing, Mortgages, Reporting and recordkeeping requirements.

■ Accordingly, for the reasons described in the preamble, HUD amends 24 CFR parts 28, 30, 81, 180, 3282, and 3500 to read as follows:

PART 28—IMPLEMENTATION OF THE PROGRAM FRAUD CIVIL REMEDIES ACT OF 1986

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

Authority: 28 U.S.C. 2461 note; 31 U.S.C. 3801; 42 U.S.C. 3535(d).

■ 2. Revise §§ 28.10 (a)(1) introductory text and (b)(1) introductory text to read as follows:

§ 28.10 Basis for civil penalties and assessments.

(a) *Claims.* (1) A civil penalty of not more than \$7,500 may be imposed upon a person who makes a claim that the person knows or has reason to know:

* * * * *

(b) *Statements.* (1) A civil penalty of up to \$7,500 may be imposed upon a person who makes a written statement that:

* * * * *

PART 30—CIVIL MONEY PENALTIES: CERTAIN PROHIBITED CONDUCT

■ 3. The authority citation for part 30 continues to read as follows:

Authority: 12 U.S.C. 1701q-1, 1703, 1723i, 1735f-14, 1735f-15; 15 U.S.C. 1717a; 28 U.S.C. 2461 note; 42 U.S.C. 1437z-1 and 3535(d).

■ 4. Revise § 30.20(b) to read as follows:

§ 30.20 Ethical violations by HUD employees.

* * * * *

(b) *Maximum Penalty.* The maximum penalty is \$16,000 for each violation.

■ 5. Revise § 30.25(b) to read as follows:

§ 30.25 Violations by applicants for assistance.

* * * * *

(b) *Maximum penalty.* The maximum penalty for each violation is \$16,000.

■ 6. Revise § 30.35(c)(1) to read as follows:

§ 30.35 Mortgagees and lenders.

* * * * *

(c) *Amount of penalty.*—(1) *Maximum penalty.* Except as provided in paragraph (c)(2) of this section, the maximum penalty is \$7,500 for each violation, up to a limit of \$1,375,000 for all violations committed during any one-year period. Each violation shall constitute a separate violation as to each mortgage or loan application.

* * * * *

■ 7. Revise § 30.36(c) to read as follows:

§ 30.36 Other participants in FHA programs.

* * * * *

(c) *Amount of penalty.* The maximum penalty is \$6,050 for each violation, up to a limit of \$1,210,000 for all violations committed during any one-year period. Each violation shall constitute a separate violation as to each mortgage or loan application.

■ 8. Revise § 30.40(c) to read as follows:

§ 30.40 Loan guarantees for Indian housing.

* * * * *

(c) *Amount of penalty.* The maximum penalty is \$7,000 for each violation, up to a limit of \$1,375,000 for all violations committed during any one-year period. Each violation shall constitute a separate violation as to each mortgage or loan application.

■ 9. Revise § 30.45(g) to read as follows:

§ 30.45 Multifamily and Section 202 or 811 mortgagors.

* * * * *

(g) *Maximum penalty.* The maximum penalty for each violation under paragraphs (c) and (f) of this section is \$37,500.

* * * * *

■ 10. Revise § 30.50(c) to read as follows:

§ 30.50 GNMA issuers and custodians.

* * * * *

(c) *Amount of penalty.* The maximum penalty is \$7,500 for each violation, up to a limit of \$1,375,000 during any one-year period. Each violation shall constitute a separate violation with respect to each pool of mortgages.

■ 11. Revise § 30.55(c) to read as follows:

§ 30.55 Interstate Land Sales violations.

* * * * *

(c) *Amount of penalty.* The maximum penalty is \$1,100 for each violation, up to a limit for any particular person of \$1,375,000 during any one-year period. Each violation shall constitute a separate violation as to each sale or lease or offer to sell or lease.

■ 12. Revise § 30.60(c) to read as follows:

§ 30.60 Dealers or loan correspondents.

* * * * *

(c) *Amount of penalty.* The maximum penalty is \$7,500 for each violation, up to a limit for any particular person of \$1,375,000 during any one-year period.

PART 81—THE SECRETARY OF HUD'S REGULATION OF THE FEDERAL NATIONAL MORTGAGE ASSOCIATION (FANNIE MAE) AND THE FEDERAL HOME LOAN MORTGAGE CORPORATION (FREDDIE MAC)

■ 13. The authority citation for part 81 continues to read as follows:

Authority: 12 U.S.C. 1451 *et seq.*, 1716-1723h, and 4501-4641; 28 U.S.C. 2461 note; 42 U.S.C. 3535(d) and 3601-3619.

■ 14. Revise §§ 81.83 (b)(1) and (b)(2) to read as follows:

§ 81.83 Civil money penalties.

* * * * *

(b) * * *

(1) For any failure described in paragraph (a)(1) of this section, \$35,000 for each day that the failure occurs; and

(2) For any failure described in paragraphs (a)(2) or (a)(3) of this section, \$16,000 for each day that the failure occurs.

* * * * *

PART 180—CONSOLIDATED HUD HEARING PROCEDURES FOR CIVIL RIGHTS MATTERS

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

Authority: 29 U.S.C. 794; 42 U.S.C. 2000d-1, 3535(d), 3601-3619, 5301-5320, and 6103.

■ 16. Revise § 180.670(b)(3)(iii) to read as follows:

§ 180.670 Initial Decision of ALJ.

* * * * *

(b) * * *

(3) * * *

(iii) Assessing a civil penalty against any respondent to vindicate the public interest in accordance with § 180.671.

* * * * *

■ 17. Revise §§ 180.671(a)(1), (2), and (3) to read as follows:

§ 180.671 Assessing civil penalties for Fair Housing Act cases.

(a) * * *

(1) \$16,000, if the respondent has not been adjudged in any administrative hearing or civil action permitted under the Fair Housing Act or any state or local fair housing law, or in any licensing or regulatory proceeding

conducted by a federal, state, or local governmental agency, to have committed any prior discriminatory housing practice.

(2) \$37,500, if the respondent has been adjudged in any administrative hearing or civil action permitted under the Fair Housing Act, or under any state or local fair housing law, or in any licensing or regulatory proceeding conducted by a federal, state, or local government agency, to have committed one other discriminatory housing practice and the adjudication was made during the five-year period preceding the date of filing of the charge.

(3) \$65,000, if the respondent has been adjudged in any administrative hearings or civil actions permitted under the Fair Housing Act, or under any state or local fair housing law, or in any licensing or regulatory proceeding conducted by a federal, state, or local government agency, to have committed two or more discriminatory housing practices and the adjudications were made during the seven-year period preceding the date of filing of the charge.

* * * * *

PART 3282—MANUFACTURED HOME PROCEDURAL AND ENFORCEMENT REGULATIONS

■ 18. The authority citation for part 3282 continues to read as follows:

Authority: 28 U.S.C. 2461 note; 42 U.S.C. 5424; and 42 U.S.C. 3535(d).

■ 19. Revise § 3282.10 to read as follows:

§ 3282.10 Civil and criminal penalties.

Failure to comply with these regulations may subject the party in question to the civil and criminal penalties provided for in section 611 of the Act, 42 U.S.C. 5410. The maximum amount of penalties imposed under section 611 of the Act shall be \$1,100 for each violation, up to a maximum of \$1,375,000 for any related series of violations occurring within one year from the date of the first violation.

PART 3500—REAL ESTATE SETTLEMENT PROCEDURES ACT

■ 20. The authority citation for part 3500 continues to read as follows:

Authority: 12 U.S.C. 2601 *et seq.*; 42 U.S.C. 3535(d).

■ 21. Revise § 3500.17(m)(1) to read as follows:

§ 3500.17 Escrow accounts.

* * * * *

(m) *Penalties.* (1) A servicer's failure to submit to a borrower an initial or annual escrow account statement meeting the requirements of this part shall constitute a violation of section 10(d) of RESPA (12 U.S.C. 2609(d)) and this section. For each such violation, the Secretary shall assess a civil penalty of 75 dollars (\$75), except that the total of the assessed penalties shall not exceed \$130,000 for any one servicer for violations that occur during any consecutive 12-month period.

* * * * *

Dated: January 26, 2007.

Roy A. Bernardi,

Deputy Secretary.

[FR Doc. E7-1941 Filed 2-5-07; 8:45 am]

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Federal Register

**Tuesday,
February 6, 2007**

Part VI

The President

**Notice of February 5, 2007—Continuation
of the National Emergency Blocking
Property of Certain Persons Contributing
to the Conflict in Cote d'Ivoire**

Presidential Documents

Title 3—

Notice of February 5, 2007

The President

Continuation of the National Emergency Blocking Property of Certain Persons Contributing to the Conflict in Cote d'Ivoire

On February 7, 2006, by Executive Order 13396, I declared a national emergency and ordered related measures blocking the property of certain persons contributing to the conflict in Cote d'Ivoire, pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706). I took this action to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the situation in or in relation to Cote d'Ivoire, which has been addressed by the United Nations Security Council in Resolution 1572 of November 15, 2004, and subsequent resolutions, and has resulted in the massacre of large numbers of civilians, widespread human rights abuses, significant political violence and unrest, and attacks against international peacekeeping forces leading to fatalities.

Because the situation in or in relation to Cote d'Ivoire continues to pose an unusual and extraordinary threat to the national security and foreign policy of the United States, the national emergency declared on February 7, 2006, and the measures adopted on that date to deal with that emergency, must continue in effect beyond February 7, 2007. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency declared in Executive Order 13396.

This notice shall be published in the **Federal Register** and transmitted to the Congress.



THE WHITE HOUSE,
February 5, 2007.

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